REINVENTING REALITY: THE IMPERMISSIBLE INTRUSION OF AFTER-ACQUIRED EVIDENCE IN TITLE VII LITIGATION

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I. INTRODUCTION

Jane Pianin is an extremely successful twenty-five-year-old saleswoman for a large computer company. She earns a very small salary plus a bonus, which is based on a mathematical formula of the amount of sales over her goal. Her bonuses for the last two or three years have been very high because Jane has sold at least 150% of her goal each year. Her boss, Sam Wolfe, a vice-president of the company, determines which territory each salesperson gets and sets the goals for the territories.

After Jane works for the company for three years, Sam begins to send her flowers and ask her out on dates. Jane declines the invitations. Sam gets more persistent as time progresses. He leaves messages on her phone tape at her home telling her how attractive she is and that he cannot live without her. He continues to send flowers and other gifts, most of which she returns to him. He writes her love letters. Jane tells him that she is not interested in having a personal relationship with him.

Sam gets angry. He tries to fondle her after calling her into his office ostensibly for work reasons. When Jane rebuffs his advances, Sam threatens that if she does not have an intimate relationship with him he will change her territory and increase her goals, making them unattainable. Jane refuses to give in to Sam. In response, Sam replaces Jane's sales territory with the company's worst territory. He also increases her goal to a level that cannot be met. Predictably, Jane receives no bonus because she does not meet her goal. Jane sues the company for a violation of Title VII of the Civil Rights Act.2

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1. The facts in this hypothetical resemble a real case known to the author, but the names of the actors are fictitious.
a) Employer practices. It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

In Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the Court interpreted the Act to
During discovery, the company finds out that Jane misrepresented her credentials on her job application. Although she had completed only two years toward her bachelor of arts degree, Jane stated on her application that she had obtained a four-year degree. The company files a motion for summary judgment, attaching an affidavit of its personnel director averring that if it had known that Jane lied on her application, it would not have hired her in the first place and, if it had learned during her employment of the fraud, it would have fired her. Therefore, the company argues, Jane is not entitled to relief under Title VII even if its actions amounted to sexual harassment.

Although Jane’s complaint alleges a clear-cut case of illegal sexual harassment under Title VII of the Civil Rights Act, if Jane brought her claim in the Sixth, Seventh or Tenth Circuits, she would likely lose on summary judgment. These circuits have held that as a matter of law, on a motion for summary judgment, an employer can use after-acquired evidence of misrepresentations on a job application or on-the-job misconduct to defeat a valid discrimination claim brought under federal law. In so concluding, the three circuits have analogized their treatment of after-acquired evidence to the mixed motives anal-

forbid sexual harassment in the workplace. Id. at 67-68. There are two types of sexual harassment: quid pro quo, id. at 65, and hostile work environment. Id. Quid pro quo harassment, of which this hypothetical is an illustration, is the use by a supervisor of threats of adverse employment decisions and the adverse decisions themselves in an attempt to get an employee to give in to the supervisor’s sexual advances. Id.

3. See supra note 2.


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


8. Misrepresentations on job applications or resumes is often called “resume fraud,” a term which this Article will use interchangeably with “misrepresentation.”

9. Summers, 864 F.2d at 705-06, which was decided before Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), cited to Mount Healthy, 429 U.S. at 285-86, which essentially contained the same mixed motives analysis in the First Amendment firing context.

10. For purposes of this article, “after-acquired evidence” is evidence of an employee’s on-the-job misconduct or of an employee’s misrepresentation on his job application or resumes that the employer learns only after making an adverse employment decision regarding the employee. Normally, the employer learns about the evidence after the employee files charges or brings
ysis employed by the United States Supreme Court in *Price Waterhouse v. Hopkins*\(^ {11}\) and *Mount Healthy City School District Board of Education v. Doyle.*\(^ {12}\)

In *Mount Healthy*, the employer school board had mixed motives for refusing to renew the contract of a teacher in a public school.\(^ {13}\) The teacher made obscene gestures to his students, conduct which is clearly not protected by the First Amendment.\(^ {14}\) He also engaged in objectionable speech that was protected by the First Amendment.\(^ {15}\) The employer refused to renew the contract for both reasons: one permissible and one permissible.\(^ {16}\) The Supreme Court held that if the employer could prove that it would have made the same decision absent the impermissible reason, it could escape liability.\(^ {17}\) In *Price Waterhouse*, which followed *Mount Healthy*'s reasoning,\(^ {18}\) the employer had mixed motives for failing to grant the plaintiff a partnership in the firm; one was permissible and one was discriminatory.\(^ {19}\) The Court established a formula to decide mixed motives cases in the Title VII context.\(^ {20}\) According to *Price Waterhouse*, after the plaintiff proves that the discriminatory reason was a "substantial factor" in the employment decision,\(^ {21}\) the burden shifts to the defendant to prove that it would have fired the plaintiff for a legitimate reason absent the discriminatory reason.\(^ {22}\)

The use of the *Mount Healthy* and *Price Waterhouse* mixed motives analysis in after-acquired evidence cases is misplaced because it is impossible for the permissible motive — resume fraud — to have been a factor in the adverse employment decision. The employer knows noth-

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\(^ {11}\) 490 U.S. 228.

\(^ {12}\) 429 U.S. 274.

\(^ {13}\) *Id.* at 282-83 n.1.

\(^ {14}\) *Id.* at 282.

\(^ {15}\) *Id.* at 284.

\(^ {16}\) *Id.* at 282-83 n.1, 284.

\(^ {17}\) *Id.* at 285. Although the majority of courts seem to interpret *Mount Healthy* to permit an employer who meets its burden to escape liability, the opinion does not clearly compel this result. Some courts and commentators believed, at least initially, that the employer's proof is relevant only to the issue of remedies. *See infra* note 52 and accompanying text.

\(^ {18}\) 490 U.S. 228, 248-49.

\(^ {19}\) *Id.* at 251-52.

\(^ {20}\) *Id.* at 244-45.

\(^ {21}\) *Id.* Although the plurality used the term "motivating factor," the concurrences of Justices White and O'Connor used the term "substantial factor." *Id.* at 265. Thus, a majority of the Court adopted the more stringent