NEW YORK LAW SCHOOL

NYLS Law Review

Volume 39
Issue 4 *VOLUME XXXIX, Number 4, 1994*

Article 4

January 1994

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Martin Adler

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I. INTRODUCTION

Imagine this scenario.[1] An African-American man (we'll call him Smith) applies for a position in a factory and is hired. However, from the first day on Smith encounters problems with his supervisor who is white. The supervisor makes racially disparaging comments to others concerning Smith and consistently assigns Smith the most menial assignments, insinuating that these tasks are all he is capable of performing. When Smith comes up for a review he receives poor marks from the supervisor despite the fact that he has performed every task as well, if not better, than the other workers in his department. Twice Smith is passed up for promotions which are awarded to white workers with less seniority and less experience. Finally, Smith has had enough. He confronts his supervisor and expresses his frustration and outrage at the treatment he has been accorded. The supervisor says nothing.

On the following day, Smith reports to work only to find that he has been discharged. The reason given is an inability to get along with his management and a generally poor attitude. Smith then takes the appropriate steps and files an action against his former employer, alleging that he was discharged because of his race.[2] Smith seems to have a strong case against his former employer. However, during the pre-trial discovery process the employer's attorneys become aware, for the first time, of several misrepresentations made by Smith concerning his educational background on his initial job application. The employer's attorney presents this after-acquired evidence (so-called because it was not discovered until after the employee's termination) to the court and asks for summary judgment, for all intents and purposes admitting that Smith's discharge was discriminatory in nature but arguing that, based on this after-acquired evidence, had Smith's employers been aware of his misrepresentations while he was employed they would never have hired him in the first place or would have discharged him. The court grants the employer's motion for summary judgment, effectively foreclosing the employer's liability and defeating Smith's discrimination claim.

Such a scenario seems patently unfair. Smith was clearly the victim of discrimination at the hands of his employer, yet evidence that was totally unrelated to his discriminatory discharge was used to disqualify him

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1. This hypothetical is based upon a compilation of several actual cases.

2. Smith would presumably be suing under 42 U.S.C. § 2000e-2(a) (1988), which prohibits discharge based on race.

from pursuing a civil rights claim. The employer was able to use this evidence to escape any liability for its discriminatory employment practices. Such a result would seem to run counter to our traditional view of justice—that the victim should be compensated and the offender be punished.[3] However, until January 23, 1995, when the Supreme Court unanimously decided *McKennon v. Nashville Banner Publishing Co.*[4] and effectively abolished the after-acquired evidence doctrine, most courts would have followed the hypothetical court's example and granted summary judgment to the employer.[5] Other courts would not have allowed use of such evidence as a method of precluding an employer's liability for a discriminatory employment practice, but *would* have allowed the use of after-acquired evidence to reduce the amount of damages the victim could recover.[6] The after-acquired evidence doctrine was first accepted as an affirmative defense to an employment discrimination claim by the Tenth Circuit in 1988.[7] In the past seven years employers had been very successful in using the doctrine to totally defeat claims or reduce damages in cases arising under Title VII of the Civil Rights Act of 1964 (Title VII),[8] which prohibits discrimination by employers based on

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3. "[T]he general rule is, that when a wrong has been done . . . the compensation shall be equal to the injury . . . [t]he injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975) (quoting Wicker v. Hoppock, 6 Wall. 94, 99 (1867)).

4. 115 S. Ct 879 (1995).

5. *See, e.g.*, Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409 (6th Cir. 1992); Washington v. Lake County, Ill., 969 F.2d 250 (7th Cir. 1992); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988); Bonger v. American Water Works, 789 F. Supp. 1102 (D. Colo. 1992); McKennon v. Nashville Banner Publishing Co., 797 F. Supp. 604 (M.D. Tenn. 1992), *aff'd*, 9 F.3d 539 (6th Cir. 1993), *rev'd*, 115 S. Ct. 879 (1995); Churchman v. Pinkerton's Inc., 756 F. Supp. 515 (D. Kan. 1991).

6. *See, e.g.*, Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992); Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314 (D. N.J. 1993).

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

8. *See, e.g.*, Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409; Washington v. Lake County, Ill., 969 F.2d 250; Bonger v. American Water Works, 789 F. Supp. 1102.

certain protected characteristics.[9] As such, this doctrine had become a valuable weapon for employers faced with Title VII litigation.[10]

This note argues that the Supreme Court acted appropriately in abolishing the after-acquired evidence doctrine because it was antithetical to the purposes and history of Title VII.[11] Generally speaking, Title VII was adopted with the intention of eradicating invidious discrimination, primarily against blacks,[12] that existed in the area of employment at the time.[13] By allowing employers to engage in discriminatory employment practices with virtual impunity, the after-acquired evidence doctrine undermined Title VII's first objective—to discourage employment discrimination.[14]

Additionally, successful application of the doctrine has meant that the victim of employment discrimination would, at a minimum, have faced a substantial reduction of any relief awarded,[15] and, in most circuits, would have had his or her claim completely barred by the granting of summary

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9. 42 U.S.C. §§ 2000e to 2000e-17 (1988). § 2000e-2(a) states:
(a) It shall be an unlawful employment practice for an employer- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Id.

10. *See, e.g.*, William M. Muth, Jr., Note, *The After-Acquired Evidence Doctrine in Title VII Cases and the Challenge Presented by Wallace v. Dunn Construction Co., 968 F.2d 1174 (11th Cir. 1992)*, 72 NEB. L. REV. 330 (1993) (describing how employers have been very successful in applying the doctrine to defeat employment discrimination claims).

11. *See* EEOC v. Rinella & Rinella, 401 F. Supp. 175, 180 (N.D. Ill. 1975) ("[T]he primary objective of Title VII is the elimination of the major social ills of job discrimination . . . .").

12. *See* Steelworkers v. Weber, 443 U.S. 193, 202 (1972) ("Congress's primary concern in enacting . . . Title VII . . . was with 'the plight of the Negro . . . .'" (quoting 110 CONG. REC. 6548 (1964) (statement of Sen. Humphrey)).

13. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) ("The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.").

14. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (describing how remedial awards force noncompliant employers to evaluate their employment practices and eradicate discrimination).

15. *See, e.g.*, Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992) (denying reinstatement, frontpay and injunctive relief to a victim of retaliatory discharge).

judgment to the employer.[16] This subverted the second purpose of Title VII—to make the victim of employment discrimination "whole for injuries suffered on account of unlawful employment discrimination"[17]—by punishing the victim for conduct that was unrelated to his or her discriminatory discharge.

This note argues further that, despite the Supreme Court's recent decision, the doctrine should be legislatively abolished as well.[18] Several reasons can be extended as to why Congress should pass legislation to proscribe the use of the after-acquired evidence doctrine in Title VII litigation. First, notwithstanding the Court's unanimous decision in *McKennon v. Nashville Banner Publishing Co.*, a review of recent Supreme Court decisions involving Title VII has shown the Court to be unpredictable in its results.[19] Second, an amendment to Title VII proscribing the use of after-acquired evidence in employment discrimination litigation would be consistent with earlier congressional action that expanded the scope and deterrent effect of Title VII.[20] Section II of this note examines Title VII.[21] It discusses the circumstances surrounding the passing of the Civil Rights Act of 1964 and the objectives of Title VII,[22] and traces the expansion of Title VII through the congressional amendments of 1972,[23] 1978,[24] and 1991.[25] The after-acquired evidence doctrine is examined in Section III.[26] The origins of the doctrine are discussed, and the competing viewpoints that had been adopted by the circuits are analyzed.[27]

Next, in Section IV the argument is made that the Supreme Court in *McKennon* was correct in holding that after-acquired evidence of employee

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16. *See supra* note 5 and accompanying text.

17. *Albemarle*, 422 U.S. at 418.

18. *See infra* notes 320-29 and accompanying text.

19. *See* Howard A. Simon, *Mixed Signals: The Supreme Court's 1991 Title VII Decisions*, 17 EMPLOYEE REL. L.J. 207, 221 (describing how the Supreme Court seemed to protect employees' rights in one case while denying them rights in another case).

20. *See infra* text accompanying notes 56-153.

21. *See infra* notes 32-153 and accompanying text.

22. *See infra* notes 32-55 and accompanying text.

23. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended in scattered sections of 42 U.S.C. (1982)).

24. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)).

25. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C. (Supp. III 1991)).

26. *See infra* notes 158-316 and accompanying text.

27. *See infra* notes 172-275 and accompanying text.

misrepresentation or misconduct should not be admissible in employment discrimination litigation for the purpose of barring a victim's claims, because the doctrine subverted the twin purposes of Title VII—the eradication of employment discrimination and the desire to fully compensate its victims.[28] The effect of the doctrine on both the perpetrator and the victim of employment discrimination is analyzed in terms of the doctrine's incompatibility with the stated purposes and legislative intent of Title VII.[29] This section also asserts that despite the Supreme Court's welcome ruling, the invalidation of the doctrine would best be carried out by congressional action, in the form of an amendment to Title VII.[30] Finally, proposed legislation is introduced.

II. TITLE VII

A. *Title VII—What Does It Provide For?*

Title VII of the Civil Rights Act of 1964[31] was enacted to counter the long history of discrimination faced by minorities in the workforce.[32] The congressional effort to enact Title VII was bitter and hard-fought.[33] Title VII prohibits employers,[34] employment agencies,[35] and labor unions[36] from engaging in discriminatory employment practices against any individual on the basis of the individual's race, color, religion, sex, or national origin.[37] Certain exemptions, however, do apply.[38]

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28. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (stating that purpose of Title VII was to eliminate discrimination in the workforce and to make victims of such discrimination whole).

29. *See infra* notes 276-316 and accompanying text.

30. *See infra* text accompanying notes 317-326.

31. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

32. *See, e.g.*, Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 INDUS. REL. L.J. 1, 2 ("[L]ong-established patterns of employment discrimination . . . for generations had locked blacks and members of other minority groups into a permanent state of economic depression.").

33. *See id.* at 1-5 (describing how Title VII had to overcome tremendous opposition from conservative members of Congress and many employer groups, who felt that the federal government would use its powers under the Act to intrude into the private sector).

34. 42 U.S.C. § 2000e-2 (1988).

35. *Id.* § 2000e-2(b).

36. *Id.* § 2000e-2(c).

37. *Id.* § 2000e-2.

Activity proscribed by Title VII includes, among others, a failure or refusal to hire an individual on the basis of one or more of these protected characteristics,[39] the discharge of an employee for similar reasons,[40] and any classification of individuals, based on protected characteristics, that adversely affects their status as employees.[41] An individual claiming to be a victim of employment discrimination is accorded the legal right, pursuant to Title VII, to undertake a private cause of action against his or her employer,[42] and if he or she can make out a prima facie case of discrimination,[43] Title VII allows courts to administer a wide range of remedies.[44] This is in keeping with the broad purpose behind Title VII, as recognized by the United States Supreme Court in *Griggs v. Duke Power Co.*[45] *Griggs* held that Title VII was designed to accomplish "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[46] Another important aspect of Title VII was its creation of the Equal Employment Opportunity

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38. *See, e.g.*, 42 U.S.C. § 2000e-2(c) (1988), which allowed discrimination on the basis of religion, sex, or national origin (but not race) where such a factor was a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ." *Id.*

39. *Id.* § 2000e-2.

40. *Id.*

41. *Id.*

42. *Id.* § 2000e-5(f)(1).

43. The requirements for proving a prima facie case of discrimination vary according to the charge. For example, to establish a prima facie case of discriminatory discharge, plaintiffs must show that they were a member of a statutorily protected class, that they were qualified for the position, that they were discharged, and that they were replaced by someone outside the statutorily protected group. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

44. 42 U.S.C. § 2000e-5(g) (1988). This section states the following:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

Id.

45. 401 U.S. 424 (1971).

46. *Id.* at 431.

Commission (EEOC).[47] The EEOC is the administrative agency responsible for the enforcement of Title VII.[48] Until the 1972 Equal Employment Opportunity Act,[49] however, the EEOC was impotent in the area of Title VII enforcement.[50] Its functions were limited to investigating charges of employment discrimination,[51] referring cases involving a pattern of discrimination to the United States Attorney General,[52] and issuing guidelines detailing its interpretations of various provisions of Title VII.[53] The 1972 Act, however, authorized the EEOC to initiate litigation against a discriminatory employer if it could not secure an acceptable conciliation agreement from the employer within 30 days of a charge being filed with the EEOC.[54] The 1972 Act also gave the EEOC the power to intervene on behalf of the aggrieved individual in a private civil action against a non-governmental entity.[55]

B. *Expansion of Title VII Through Congressional Amendments*

Title VII was enacted following an extended period of rancorous debate,[56] and its proponents in Congress were forced to compromise on a number of key issues in order to secure its enactment.[57] As a result, the power to pursue the broadly stated goal of eradicating discrimination was considerably weaker than had been anticipated by its advocates.[58] Consequently, on three separate occasions Congress has expanded the

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47. 42 U.S.C. § 2000e-4 (a) (1988).

48. *Id.* § 2000e-4 (g).

49. Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended in scattered sections of 42 U.S.C. (1988)) [hereinafter 1972 Act].

50. *See, e.g.*, Hill, *supra* note 32, at 81-82.

51. *See* 42 U.S.C. § 2000e-5(f)(1) (1964).

52. *Id.*

53. *Id.*

54. 42 U.S.C. § 2000e-5(f)(1) (1988).

55. *Id.* § 2000e-4(g)(6).

56. *See* Hill, *supra* note 32, at 1 (describing Title VII as "the product of an epic legislative struggle").

57. *See id.* at 2. Hill notes that Title VII was amended 105 times before it was finally passed by Congress.

58. *See id.* at 32 (observing that efforts to improve the statute were begun soon after Title VII was enacted).

scope of Title VII through various amendments.[59] Although each amendment was directed at a different aspect of employment discrimination, taken as a whole they manifest a desire by Congress to expand the classification and enforcement authority of Title VII.[60]

1. The Equal Employment Opportunity Act of 1972

The first significant amendment to Title VII occurred in 1972 with the enactment of the Equal Employment Opportunity Act of 1972.[61] The 1972 Act, which had also faced stiff opposition from business interests,[62] augmented Title VII in a number of ways. One significant feature of this act was the increased enforcement powers accorded to the EEOC.[63] Prior to the enactment of this amendment, the EEOC did not have much power to punish employers who violated Title VII.[64] This lack of enforcement power caused many discrimination complaints to linger unresolved with the EEOC.[65]

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59. *See* Jennifer Miyoko Follette, *Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of After-Acquired Evidence,* 68 WASH. L. REV. 651, 652 (1993) (discussing how the 1972 amendment reflected the commitment Congress had made to eradicate discrimination from society); Robin Rogers, *A Proposal for Combatting Sexual Discrimination in the Military: Amendment of Title VII,* 78 CAL. L. REV. 165, 187 n.121 (1990) (noting how the 1972 and 1978 amendments served to expand Title VII's scope).

60. *See infra* text accompanying notes 61-153.

61. Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended in scattered sections of 42 U.S.C. (1988)).

62. *See* Hill, *supra* note 32, at 33 ("Business interests conducted an intensive lobbying compaign [sic] against the various proposals to extend Title VII coverage, provide enforcement power to the EEOC, or strengthen the antidiscrimination statute in any way.").

63. *See* Marjorie H. Gordon, *Kremer v. Chemical Construction Corporation: Eviscerating Title VII,* 17 SUFFOLK UNIV. L. REV. 987, 994-97 (1983) (noting that Congress intended to strengthen the EEOC because its previous powers, which were quite limited, had proven ineffective in deterring employers from ceasing employment discrimination).

64. *See supra* text accompanying notes 51-53 (describing limitations on EEOC's power).

65. *See* Hill, *supra* note 32, at 33 ("Toward the end of 1971 the Commission was handicapped by a backlog of more than *23,000* unresolved complaints of discrimination . . . . ") (emphasis added).

The 1972 Act attempted to cure the problem of the EEOC's ineffectiveness.[66] The EEOC was given the authorization to initiate civil actions in federal district courts against violators of Title VII.[67] The Act established the Office of the General Counsel, which would exclusively handle litigation for the EEOC.[68] Litigation could only commence, however, if the EEOC had not achieved a settlement through the conciliation process within thirty days of a charge of employment discrimination being filed with it by an aggrieved employee.[69] Once it filed an action, the EEOC could seek injunctive relief and other remedies for discriminatory practices conducted by employers and other categories covered under Title VII.[70] However, if the United States government or a governmental agency was the alleged offender, the EEOC could not pursue the action.[71] Instead, such cases were to be transferred to the Attorney General if efforts at conciliation failed.[72]

The 1972 Act also allowed private parties to join in EEOC litigation.[73] Similarly, the EEOC was given the power to intervene on behalf of individuals in private civil suits "upon certification that the case is of general public importance."[74] This granting of increased enforcement power to the EEOC indicated that Congress wanted to provide further incentives for employers and others to eliminate unlawful employment practices.[75] The transformation of the EEOC into a law-enforcement agency would put an employer or other institution engaging in unlawful employment practices on notice that they were now likely to become embroiled in litigation against the United States government, either as the plaintiff or as a party to the action.[76] Another significant provision of the 1972 Act was its expanded definitions of who was covered under Title VII. As originally enacted, Title VII only applied to

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66. *See* Follette, *supra* note 59, at 659 (describing how the 1972 Act transformed the EEOC into a law-enforcement agency).

67. 42 U.S.C. § 2000e-5(f)(1) (1988).

68. *Id.* § 2000e-4(b).

69. *Id.* § 2000e-5(f)(1).

70. *Id.* § 2000e-5(g).

71. *Id.* § 2000e-5(f)(1).

72. *Id.*

73. *Id.*

74. *Id.*

75. *See* Gordon, *supra* note 63, at 994 (previous enforcement ability of EEOC had been ineffective in providing incentives to stop employment discrimination).

76. *See* Hill, *supra* note 32, at 33 (discussing how the EEOC's lack of litigation power forced Congress to amend Title VII "in order to achieve the purposes for which it was originally enacted").

those employers who continuously employed more than twenty-five employees; however, the 1972 Act expanded the coverage of Title VII by lowering the requisite number of employees to fifteen.[77] This change was estimated to have extended Title VII coverage to an additional several million private sector employees.[78] This expansion of Title VII protection is "further evidence of the legislature's desire to expand the reach of Title VII."[79]

The 1972 Act also extended Title VII coverage to state and local government employees, who had been excluded from the original version of Title VII.[80] Federal employees were also granted rights under Title VII, although they had to file their complaints through the Civil Service Commission rather than the EEOC.[81] The 1972 Act also removed the exemption for educational institutions,[82] although religious schools were still exempted.[83]

Procedural changes wrought by the 1972 Act, while not as radical as the substantive ones mentioned above, also served to provide an incentive for aggrieved employees or applicants for employment to bring their claims to the attention of the EEOC.[84] The first change extended the statute of limitations on filing an employment discrimination charge with the EEOC.[85] Previously, an individual who felt that he or she had been the victim of an unlawful employment practice had to file a charge with

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77. 42 U.S.C. § 2000e(b) (1988) defines an employer as

> "[A] person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person . . . ."

Id.

78. *See* Hill, *supra* note 32, at 52 (stating "[t]his expanded coverage adds an estimated six million private industry employees to EEOC's jurisdiction").

79. *See* JOEL WM. FRIEDMAN & GEORGE M. STRICKLER, JR., THE LAW OF EMPLOYMENT DISCRIMINATION 32 (2d ed. 1987) [Hereinafter FRIEDMAN & STRICKLER] (noting that Congress's actions in extending Title VII protection to more workers were driven by a desire to hasten the demise of employment discrimination).

80. 42 U.S.C. § 2000e(f) (1988).

81. *Id.* § 2000e-16(b).

82. *Id.* § 2000e-1 (a). *See* Hill, *supra* note 32, at 53 (stating "[e]mployees and applicants for employment in teaching, administrative, and clerical positions in both public and private school systems [were] brought under Title VII protection.").

83. 42 U.S.C. § 2000e-3(e) (1988).

84. *See* Hill, *supra* note 32, at 54 (noting that the longer time period for filing complaints with the EEOC was instituted in consideration of its frequent inability to act within the earlier time period).

85. *Id.* § 2000e-5(e).

the EEOC within 90 days of the alleged violation.[86] The 1972 Act doubled the time period, so that now the individual has 180 days during which to file the charge,[87] and up to 300 days if he or she was required to first file with a state or local fair employment practice agency.[88] This increased time period reflects the congressional determination to remove obstacles in the path of those who allege that they have been the victims of employment discrimination[89] so as to encourage the main purpose of Title VII—"to deter employers from discriminating in the workplace and to eliminate unlawful employment practices."[90]

This determination is clearly seen in the final major provision of the 1972 Act. The amendment allowed for claims to be filed with the EEOC not just by a person claiming to be aggrieved, as had been the case previously, but also on behalf of a person claiming to be aggrieved.[91] This section was clearly amended to allow those individuals who had reason to file a charge, but who may have been reluctant out of fear that they might face retaliation by their employer, in other words, a way to bring the alleged violations before the EEOC through a third party.[92] The alleged victim would not be identified in the charge, but the EEOC would obtain his or her name from the third party.[93] The alleged victim's name would remain confidential, however.[94] In this way, more allegations of employment discrimination would be revealed, and violators would be put on notice that they would not be able to intimidate their workers through scare tactics anymore. This serves to further the

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86. *Id.* *See* Hill, *supra* note 32, at 53 (describing the pre-1972 Act procedures for filing claims with the EEOC).

87. 42 U.S.C. § 2000e-5(e) (1988).

88. *Id.*

89. *See supra* note 84. EEOC's well-known difficulties with processing complaints led to the failure of many alleged victims of employment discrimination to file complaints. *Id.*

90. Larry M. Parsons, Note, *Title VII Remedies: Reinstatement and the Innocent Incumbent Employee*, 42 VAND. L. REV. 1441, 1447-48 (1989).

91. 42 U.S.C. § 2000e-5(b) (1988).

92. *See* Hill, *supra* note 32, at 54 (alleged victim's name would be kept confidential as "a protection against reprisals").

93. 42 U.S.C. § 2000e-5(b) (1988).

94. *Id.* § 2000e-5(b) states that personal information provided to the EEOC would not be released without the aggrieved individual's consent, and provides for a possible fine or prison sentence for anyone who reveals such confidential information.

overarching goal of Title VII—"to eradicate employment discrimination . . . ."[95]

The 1972 Act went a long way towards redressing the limitations of Title VII as originally enacted.[96] Its provisions made filing a charge of employment discrimination more attractive and more convenient, and at last empowered the EEOC to deal effectively with employment discrimination.[97]

2. The Pregnancy Discrimination Act of 1978

The next major amendment of Title VII occurred in 1978 with the enactment of the Pregnancy Discrimination Act of 1978.[98] The 1978 Act was a response to the ruling of the United States Supreme Court in a case decided two years earlier.[99] In *General Electric Co. v. Gilbert*,[100] the Court held that discrimination against pregnant women in a disability benefits plan did not constitute sex-based discrimination under Title VII.[101] General Electric provided a disability plan for its employees that paid benefits for non-work related illnesses and accidents.[102] The plan did not, however, extend to disabilities stemming from pregnancies.[103] A number of past and present female employees, who had been denied payments to cover the time off they required during their pregnancies, brought an action against General Electric, alleging that its exclusion of pregnancy-related disabilities violated Title VII.[104] The district court

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95. Steven G. Anderson, *Tester Standing Under Title VII: A Rose by Any Other Name*, 41 DEPAUL L. REV. 1217, 1238 (1992) (citing 110 CONG. REC. 6328, 1592 (statement of Rep. Corman)).

96. *See supra* text accompanying notes 59-60, 63-97.

97. *See supra* notes 63-95 and accompanying text.

98. Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (1982)) [hereinafter 1978 Act].

99. *See* Patricia J. Bejarano, *Labor Pains: The Rights of the Pregnant Employee*, 43 LAB. L.J. 780, 781 (1992) (1978 legislation enacted following intensive lobbying campaign by womens' rights groups following the Supreme Court's decision in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), *reh'g denied*, 429 U.S. 1079 (1977)).

100. 429 U.S. 125 (1976), *reh'g denied*, 429 U.S. 1079 (1977).

101. *General Elec. Co.*, 429 U.S. at 125 (1976).

102. *Id.* at 127.

103. *Id.*

104. *Id.* at 128.

agreed, holding that the exclusion constituted sex discrimination in violation of Title VII.[105] The court of appeals affirmed.[106]

The Supreme Court reversed,[107] holding that "it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's . . . plan is less than all-inclusive."[108]

In the wake of this decision, women's rights groups were outraged.[109] After intensive lobbying efforts, Congress enacted the 1978 Act.[110] The 1978 Act accorded pregnant women protection equivalent to that provided to other aggrieved individuals under Title VII.[111] The 1978 Act, then, similar to the 1972 Act, served to broaden the scope of Title VII, in keeping with the purposes of Title VII as noted by the Court in *Albemarle Paper Co. v. Moody*:[112] to "eradicate discriminatory employment practices"[113] and "to make persons whole for injuries suffered on account of unlawful employment discrimination."[114]

3. The Civil Rights Act of 1991

Most recently, Congress enacted the Civil Rights Act of 1991,[115] a far-reaching amendment whose principal purpose was to reverse the effect of a number of then-recent Supreme Court decisions[116] that were seen

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105. *See* General Elec. Co. v. Gilbert, 375 F. Supp. 367, 385-86, *aff'd*, 519 F.2d 661, *rev'd*, 429 U.S. 125 (1976), *reh'g denied*, 429 U.S. 1079 (1977).

106. *General Elec. Co.*, 519 F.2d 661.

107. *General Elec. Co.*, 429 U.S. 125.

108. *Id.* at 138-39.

109. *See* Bejarano, *supra* note 99, at 781.

110. *See id.*

111. *See, e.g.*, Rogers, *supra* note 59, at 187 n.121 ("Congress . . . plac[ed] pregnant women decisively within [Title VII's] protection by passing the Pregnancy Discrimination Act of 1978 . . . .").

112. 422 U.S. 405 (1975).

113. *Id.* at 417.

114. *Id.* at 418.

115. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C. (1991)) [hereinafter 1991 CRA].

116. Some of the Supreme Court decisions that led to the 1991 Civil Rights Act included EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (court held Title VII did not protect American citizens working for American employers outside the territorial borders of the United States); Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989) (court altered burden of proof applicable to disparate impact theory of

as having "unduly narrowed the rights of individuals to protect themselves from employment discrimination."[117] However, the 1991 CRA went beyond specifically dealing with past Supreme Court decisions and expanded the scope of Title VII once again.[118] For the purposes of this note, several provisions are relevant.

The 1991 CRA allowed aggrieved individuals claiming intentional discrimination to recover compensatory and punitive damages for the first time.[119] Previously, this had not been an option for alleged victims of employment discrimination.[120] This effort to dramatically expand the amount of damages a victim of intentional employment discrimination might potentially recover if he or she could establish intentional discrimination helped serve the twin purposes of Title VII—eradicating employment discrimination and making its victims whole.[121] By vastly increasing the amount of damages a victim could be awarded, this provision was likely to result in more litigation by aggrieved individuals against their employers.[122] A corollary to this would be the notion that employers, when faced with the prospect of having to pay out large awards for compensatory and punitive damages, would have an increased incentive to eliminate unlawful employment practices from their environs.[123]

The 1991 CRA also provided that either party could demand a jury trial if compensatory or punitive damages were being sought by the

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discrimination); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (court allowed employer to avoid liability in mixed-motive cases).

117. LEX K. LARSON, CIVIL RIGHTS ACT OF 1991, at 5 (1992) (stating that recent court decisions had been adverse to the interests of alleged victims of employment discrimination).

118. *See* Timothy D. Loudon, *The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?*, 71 NEB. L. REV. 304, 306 (1992) (observing that the 1991 CRA "was intended to go well beyond simply reversing" the recent decisions by the Supreme Court, by adding remedies and allowing for jury trials in some cases).

119. *See* 42 U.S.C.A. § 1981a(a)(1) (West Supp. 1993).

120. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 182 n.4 (1989) (Brennan, J., concurring in part and dissenting in part) (Justice Brennan noting that plaintiffs in Title VII litigations were limited to recovering only back-pay); Richard L. Neumeier, *Civil Rights Act of 1991: What Does It Do? Is It Retroactive?*, 59 DEF. COUNS. J. 500, 504 (1992) ("Title VII . . . was carefully drafted to provide only for equitable relief.").

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

122. *See* LARSON, *supra* note 117, at 11 (stating Congress's belief that the existing remedies were not substantial enough for many individuals to bother pursuing litigation).

123. *See* Loudon, *supra* note 118, at 321 (stating that the increased remedies would certainly lead to a rise in litigation).

aggrieved individual.[124] Previously, such individuals were not guaranteed the right to a jury trial in Title VII cases.[125] This right was initially denied on the theory that Title VII plaintiffs, who (at least in the early days of Title VII) were generally minorities, would not stand much of an opportunity for a fair trial in the courts of the South.[126]

By allowing the right to a jury trial in cases involving intentional discrimination, the 1991 CRA provided a further incentive for aggrieved individuals to press their claims against discriminatory employers.[127] This is evidenced by section 1981a(c)(2), which provided that in Title VII jury trials dealing with compensatory and punitive damages, the jury could not be informed of the statutory caps set on those damages.[128] According to one commentator, the motive behind this provision was that "Congress was afraid that juries would be influenced by the size of the caps to unduly increase their awards."[129] Congress, then, realized that the jury trial option would be very favorable to plaintiffs, and felt compelled to keep the awards down to reasonable levels.[130] The right to a jury trial will also serve to deter unlawful employment practices for the same reasons that make it such an attractive option for plaintiffs.[131]

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124. 42 U.S.C.A. § 1981A(c)(1) (West Supp. 1993).

125. The Seventh Amendment does not guarantee the right to a jury trial if only equitable damages are at stake. *See* Neumeier, *supra* note 120, at 504 (noting that Title VII was "carefully drafted to provide only for equitable relief"). Prior to the 1991 Civil Rights Act, the Supreme Court had never held that a plaintiff seeking equitable relief under Title VII had a constitutionally-guaranteed right to a jury trial. *See* Teamsters v. Terry, 494 U.S. 558, 572 (1989) (citing Lorillard v. Pons, 434 U.S. 575, 581-82 (1978)).

126. *See* Neumeier, *supra* note 120, at 504. Neumeier states that when Title VII was drafted, its drafters did not "[perceive] that plaintiffs would meet with much success in discrimination claims in Southern states." *Id.*

127. *Id.* (describing how commentators have stated that "jury trials will favor plaintiffs"); Loudon, *supra* note 118, at 312 ("The availability of trial by jury is a significant victory for the plaintiffs' bar. It is a well-known fact that juries tend to be more sympathetic to the 'little guy,' as opposed to the 'heartless' corporate entity.").

128. 42 U.S.C.A. § 1981a(c)(2) (West Supp. 1993). Congress placed a sliding scale on the maximum amount of compensatory and punitive damages a plaintiff could recover. The award was capped at between $50,000 and $300,000, and was calculated by the number of employees continuously employed by the violative employer. 42 U.S.C.A. § 1981a(b)(3) (West Supp. 1993).

129. LARSON, *supra* note 117, at 17.

130. *See id.*

131. *See* Loudon, *supra* note 118, at 312.

For employers, "[t]he odds of prevailing in employment discrimination cases . . . will now be significantly reduced."[132]

Another provision of the 1991 CRA was aimed directly at the Supreme Court's decision in *EEOC v. Arabian American Oil Co.*,[133] where the Court ruled that Title VII's protection did not extend to American employees of American employers outside the boundaries of the United States.[134] The 1991 CRA legislatively overruled this potentially wide-ranging decision by amending the definition of employee to include United States citizens employed in a foreign country.[135] This amended provision also extended protection to American employees of foreign corporations controlled by an American employer,[136] again manifesting the commitment Congress has made toward eradicating employment discrimination.[137]

Most significantly, for purposes of this note, the 1991 CRA overruled the Supreme Court's decision in *Price Waterhouse v. Hopkins*.[138] *Price Waterhouse* concerned a charge of employment discrimination where there were mixed-motives; that is, "when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives."[139] In *Price Waterhouse*, the respondent, Anne Hopkins, was a senior manager in petitioner's office.[140] Hopkins was proposed for partnership in 1982, but was neither offered nor denied the position; rather, she was to await reconsideration in 1983.[141] Hopkins brought her suit after the partners in her office refused to repropose her for partnership, claiming that Price Waterhouse had discriminated against her on the basis of sex.[142] Price Waterhouse argued that Hopkins was

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132. *Id.*

133. 499 U.S. 244 (1991).

134. *See id.*

135. 42 U.S.C.A. § 2000e-(f) (West Supp. 1993) states that "with respect to employment in a foreign country, such term [employee] includes an individual who is a citizen of the United States." *Id.* § 2000e-(f).

136. *Id.* § 2000e-1(c)(1).

137. *See* Loudon, *supra* note 118, at 316.

138. 490 U.S. 228 (1989).

139. *Id.* at 232.

140. *See id.* at 231.

141. *Id.*

142. *Id.* at 235. Examples of Hopkins' allegations included that she was described by one partner as "macho," she was told by another that she "overcompensated for being a woman," and yet another partner informed her that if she wanted to improve her chances of making partner she had better "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.*

passed over for partnership because she had problems in her professional relationship with coworkers.[143]

The Court felt that Hopkins had successfully established that her gender had played a part in her being denied a partnership position; nonetheless, the Court allowed her employer a way to avoid liability for violation of Title VII, if Price Waterhouse could establish "by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account . . . ."[144] On this basis, the Court remanded the case for further proceedings.[145]

Congress responded to the *Price Waterhouse* decision by including language in the 1991 CRA stating that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[146] Thus, an employer today cannot use evidence of a legitimate motive to avoid liability for an employment practice when a protected characteristic was also part of the motivation behind the conduct.[147]

However, if an employer establishes that he or she "would have taken the same action in the absence of the permissible factor,"[148] the aggrieved employee is limited to declaratory relief, injunctive relief, and attorney's fees.[149] This provision was ostensibly included to avoid granting employees a windfall in situations where they were discharged for both poor work performance and for a discriminatory motive.[150] If the employer could establish that the employee was discharged based on his sub-par work performance alone, allowing the employee to recover damages such as back-pay[151] or frontpay[152] would serve to do more

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143. *Id.* at 234. Staff members felt that too often "Hopkins' aggressiveness spilled over into abrasiveness . . . [and partners] had counseled her to improve her relations with staff members." *Id.*

144. *Id.* at 258.

145. *See id.* On remand, the United States District Court for the District of Columbia ordered Price Waterhouse to install Ms. Hopkins as a partner. Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1211 (D.C. 1990).

146. 42 U.S.C.A. § 2000e-2(m) (West Supp. 1993).

147. *See* Neumeier, *supra* note 120, at 501.

148. 42 U.S.C.A. § 2000e-5(g)(2)(B) (West Supp. 1993).

149. *Id.* § 2000e-5(g)(2)(B)(i).

150. *See infra* note 158.

151. Back-pay is defined as "the total economic compensation the individual would have earned . . . from the date the individual is denied a position or discharged to the date of a court decree awarding the position or reinstatement." Follette, *supra* note 59,

than make him or her whole for any discrimination suffered. Instead, it would make him better off by virtue of his protected characteristic, and this was not the intention of Title VII.[153]

4. Amendments to Title VII—Reaffirming Congress's Commitment

The 1991 CRA was a broad effort by Congress to ensure that then-recent decisions handed down by the Supreme Court would not diminish the rights of alleged victims of employment discrimination.[154] By adding new provisions for damages and reversing Supreme Court attempts to limit employer's liability for unlawful employment practices, Congress greatly increased the risks that employers would confront if they continued to engage in such violative practices.[155]

As such, the 1991 amendments were only the latest in a series of congressional actions that went a long way towards reaffirming Congress's commitment to the twin aims of Title VII, as expressed by the Supreme Court in 1975—to "eradicate discriminatory employment practices"[156] and "to make persons whole for injuries suffered on account of unlawful employment discrimination."[157]

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at 654 n.12.

152. Frontpay has been defined as "damages for wages lost either where plaintiff is awarded reinstatement but for one reason or another the position is unavailable for some time, or where the plaintiff has acquired another job at lesser pay." Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 318 n.4 (D. N.J. 1993).

153. *See* LARSON, *supra* note 117, at 31. Larson states that the reason behind limiting damages in such a situation is to "[avoid] placing the employee in a better position than he or she would have been in had the employer not acted in a discriminatory manner." *Id.*

154. *See id.* at 5 (describing the 1991 CRA as having a "profound and far-reaching" effect on employment discrimination); *see supra* note 116.

155. *See* Loudon, *supra* note 118, at 321. Discussing the recently-enacted 1991 CRA, Loudon observed that "the price of discrimination has just increased a thousand-fold. With the availability of compensatory and punitive damages in cases of intentional discrimination . . . coupled with the availability of jury trials in such cases, employers are certain to see an increase in employment litigation." *Id.*

156. Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975).

157. *Id.* at 418.

III. THE AFTER-ACQUIRED EVIDENCE DOCTRINE

A. *Origins of the After-Acquired Evidence Doctrine:* Mount Healthy City School District Board of Education v. Doyle

Although after-acquired evidence of employee misconduct was first used as an affirmative defense against a Title VII action in 1988,[158] its origins date back to 1977, when the Supreme Court decided *Mount Healthy City School District Board of Education v. Doyle*.[159] The first court to articulate the after-acquired evidence doctrine utilized *Mount Healthy* to a great degree in reaching its decision;[160] thus it is worthwhile to examine the facts of the case.

Fred Doyle was an untenured teacher who was discharged by the Mount Healthy school district for both constitutionally-protected conduct and conduct that was not accorded any such protection.[161] He brought an action against his former employer, seeking reinstatement and damages.[162] Doyle claimed that the school district's refusal to rehire him constituted a violation of his rights under the First and Fourteenth Amendments.[163] In a unanimous decision, the Supreme Court vacated the lower court's judgment that Doyle was entitled to reinstatement with back-pay.[164]

The Court feared that reinstatement of Doyle, when he could have been discharged based solely on his unprotected conduct, might very well place Doyle "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing."[165] According to the Court, Doyle had the burden of establishing that an illegal motive was a substantial factor in the school

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158. *See* Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988) (discovery of former employee's falsifications defeated his Title VII claim).

159. 429 U.S. 274 (1977).

160. *See* Muth, *supra* note 10, at 334 (describing how the *Summers* court used language from the Mount Healthy decision to guide its application of the after-acquired evidence doctrine to Title VII cases).

161. *See Mount Healthy*, 429 U.S. at 274. Doyle was dismissed following several incidents that occurred while he was employed as a teacher. *Id.* Among these were altercations with fellow teachers, staff members and students, as well as a telephone call Doyle made to a local radio station, wherein he conveyed the contents of an internal memorandum concerning teacher dress code and appearance. *Id.*

162. *Id.*

163. *Id.*

164. *See id.* at 287.

165. *Id.* at 285.

district's decision to discharge him.[166] Doyle was found to have met this burden.[167] However, the Court felt that the district court should have taken this analysis one step further and "determine[d] whether the Board had shown . . . that it would have reached the same decision . . . even in the absence of the protected conduct."[168] If the school district could establish that, indeed, it would have discharged Doyle based solely on the conduct that was not protected under the Constitution, then the discharge could not be the basis for any relief.[169] This reasoning was applied, some would say erroneously,[170] by the court in *Summers v. State Farm Mutual Automobile Insurance Co.*[171]

B. *Opening the Floodgates:* Summers v. State Farm Mutual Automobile Insurance Co.

Summers v. State Farm Mutual Automobile Insurance Co.[172] has been regarded as the "seminal case regarding an employer's use of . . . evidence discovered after commencement of an employment discrimination action."[173] In the wake of this case, employers had been able to use the after-acquired evidence to defeat (or reduce the damages in) Title VII claims in a large number of cases.[174]

Ray Summers was a field claims representative for State Farm, a position he had held for nearly twenty years.[175] Between 1963 and

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166. *See id.* at 287.

167. *See id.* Doyle had proven this burden by establishing that his delivery of the message concerning the proposed dress code to the radio station constituted conduct that was protected by the First Amendment. *Id.*

168. *Id.*

169. *Id.* On remand, the district court found that the school board had met this burden, and consequently denied Doyle any relief. The Sixth Circuit affirmed. *See* Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 706 n.2 (10th Cir. 1988).

170. *See* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1179 (11th Cir. 1992) (stating that the *Summers* court misconstrued the reasoning behind the Supreme Court's decision in *Mt. Healthy*).

171. 864 F.2d 700 (10th Cir. 1988).

172. *Id.*

173. Elizabeth Pryor Johnson, *After-Acquired Evidence of Employee Misconduct: Affirmative Defense or Limitation on Remedies?*, FLA. B.J., June 1993, at 76.

174. *See* Tim A. Baker, *New Defense to Discrimination Suits*, A.B.A. J., Sept. 1993, at 44 (describing the number of cases making use of the doctrine as "overwhelming").

175. Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 702 (10th Cir. 1988).

1980, Summers had an unblemished work record.[176] In July of 1980, however, State Farm discovered that Summers had committed a forgery.[177] Summers did not deny having committed the falsification; State Farm let him off with a warning that another instance of forgery could result in his discharge.[178] The next year, State Farm was made aware of a 1977 incident in which Summers had committed another falsification. He was warned again that further forgeries would result in his dismissal.[179] Following this latest discovery, State Farm reviewed past files and discovered more instances of forgery by Summers.[180] Summers was not dismissed, however; rather, he was warned yet again and was placed on two week probation without salary.[181] Following his return from probation, Summers continued to work for State Farm until his discharge on May 19, 1982.[182] The reason State Farm offered for its discharge was not the several instances of falsification, but rather "his poor attitude, inability to get along with fellow employees and customers, and similar problems in dealing with the public and coworkers."[183]

Summers brought an action against State Farm, alleging that he was discharged on the basis of age and religion.[184] Nearly four years later, during the pre-trial discovery process, State Farm discovered more than one hundred fifty additional instances of falsification committed by Summers.[185] Summers attempted to suppress the admissibility of these falsifications as evidence at trial.[186] Meanwhile, State Farm moved for summary judgment based upon these additional forgeries.[187] The district

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176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* Apparently, Summers was not discharged for his misconduct because there was no evidence that he had personally profited from any of the falsifications. *Id.*

182. *Id.*

183. *Id.* at 702-03.

184. *Id.* at 702. Summers claimed that he was the victim of discrimination based on his age and religion. *Id.* At the time of discharge, Summers was 56 years old; moreover, he was a member of the Mormon Church. *Id.*

185. *Id.* at 703. Eighteen of these falsifications were found to have occurred *after* Summers returned to employment following his probation. *Id.*

186. *Id.*

187. *Id.*

court granted State Farm's request for summary judgment, and Summers appealed.[188]

The Tenth Circuit affirmed the lower court's decision.[189] The court agreed with State Farm's argument that, although the evidence of the one hundred fifty falsifications could not have been the cause of Summer's discharge, by virtue of it not having been discovered until four years after his dismissal, it was relevant to his claim of injury and therefore foreclosed the grant of any relief or remedy to Summers.[190] In so ruling, the court rejected Summers' argument that, "since they were not discovered until 1986, these additional falsifications [were] irrelevant and inadmissible, and that . . . the fact finder should not even know of them."[191] The court viewed such a request as "utterly unrealistic."[192] Although it assumed that State Farm's motive for discharging Summers was at least partly discriminatory, the court, nonetheless, found that Summers was not entitled to relief because the after-acquired evidence of the additional falsifications established that Summers continued to engage in misconduct after he was warned that such misbehavior would lead to his dismissal.[193] The court ended its opinion with a hypothetical that has been cited approvingly in a number of subsequent cases:

> The present case is akin to the hypothetical wherein a company doctor is fired because of his age, race, religion, and sex and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a "doctor." In our view, the masquerading doctor would be entitled to no relief, and Summers is in no better position.[194]

C. *The After-Acquired Evidence Doctrine Following* Summers: *The Floodgates are Open*

In the years following the *Summers* decision that after-acquired evidence of employee misrepresentation or misconduct could bar employment discrimination claims, the doctrine had been increasingly utilized by employers seeking to avoid liability for their unlawful

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188. *Id.*

189. *See id.* at 701.

190. *See id.* at 708.

191. *Id.* at 704.

192. *Id.* at 708.

193. *See id.*

194. *Id.*

employment practices.[195] The doctrine had thus become a valuable weapon in employer's arsenals.[196] Since 1988, the *Summers* doctrine had been adopted, in varying degrees, by three additional circuits: the Sixth,[197] Seventh,[198] and Eleventh.[199] While these circuits had generally agreed that after-acquired evidence of employee misrepresentation or misconduct may be admitted in Title VII cases, they disagreed on the weight such evidence should carry.[200]

1. The Sixth Circuit

In *Johnson v. Honeywell Information Systems, Inc.*,[201] the Sixth Circuit applied the after-acquired evidence doctrine to a state civil rights claim.[202] Although the court followed the *Summers* rationale that after-acquired evidence of employee misrepresentation or misconduct could preclude the plaintiff's recovery, in *Johnson* it added an extra burden that the employer would have to meet in order to obtain summary

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195. *See* Muth, *supra* note 10, at 332 n.4 ("The number of cases construing the doctrine has increased each year since its introduction into Title VII cases by Summers."); William S. Waldo & Rosemary A. Mahar, *Lost Cause and Found Defense: Using Evidence Discovered After an Employee's Discharge to Bar Discrimination Claims*, 9 LAB. L.J. 31, 31 (1993) ("At least sixteen federal and state courts have flatly dismissed discrimination claims . . . based solely on evidence that the employer neither knew about nor relied on at the time it terminated the employee.") *Id* .

196. *See* George D. Mesritz, *"After-Acquired" Evidence of Pre-Employment Misrepresentations: An Effective Defense against Wrongful Discharge Claims*, 18 EMPLOYEE REL. L.J. 215, 216 (1992) (describing how the doctrine has become "an effective defense against lawsuits filed by employees . . . .") *Id.*

197. *See, e.g.*, Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409 (6th Cir. 1992) (summary judgment granted to employer upon discovery that former employee had lied about her educational achievement).

198. *See, e.g.*, Washington v. Lake County, Ill., 969 F.2d 250 (7th Cir. 1992) (former employee's misrepresentations as to prior convictions barred him from any relief).

199. *See, e.g.*, Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992) (employer's motion for summary judgment not granted upon discovery of former employee's resume fraud).

200. *See supra* notes 202-04 and accompanying text; *see also* Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 321 (D. N.J. 1993) (after-acquired evidence could not be used to bar Title VII claims).

201. 955 F.2d 409 (6th Cir. 1992).

202. *Id.* at 411 (plaintiff claimed retaliatory discharge in violation of Michigan civil rights provision).

judgment.[203] The employer would only be entitled to summary judgment if it could successfully establish that the "misrepresentation or omission was material, directly related to measuring a candidate for employment, and was relied upon by [the] employer in making the hiring decision."[204] The *Johnson* court felt that this showing of materiality was necessary to avoid situations in which employers would "[comb] a discharged employee's record for evidence of any and all misrepresentations, no matter how minor or trivial, in an effort to avoid legal responsibility for an otherwise illegal discharge."[205]

Mildred Johnson was employed by Honeywell as a field relations manager between 1976 and 1984.[206] Part of her job function was to provide assistance to the company's branch managers in instituting affirmative action programs and responding to EEOC charges.[207] Her performance reviews were consistently positive until 1983, when Johnson was accused of being uncooperative, hard to reach, and generally ineffective.[208] Subsequent reviews were inconclusive concerning her performance.[209]

On November 2, 1984, Johnson was discharged.[210] The reason proffered by Honeywell was her continued poor performance.[211] Johnson, on the other hand, maintained that her job performance had been satisfactory throughout her employment, and brought a civil rights action against Honeywell on grounds of retaliatory discharge in violation of the Elliot-Larson Civil Rights Act,[212] Michigan's equivalent to Title

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203. *See id.* at 414.

204. *Id.*

205. *Id.*

206. *Id.* at 411.

207. *Id.* Ironically, Johnson had the responsibility of dealing with employment discrimination charges brought against Honeywell.

208. *Id.*

209. *Id.* While some later reviews showed that Johnson had made a significant effort to improve, others showed little change in her performance.

210. *Id.* Johnson was dismissed after refusing the company's request that she voluntarily resign.

211. *Id.* Honeywell specifically alleged that Johnson had refused to follow the directions of one of her supervisors.

212. M.C.L.A. § 37.2701(a) (West Supp. 1993). The section makes illegal the discharge of a person "because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." *Id.* The court noted that Michigan state courts looked to Title VII to resolve questions concerning the Michigan legislation, and thus interpreted the Elliot-Larson Act "in the same manner as its federal

VII.[213] Johnson claimed that the motivating factor in her racially-motivated discharge was a series of conflicts she had gotten into with certain branch managers.[214]

While preparing for trial, Honeywell discovered several instances of misrepresentation in Johnson's employment application.[215] With this after-acquired evidence in hand, Honeywell moved for summary judgment, arguing that Johnson's misrepresentations barred any relief for her.[216] The district court denied the motion, but later granted a directed verdict in Honeywell's favor on the civil rights claim, holding that Johnson had failed to establish that Honeywell's reasons for firing her were just a pretext for the alleged retaliatory discharge.[217]

On appeal, the Sixth Circuit applied the rationale in *Summers* and held that Johnson's resume fraud barred her recovery under the Michigan civil rights legislation, even if she could have made out a claim.[218] The court believed that summary judgment for Honeywell was appropriate in this case because Honeywell had established materiality.[219]

By its holding in *Johnson*, the Sixth Circuit effectively reversed the district court's judgment in *Milligan-Jensen v. Michigan Technological University*,[220] which had rejected the *Summers* approach.[221] *Johnson* was decided by the Sixth Circuit while *Milligan-Jensen* was on

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counterpart." Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 415 n.1 (6th Cir. 1992).

213. Johnson, 955 F.2d at 411. Johnson's action, which also alleged that her retaliatory discharge breached an employment contract stating that she could only be discharged for cause, was originally brought in state court and was removed to federal court by Honeywell.

214. *Id.* According to Johnson, several branch managers were very reluctant to comply with her efforts to meet affirmative action hiring goals. She felt that her discharge was in retaliation for her aggressive approach towards meeting those goals.

215. *See id.* at 411-12. Johnson had lied about her educational achievements, claiming to have held a bachelor's degree from one college when in fact she had only taken four classes there.

216. *See id.* at 412.

217. *See id.*

218. *See id.* at 415. The court also held that Johnson had failed to state a prima facie claim under the Elliot-Larson Act.

219. *See id.*

220. 767 F. Supp. 1403 (W.D. Mich. 1991), *rev'd* 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991 (1993), *cert. dismissed*, 114 S. Ct. 22 (1993).

221. *See Milligan-Jensen*, 767 F. Supp. 1403, 1416 (court noting that *Summers* was distinguishable from the instant case).

appeal.[222] The Sixth Circuit, when deciding *Milligan-Jensen* on appeal, felt that its holding in *Johnson* necessarily precluded the district court's approach, which, instead of allowing after-acquired evidence of employee misrepresentation to bar plaintiff's entire claim, only allowed its use to reduce the plaintiff's damages by half.[223] The district court chose this application of the doctrine because the trial court had found that there was direct evidence of sex discrimination against the plaintiff.[224] Faced with this discrimination, as well as the fact that the employer had failed to establish that it would have discharged the plaintiff absent the discriminatory motive, the trial judge held that he "[would] not deny relief to a plaintiff found to have been wronged."[225] This approach was seen as "strik[ing] a middle ground . . . ."[226] Unfortunately, this novel approach was not reached by the Sixth Circuit, which held that the *Johnson* decision "require[d] that the case be reversed . . . ."[227] However, it appears that, had the Sixth Circuit reached the merits of the case, it would have rejected the district court's approach.[228]

2. The Seventh Circuit

The Seventh Circuit also adopted the *Summers* approach, but, similar to the Sixth Circuit in *Johnson*, required employers seeking summary judgment to meet a more stringent standard.[229] In *Washington v. Lake County, Ill.*,[230] the court held that, regardless of whether the after-acquired evidence involved misrepresentation or misconduct, such evidence would bar the employee's discrimination claim only if the

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222. *See Milligan-Jensen*, 975 F.2d at 303.

223. *See Milligan-Jensen*, 767 F. Supp. at 1417 (back-pay award reduced under court's equitable power).

224. *See id.*

225. *Id.* at 1417.

226. *Id.*

227. *Milligan-Jensen*, 975 F.2d 302, 303.

228. *See* Muth, *supra* note 10, at 339 n.46 (describing how the circuit court indicated its dislike of the arbitrary decision reached by the trial court by comparing it to the biblical story of King Solomon dividing a baby whose mother's identity was uncertain).

229. *See* Washington v. Lake County, Ill., 969 F.2d 250 (7th Cir. 1992) (employer had burden of proving that employee would have been discharged upon discovery of misconduct or misrepresentation).

230. *Id.*

employer could establish that it would have discharged the employee if it had known of his or her actions.[231]

Eddie Washington was hired by the Lake County, Illinois Sheriff's Department (the "Department") in September 1986.[232] The employment application Washington filled out asked whether he had ever been convicted of a criminal offense.[233] Washington answered that he had not, when in reality he had been convicted twice before.[234] Washington continued to work as a jailer until he was discharged in July 1987.[235] The Department stated that he was discharged because his recent arrest for criminal sexual assault had brought "discredit to the Department,"[236] and, furthermore, his file showed several instances when he had violated Department policy.[237]

Washington filed an action under Title VII, alleging that the Department had discriminated against him because of his race.[238] He claimed that members of the Department had singled him out because he was African-American, and that they had falsely characterized incidents reported in his personnel file.[239] Washington also compared his situation to that of another member of the Department, a white, who had been arrested for driving while intoxicated.[240]

During the discovery process, the Department became aware of Washington's past convictions for criminal offenses and moved for summary judgment.[241] This motion was granted by the district court,

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231. *See id.* at 256.

232. *Id.* at 251.

233. *Id.* at 251-252.

234. *Id.* at 252. Washington had been convicted of criminal trespass in 1974, for which he was fined $100, and third-degree assault in 1981, for which he received a 28 day sentence which was suspended in place of two years probation.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* Washington was an African-American. *See* text accompanying notes 244-45.

239. *See id.* Washington pointed out that in his most recent performance review, which took place less than two months before his discharge, all his ratings were either excellent or proficient, and the review made no mention of any violations of Department policy.

240. *Id.* Officer Linda Blau, a white woman, was suspended three days for her misconduct. By contrast, Washington was allegedly discharged because of his criminal sexual assault arrest, even though the complainant dropped the charges shortly afterwards.

241. *See id.* at 251.

which held that even if Washington had been fired on account of his race, his misrepresentations barred him from any relief.[242] On appeal, the Seventh Circuit affirmed the lower court's decision,[243] holding that the proper question to ask in cases of employee misrepresentation was whether the defendant, acting in a race-neutral manner, would have fired the employee had it discovered the misrepresentation during his or her employment.[244] The court thus rejected the would-not-have-hired standard,[245] which granted employers summary judgment if they established that had they been aware of an employee's resume fraud they would not have hired that employee in the first place.[246] This standard of proof, which would be more difficult for the employer to meet, was adopted by the *Washington* court because it believed that "there are many situations . . . in which an employer would not discharge an employee if it subsequently discovered resume fraud, although the employee would not have been hired absent that resume fraud."[247] The court felt that to focus on whether the plaintiff would have been hired in the first place, as the *Summers* court had done, would wrongly incorporate property right concepts into employment discrimination law.[248] The circuit also implied, in a rather offhand way, that a plaintiff who could successfully establish discrimination would be entitled to back-pay between the time of his or her discharge and the time that the after-acquired evidence was discovered.[249]

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242. *See id.*

243. *See id.* at 257.

244. *See id.* at 255. In this case, the court held that the Department's evidence (several affidavits stating that knowledge of Washington's criminal past would certainly have led to his discharge) established that Washington would indeed have been discharged had his resume fraud come to light during his employment with the Department.

245. *See id.*

246. *See id.* at 253 n.2 ("If Title VII is meant to eradicate discrimination in employment, then the acts of the employers in [Summers and its progeny] must be illegal . . . .") (quoting Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 97 (1991)).

247. *Id.* at 256 n.5 (quoting Bonger v. American Water Works, 789 F. Supp. 1102, 1102 (D. Colo. 1992)).

248. *See id.* at 256. The court felt that a property right in one's job was not required to show an injury in a federal discrimination claim, because Title VII was silent on the issue.

249. *See id.* at 253, n.2. Apparently, however, Washington never brought up the issue of back-pay in his complaint, and the court did not have to consider it.

3. The Eleventh Circuit

Until the recent Supreme Court decision in *McKennon v. Nashville Banner Publishing Co.*,[250] the Eleventh Circuit had stood alone as the only federal appellate-level court that had rejected outright the Tenth Circuit's application of the after-acquired evidence doctrine.[251] In *Wallace v. Dunn Construction Co.*,[252] the court made clear its belief that the *Summers* court had incorrectly applied the Supreme Court's holding in *Mount Healthy* to the facts before it, and held that after-acquired evidence of employee misrepresentation or misconduct could not bar a plaintiff's employment discrimination claim.[253] Instead, such evidence could only be used to reduce the damages available to the plaintiff.[254]

The plaintiff in *Wallace*, a woman, was employed as a flagperson on a highway construction crew.[255] Shortly after her termination, she brought suit against her former employer, claiming several causes of action, including sexual harassment and retaliatory discharge.[256] During its deposition of the plaintiff, her former employer became aware for the first time of misrepresentations she had made concerning her criminal background.[257]

Relying on the Tenth Circuit's holding in *Summers*, the employer moved for partial summary judgment.[258] The district court denied the employer's motion.[259] On appeal, the Eleventh Circuit ruled that the after-acquired evidence of the plaintiff's resume fraud could only be used to bar certain remedies.[260] The court held that the *Summers* approach, which would deny all relief to victims of unlawful employment practices,

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250. 115 S. Ct. 879 (1995).

251. *See* Wallace v. Dunn Construction Co., 968 F.2d 1174 (11th Cir. 1992). The Eleventh Circuit's approach has thus far been adopted by one federal district court. *See* Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314 (D. N.J. 1993).

252. 968 F.2d 1174 (11th Cir. 1992).

253. *See id.* at 1181.

254. *See id.*

255. *Id.* at 1184.

256. *Id.* at 1176.

257. *Id.* at 1176-77. The plaintiff had previously pled guilty to possession of cocaine and marijuana.

258. *Id.*

259. *Id.* at 1176 n.3.

260. *See id.* at 1181.

was "antithetical to the principal purpose of Title VII,"[261] in that it did not serve to discourage discriminatory employment practices.[262] Allowing an employer the luxury of going through an employee's files after he or she was illegally discharged to search for any evidence of misrepresentation that could lead to a summary judgment in the employer's favor would hardly cause employers to scrutinize their unlawful employment practices.[263] Rather, the end result of applying the majority approach would likely be that employers would have an incentive to sandbag their employees.[264] Thus, the *Summers* approach could actually lead to *increased* occurrences of employment discrimination.[265]

Furthermore, the *Wallace* court felt that the *Summers* approach to after-acquired evidence failed to advance the other purpose of Title VII, that of making the victim of discrimination whole.[266] Citing *Mount Healthy* for the proposition that the victim of employee discrimination should not be placed in a worse position by virtue of his protected status than those employees who did not have protected status, the *Wallace* court held that an application of the *Summers* approach *would* leave employees in a worse position.[267] Unlawfully-discharged employees would be denied all relief based on after-acquired evidence of their misrepresentation or misconduct that was unrelated to their discharge, although if it was not for the employer's discriminatory conduct the employees would have remained employed for some time after they were actually discharged (presumably until the evidence was discovered).[268] The Eleventh Circuit believed that the *Summers* approach, therefore, "constitute[d] an unwarranted extension of *Mount Healthy*"[269] because it "ignore[d] the lapse of time between the employment decision and the

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261. *Id.* at 1180.

262. *See id.*

263. *Id.*

264. *Id.* By sandbagging, the Eleventh Circuit was afraid that, under the Tenth Circuit's approach, employers who tended to discriminate would set artificially low standards for termination, hire a member of a protected class knowing that he or she violated these low standards, and discriminate against the employee until he or she complained. Then, the employer could discharge the employee. If the employer chose to file an action, the employer could then pretend to have just discovered the violation and successfully move for summary judgment.

265. *See id.* at 1181.

266. *See id.* at 1182.

267. *See id.* at 1179-80.

268. *Id.*

269. *Id.* at 1179.

discovery of a legitimate motive for that decision."[270] While *Mount Healthy* excused an employer's liability based on the decision it would have made absent the allegedly unlawful motive, the *Wallace* court construed *Summers* as allowing an employer to avoid all liability based on what *hypothetically* would have occurred absent the discriminatory motive.[271]

Rather than bar the plaintiff's claim, then, the *Wallace* court held that when after-acquired evidence would have provided the employer with a legitimate reason to discharge the employee, the plaintiff could recover back-pay, attorney's fees, and nominal damages.[272] Back-pay could be reduced only if the employer established that it would have discovered the evidence on its own absent any discriminatory practices.[273] Reinstatement, front-pay and injunctive relief, however, would be unavailable.[274] The court felt that its approach succeeded in balancing the interests of the wronged employee against those of the employer who now had a legitimate reason to have discharged that employee.[275]

D. *The Floodgates are Closed (For Now):* McKennon v. Nashville Banner Publishing Co.

On January 23, 1995, the Supreme Court decided *McKennon v. Nashville Banner Publishing Co.*,[276] holding unanimously that an aggrieved employee could not be barred from all relief when, following her discharge, her employer discovered evidence of wrongdoing that, had it been discovered while she was employed, would have led to her termination on lawful and legitimate grounds.[277] This decision had been eagerly anticipated,[278] and, at first glance, the Court appears to have sounded the death knell for the after-acquired evidence doctrine. However, a closer look reveals that its decision, while a welcome step in weakening the strength of the after-acquired evidence doctrine, does not

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270. *Id.*

271. *See id.*

272. *See id.* at 1182.

273. *Id.*

274. *Id.* at 1174.

275. *See id.* at 1181.

276. 115 S. Ct. 879 (1995).

277. *Id.* at 883.

278. *See Supreme Court Says Employee Misdeeds Don't Shield Employers from Bias Claims,* U.S.L.W., Jan. 31, 1995 (stating that the decision was "one of the most closely watched employment cases of the term.").

go far enough to maintain the ideals of antidiscrimination legislation articulated throughout this note.

Christine McKennon worked for the Nashville Banner Publishing Company for 39 years.[279] When she was discharged, it was ostensibly as part of a plan to reduce the work force due to financial considerations.[280] McKennon, who was 62 years old at the time of her discharge, felt that she had lost her job due to her age.[281] As such, she filed a lawsuit under the Age Discrimination in Employment Act in the United States District Court for the Middle District of Tennessee.[282] While preparing for trial, McKennon was deposed by the Banner.[283] During her deposition, she testified that in her last year of employment she had photocopied several confidential documents relating to the Banner's financial condition; documents to which she had access in her position as secretary to the Banner's comptroller.[284] She testified that she was apprehensive about losing her job for a pretextual reason, and she wanted to have the documents for "protection."[285]

Several days after McKennon's deposition, she received a letter from the Banner stating that her removal and copying of the records was a violation of company policy, and that had they been aware of this misconduct she would have been discharged immediately.[286] At trial, the Banner moved for summary judgment, conceding its discrimination against McKennon.[287] The District Court granted this motion, holding that McKennon's conduct in removing and photocopying company documents was proper grounds for her termination and that this misconduct barred her from all relief.[288] The United States Court of Appeals for the Sixth Circuit affirmed, adopting the same rationale.[289]

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279. Marcia Coyle, *After-Acquired Evidence Argued*, NAT. L.J., Nov. 14, 1994, at A13.

280. *McKennon*, 115 S. Ct. at 882.

281. *Id.* at 882-83.

282. *Id.* at 883. The Age Discrimination in Employment Act of 1967 [hereinafter ADEA] makes it illegal for any employer "to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ." 29 U.S.C. § 623(a)(1).

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

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

The Supreme Court granted certiorari, in part to resolve the circuit split that is detailed earlier in this section. In a unanimous decision, the Court reversed the lower courts' rulings and remanded the case to the Sixth Circuit.[290] Justice Kennedy, delivering the opinion for the Court, felt that the Sixth Circuit had been incorrect when it held that McKennon's misconduct made it irrelevant whether she had in fact been discriminated against.[291] Justice Kennedy launched into a description of the historical background of the ADEA, and he correctly placed the ADEA in its larger context, describing it as "part of a wider statutory scheme to protect employees in the workplace nationwide."[292] Justice Kennedy's opinion analogized the ADEA to Title VII, stating that they "share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'"[293] According to an attorney for the American Association of Retired Persons, which filed an amicus brief on behalf of Christine McKennon, the Court's decision applies to several employment discrimination statutes, including Title VII.[294]

The *McKennon* decision should not have come as much of a surprise to anyone who observed the oral arguments before the Court. McKennon's attorney argued that "no matter what the employee has done, in the context of Title VII or ADEA, the wrongdoing does not remove him from the protections of federal law."[295] The Banner's attorney averred that "'Congress did not intend the discrimination laws to benefit employees who are bad apples.'"[296]

The Justices' remarks during questioning made it clear where they stood on this issue. Justice Scalia remarked that use of the after-acquired evidence clause might discourage employees who were victims of employment discrimination from bringing suits against their employers for fear that their "entire work record will be scrutinized, and evidence of incompetence exposed to possible future employers."[297] Justice O'Connor, responding to the Banner's attorney, stated that she was unable to see how the Banner's position "'effectuates the goal of [the ADEA] at

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290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Supreme Court Says Employee Misdeeds Don't Shield Employers from Bias Claims*, U.S.L.W., Jan. 31, 1995.

295. *Justices Debate After-Acquired Evidence as Device to Defeat Job Bias Liability*, U.S.L.W., Nov. 3, 1994.

296. *Id.* (quoting Scalia, J.).

297. *Id.*

all.'"[298] And Justice Ginsburg opined that the after-acquired evidence doctrine "turns the statute on its head by permitting an inquiry into whether the employee engaged in misconduct or is otherwise incompetent."[299] Ginsburg was relentless in her belief that employees who were victims of employment discrimination must be allowed to have their day in court.[300]

Although the Court ruled that lawsuits could not be thrown out of court merely because the employer obtained after-acquired evidence of wrongdoing, it also ruled that such after-acquired evidence *was* relevant in determining the amount of damages that an aggrieved employee could expect to recover, despite the purposes of federal antidiscrimination statutes.[301] In so ruling, the Court recognized what it termed "the duality between the legitimate interests of the employer and the important claims of the employee . . ."[302] and held that "[t]he employee's wrongdoing must be taken into account . . . lest the employer's legitimate concerns be ignored."[303] The Court noted that the ADEA "does not constrain employers from exercising other prerogatives and discretions in the course of the hiring, promoting, and discharging of their employees."[304] So what appears to be a major victory for aggrieved employees, what has been called "the death knell of the *Summers* rule,"[305] in fact will not do much to deter employee misconduct, because employers will still be able to engage in discriminatory employment practices with little in the way of penalties.[306] Although "*McKennon* reinforces the central statutory purposes of the anti-discrimination laws, namely, to eliminate discrimination from the workplace and to compensate victims of such unlawful discrimination,"[307] stronger action is required to completely eradicate the use of after-acquired evidence in employment discrimination cases, as the next section will elaborate upon.

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298. *Id.* (quoting O'Connor, J.).

299. *Id.*

300. *Id.*

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

302. *Id.*

303. *Id.*

304. *Id.* (citing Price Waterhouse v. Hopkins, 490 U.S. at 239).

305. Hyman Lovitz and Sidney Gold, *After-Acquired Evidence Defense is Rejected; Supreme Court Decision Boosts Plaintiff's Cause in Bias Suits*, THE LEGAL INTELLIGENCER, Mar. 9, 1995, at 9, 10.

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

307. Lovitz and Gold, *supra* note 307, at 9, 10.

4. Entrenchment and Wide Acceptance of the After-Acquired Evidence Doctrine

As this section has discussed, the use of after-acquired evidence of employee misrepresentation or misconduct to bar employment discrimination claims or to limit the relief plaintiffs can recover had become a widely-accepted doctrine in our federal court system.[308] While the doctrine was originally utilized in the context of a Title VII action,[309] it had been applied to cases involving state laws;[310] even the EEOC, which is charged with enforcement of Title VII, went on record as supporting the doctrine, although only in its limited Eleventh Circuit application.[311]

However, as one commentator has put it, "[t]here is something wrong with a body of law that allows an employer to cover up its illegal activities by searching an employee's past for unknown falsification."[312] Title VII's primary objective has been described as the "elimination of the major social ills of job discrimination . . . ."[313] The after-acquired evidence doctrine, which allowed employers to defend themselves against charges of employment discrimination while suffering little or no harm, ran counter to this purpose by failing to provide incentives for employers to halt their unlawful employment practices and by failing to make the

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308. *See supra* notes 159-275 and accompanying text.

309. *See* Summers v. State Farm Mut. Auto. Ins. Co., 867 F.2d 700 (10th Cir. 1988) (employee alleged discrimination based on his age and religion, characteristics specifically protected by Title VII).

310. *See, e.g.*, Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409 (6th Cir. 1992) (applying doctrine to Michigan law); Baab v. AMR Serv. Corp., 811 F. Supp. 1246 (N.D. Ohio 1993) (applying doctrine to Ohio law); O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466 (D. Ariz. 1992) (applying doctrine to Arizona law); O'Driscoll v. Hercules, Inc., 745 F. Supp. 656 (D. Utah 1990) (applying doctrine to Utah law).

311. *See* EEOC Office of General Counsel Memorandum re. Litigation Guidance on the Civil Rights Act of 1991 and Related Matters, March 1, 1993 (*Reprinted in* 1993 DLR No. 41, at F-1 et seq. (Mar. 4, 1993)). Although the approach taken by the EEOC may seem contradictory in light of its mandate to ensure that Title VII is enforced, the EEOC has often been criticized, especially in the recent past, as ineffective and as "fail[ing] to fulfill its mandate to resolve individual charges [of employment discrimination]." Hill, *supra* note 32, at 94.

312. Mitchell H. Rubinstein, *The Use of Predischarge Misconduct Discovered After an Employee's Termination as a Defense in Employment Litigation*, 24 SUFFOLK U. L. REV. 1, 28 (1990).

313. EEOC v. Rinella & Rinella, 401 F. Supp. 175, 180 (N.D. Ill. 1975).

victims of discrimination whole.[314] The doctrine punished the victim of employment discrimination twice—the first time as an employee discharged for a discriminatory reason, and the second time as a plaintiff denied any relief.[315] As such, it was properly invalidated by the Supreme Court in *McKennon*. The next section explores in detail how the after-acquired evidence doctrine subverted the purposes of Title VII, and discusses what steps should be taken by Congress, in the wake of the *McKennon* decision, to guarantee that this evidence, which is unrelated to the adverse employment decision, is rendered inadmissible in cases where there has been a showing of discrimination by the employer.[316]

IV. A PROPOSAL FOR THE LEGISLATIVE INVALIDATION OF THE AFTER-ACQUIRED EVIDENCE DOCTRINE

A. *The After-Acquired Evidence Doctrine Failed to Discourage Employment Discrimination*

As indicated earlier, Title VII was enacted, after a furious battle, with the aim of eradicating one of the most serious social problems our country faced in the 1960's—discrimination, principally against minorities, in the workforce.[317] Title VII served to further this purpose by prohibiting employers from using characteristics such as race, sex, religion, color, or national origin as the basis for an adverse employment decision, be it a refusal to hire, refusal to advance or promote, or discharge of an employee.[318] Title VII offered alleged victims of employment discrimination the opportunity to bring an action against their employer and recover damages.[319] It was felt that employers, faced with the prospect of costly litigation and large awards to employees who had been discriminated against, would see fit to halt their discriminatory employment practices.[320] To further this policy, and to correct perceived deficiencies with the original legislation, Congress has amended Title VII on several occasions.[321] These amendments have expanded the

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314. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (describing the two goals Congress intended to achieve through the enactment of Title VII).

315. *See* Follette, *supra* note 59, at 671.

316. *See infra* text accompanying notes 311-18.

317. *See Albemarle Paper Co.*, 422 U.S. at 416 (describing how Title VII was designed to eradicate "a historic evil of national proportions").

318. *See supra* text accompanying notes 32-41.

319. *See supra* text accompanying notes 42-44.

320. *See* Albemarle, 422 U.S. at 417-18.

321. *See supra* Part II.

pool of employees who are qualified for protection pursuant to Title VII,[322] increased the power of the EEOC to enforce the provisions of Title VII,[323] allowed for jury trials,[324] allowed for increased remedies to aggrieved plaintiffs in certain situations,[325] and prohibited employers from avoiding liability in mixed motive cases; cases where an adverse employment decision was made based on both protected and unprotected characteristics.[326] Upon viewing these changes, it becomes clear that Congress has attempted over the years to increase the incentives for employers to stop their unlawful practices.

By allowing employers who were guilty of discrimination to use after-acquired evidence of employee misrepresentation or misconduct to avoid liability, the doctrine failed to provide an incentive for these employers to eliminate discriminatory practices. The Supreme Court in *Albemarle Paper Co. v. Moody* implied this, stating that, "employers fac[ing] only the prospect of an injunctive order . . . would have little incentive to shun practices of dubious legality."[327] The Court went on to say that it was the probability of having to pay damages to victims of employment discrimination that "provide[s] the spur or catalyst"[328] for employers to "endeavor to eliminate . . . the last vestiges of an unfortunate and ignominious page in this country's history."[329] When dealing with cases involving discrimination, a major social ill in our society, courts have "the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[330] By allowing employers to discriminate against their

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322. For example, the 1972 Act extended Title VII to government employees, while the 1991 CRA extended protection to American employees of American companies who were employed overseas. *See supra* Section II.

323. *See supra* text accompanying notes 66-76.

324. *See supra* text accompanying notes 124-32.

325. The 1991 CRA allowed plaintiffs to recover punitive and compensatory damages in cases of intentional discrimination. *See supra* text accompanying notes 119-23.

326. *See supra* text accompanying notes 138-53.

327. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

328. *Id.* (quoting United States v. N.L. Industries, Inc., 479 F.2d 354, 379 (8th Cir. 1973)).

329. *Albemarle*, 422 U.S. at 418.

330. *Id.* (quoting Louisiana v. United States, 380 U.S. 145, 154 (1965)).

employees with impunity, courts across the country shirked their obligation to uphold the principles behind Title VII.[331]

The Eleventh Circuit, which rejected the *Summers* court's application of the after-acquired evidence doctrine, recognized that the majority approach was "antithetical to the principal purpose of Title VII . . . ."[332] It believed that the Tenth Circuit's approach, which would essentially provide an affirmative defense to Title VII, would actually *encourage* employers to continue their discriminatory practices.[333] The *Wallace* court felt that its approach, which would only allow the use of after-acquired evidence to reduce the remedies available to the victim, was more equitable.[334] However, this application was at odds with Title VII's principal purpose as well—by making it less costly for employers to discriminate, the Eleventh Circuit's interpretation of the after-acquired evidence doctrine also failed to provide incentives for employers to eliminate unlawful employment practices.[335] Employers in jurisdictions applying the *Wallace* court's construction of the doctrine could rest secure in the knowledge that they would never have to pay out frontpay, punitive

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331. *See, e.g.*, Milligan-Jensen v. Michigan Technological Univ., 767 F. Supp. 1403 (W.D. Mich. 1991), *rev'd*, 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991 (1993), *cert. dismissed*, 114 S. Ct. 22 (1993). In this case, the plaintiff, a public safety officer, was clearly the victim of flagrant sexual discrimination at the hands of her fellow officers and superiors. However, after-acquired evidence that she had failed to disclose a prior conviction for driving under the influence led to the Sixth Circuit granting summary judgment for the employer.

332. Wallace v. Dunn Construction Co., 968 F.2d 1174, 1180 (11th Cir. 1992).

333. *See id.* The Eleventh Circuit felt that use of such evidence to totally bar employees' claims could lead to instances of abuse. An employer might learn of an employee's misrepresentation or misconduct while he or she was still employed and keep this information a secret. The employer would then be free to discriminate against that employee, secure in the knowledge that if he or she was taken to court for violating employment discrimination laws, this evidence could then be supposedly discovered and used to successfully move for summary judgment.

334. *See id.* at 1184. The plaintiff was denied the remedies of reinstatement, frontpay, and injunctive relief.

335. Under the Eleventh Circuit's approach, defendants would never have to pay more than back-pay (measured from the time of discharge to the time of the judgment), attorney's fees, and nominal damages. The *Wallace* decision has also been criticized by several commentators. *See* Hugh Lawson, III, *Wallace v. Dunn Construction Co.: Defining the Role of After-Acquired Evidence in Federal Employment Discrimination Suits*, 44 MERCER L. REV. 1469, 1469 (1993) (describing the court's holding as "too complicated to be feasible") *Id.*; Muth, *supra* note 9, at 332 (arguing that the court's arguments were "somewhat suspect").

or compensatory damages, even if the plaintiff could establish a prima facie case of intentional discrimination.[336]

Therefore, even under the more equitable construction that the Eleventh Circuit had given it, the after-acquired evidence doctrine allowed employers to discriminate with little, if any, cost, and thus did not provide them with any incentive to eliminate their discriminatory employment practices.

B. *The After-Acquired Evidence Doctrine Failed to Make the Victim Whole*

The second tenet of Title VII, as characterized by *Albemarle*, was to "make persons whole for injuries suffered on account of unlawful employment discrimination."[337] The make-whole objective is evidenced by the wide discretionary powers Congress granted the courts to fashion "the most complete relief possible."[338] This discretionary power was given to the courts to ensure that victims of employment discrimination were, "so far as possible, restored to a position where they would have been were it not for the unlawful discrimination."[339] Therefore, courts, in considering remedies, must consider the purposes behind Title VII.[340]

The make whole purpose of Title VII is also evidenced in the 1991 Civil Rights Act, which allowed for the recovery of compensatory and punitive damages in cases when the plaintiff could establish intentional discrimination.[341] Apparently, these remedies, which were not made available in Title VII's original enactment, were made available because it was believed that, in cases of intentional discrimination, the damage inflicted on the victim of employment discrimination could not be

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336. *See Wallace*, 968 F.2d at 1184. This is contrary to the 1991 Civil Rights Act, which allowed for the recovery of compensatory and punitive damages if the plaintiff could establish that the employer acted with "malice" or "reckless indifference." *See* 42 U.S.C.A. § 1981(a)(a)(1) (West Supp. 1992). To date, only one other federal court has followed the *Wallace* court's construction of the after-acquired evidence doctrine. Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314 (D. N.J. 1993).

337. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

338. 118 CONG. REC. 7168 (1972) (analyzing the Equal Employment Opportunity Act of 1972) (statement of Sen. Williams).

339. *Id.*

340. *See* Albemarle, 422 U.S. at 421 (noting that Title VII had been enacted to eliminate the scourge of employment discrimination and to make its victims whole through court-ordered relief).

341. *See* 42 U.S.C.A. § 1981a(a)(1) (West Supp. 1993).

measured in merely economic terms.[342] Furthermore, in pre-amendment situations where the available damages were insignificant or undesirable, many individuals would not bother to file claims and go through the costly litigation process.[343] With the addition of possible punitive and compensatory damages, these individuals would have more incentive to bring their claims to the EEOC, because they now stood a better chance of being made whole.[344] In providing for jury trials, Congress also intended to make it easier for plaintiffs to be made whole by allowing them to plead their cases before a jury rather than before a panel of judges.[345]

The after-acquired evidence doctrine failed to make the victims of employment discrimination whole.[346] The former majority approach, as articulated by the *Summers* court, argued that after-acquired evidence of employee misrepresentation or misconduct negated the plaintiff's injury, and therefore denied the plaintiff any relief.[347] By denying the victim of employment discrimination any relief because of unrelated factors, even if it was undisputed that discrimination took place,[348] the Tenth Circuit's construction of the doctrine was clearly contrary to the make whole principle of Title VII.

The Eleventh Circuit's application of the doctrine likewise failed to make the victim of employment discrimination whole.[349] Although some

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342. *See* LARSON, *supra* note 117, at 11 (describing how new remedies were made available because for many plaintiffs, "existing remedies were simply not adequate").

343. For example, individuals who were refused employment because of their race or religion would probably feel uncomfortable, to say the least, in subsequently accepting the position if the company was *forced* to hire them by a court order. *See* LARSON, *supra* note 117, at 11 (pre-existing remedies would hardly make it worthwhile for many plaintiffs to stand up for their rights).

344. *See id.*

345. *See supra* note 127 and accompanying text.

346. *See* Follette, *supra* note 59, at 664 (describing how the Tenth Circuit approach does not place the victim of discrimination in the same position he or she would have been in absent the discrimination).

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

348. Indeed, in granting summary judgment, courts generally assume that the discrimination took place. *See e.g.*, Summers, 864 F.2d at 708 ("[I]t is assumed that State Farm was motivated, at least in part, if not substantially, because of Summers' age and religion.").

349. *See supra* notes 14-16 and accompanying text.

relief was made available to the plaintiff,[350] the denial of reinstatement, front pay or injunctive relief (to say nothing of compensatory and punitive damages) resulted in the victim of discrimination being left in a worse position than he or she would have been had the discrimination not occurred, which is contrary to Congress's intention in enacting Title VII.[351]

Under the after-acquired evidence doctrine, the plaintiff in an employment discrimination case was penalized by evidence of his or her resume fraud or misconduct,[352] even though it was not known to the employer at the time of the discharge, and only came to light during the preparation for trial.[353] Had it not been for the employer's discrimination, which resulted in the litigation, the chances are that the evidence would not have been discovered, if at all, until sometime later in the future.[354] This means that the employee would have remained employed until the evidence was discovered, at which point the employer would be justified in discharging the employee. However, it is nearly impossible to predict exactly when the evidence would have been discovered. Therefore, by allowing the employer to move for summary judgment upon presentation of this after-acquired evidence, courts allowed the employer to benefit from his or her own illegal activity.[355] This was so because, according to the Eleventh Circuit, prospective relief would have been denied to the plaintiff when the employer presented evidence that would have resulted in the employee's discharge had it been discovered.[356] However, the employee might have remained employed long past the judgment date; in such a case, since the award of back-pay

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350. A victorious plaintiff in the Eleventh Circuit could recover back-pay, attorney's fees, and nominal damages. *See* Wallace v. Dunn Construction Co., 968 F.2d 1174, 1182 (11th Cir. 1992).

351. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (describing Congress's intent, in enacting Title VII, to "make persons whole for injuries suffered on account of unlawful employment discrimination").

352. *See* Waldo & Mahar, *supra* note 195, at 31.

353. In a typical case, evidence of the employee's misconduct or misrepresentation will be revealed either during inspection of records before trial or upon deposition of the plaintiff. *See, e.g.*, Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409 (6th Cir. 1992) (evidence of resume fraud revealed during Johnson's deposition); Summers v. State Farm Mutual Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988) (evidence of falsifications uncovered following inspection of records).

354. *See* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1182 (11th Cir. 1992) (employer only became aware of plaintiff's resume fraud during pre-trial deposition).

355. *See* Follette, *supra* note 59, at 664 (describing how the doctrine gives employers a "windfall"). *Id.*

356. *See supra* notes 251-75 and accompanying text.

was capped at the judgment date, the plaintiff was essentially penalized by being unable to recover for the time he or she might potentially have remained employed had the employer not engaged in discriminatory employment practices.

Thus, by denying any prospective relief, the Eleventh Circuit approach, although it granted the victim of employment discrimination some recovery (as opposed to the Tenth Circuit's total proscription of relief), did not allow sufficient relief to satisfy the objectives of Title VII—to ensure that "persons aggrieved by the consequences and effects of unlawful employment practices be, so far as possible, restored to the position where they would have been were it not for the unlawful discrimination."[357]

C. *Congress Should Amend Title VII to Invalidate the Use of After-Acquired Evidence in Employment Discrimination Litigation*

As has been shown earlier in this note, on three separate occasions Congress has seen fit to expand the scope and protection of Title VII.[358] Despite the Court's recent ruling in *McKennon*, Congress should amend Title VII once again to guarantee the invalidation the admissibility of after-acquired evidence in employment discrimination litigation. The doctrine flew in the face of both the Congressional intent in enacting Title VII and the general societal goal of eliminating discrimination.[359] Congress should take measures to nullify this doctrine, to go beyond the Court's holding in *McKennon*, because in the past several years the Court has proven itself to be very unpredictable in the area of employment discrimination law.[360]

The proposed amendment should ban the use of after-acquired evidence only in those cases where the plaintiff can establish a prima facie

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357. Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976) (citing 118 CONG. REC. 7166, 7168 (1972)).

358. *See supra* notes 61-153 and accompanying text.

359. *See* Douglas L. Williams & Julia A. Davis, *Title VII Update- Skeletons and a Double-Edged Sword*, C669 A.L.I. A.B.A. 303 (1991). The authors state that a strong argument can be made for the proposition that "the public policy and congressional intent underlying Title VII requires that . . . a finding of [employment] discrimination requires a remedy without the consideration of after-acquired evidence." *Id.* at 309.

360. *See* Neumeier, *supra* note 120, at 500 (describing how the Supreme Court has been inconsistent in its interpretation of civil rights cases since the 1989 term); Simon, *supra* note 19, at 221 (describing how, in the same term, the Court extended greater protection to employees in one decision while giving employers discretion to discriminate in another case).

case of employment discrimination. This would avoid any abuses that might anger business interests, who have fought Congress on Title VII since its inception.[361] The proposed amendment would firmly emphasize Congress's commitment to the original goals of Title VII—the elimination of discrimination from our workplaces and redressing all harm done to the victims of employment discrimination.[362] By proscribing the use of after-acquired evidence, Congress would eliminate a strategy that has been used by many employers who have eluded culpability for their illegal actions by shifting all the blame onto the victims of discrimination for conduct unrelated to their discharge.[363] This would allow the full force of Title VII to be brought against violative employers, and would consequently serve to discourage employment discrimination.[364]

V. CONCLUSION

Employment discrimination has been described as one of the "major social ills"[365] of our society. Title VII was enacted to combat this evil by compelling employers to cease their discriminatory employment practices and by making the victims of employment discrimination whole.[366] The after-acquired evidence doctrine subverted the purposes of Title VII by punishing the victims of employment discrimination for conduct unrelated to their discharge while allowing employers to avoid liability at little or no cost.[367] Although the Supreme Court's recent ruling in *McKennon* is a welcome start, Congress must take action on its

361. *See* Hill, *supra* note 32, at 4, 33 (describing how business interests were fiercely opposed to both Title VII and the 1972 Act that expanded its scope).

362. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 415, 418 (1975).

363. *See, e.g.*, Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409 (6th Cir. 1992) (evidence of employee's misrepresentations defeated her claim of retaliatory discharge); Summers v. State Farm Mut. Auto. Ins., 864 F.2d 700 (10th Cir. 1988) (former employee's claims of age and religious discrimination defeated by evidence of prior misconduct).

364. *See* Loudon, *supra* note 118 (discussing how new remedy and jury trial provisions of 1991 CRA would lead to increased litigation and would thus lead employers to change their evil ways).

365. EEOC v. Rinella & Rinella, 401 F. Supp. 175, 180 (N.D. Ill. 1975).

366. *See supra* text accompanying notes 32-44.

367. *See supra* text accompanying notes 173-275.

own to nullify the after-acquired evidence doctrine. Such action would be consistent with earlier congressional action,[368] and would go a long way towards ensuring that the purposes of Title VII are fulfilled.

Martin Adler

368. *See supra* Part II.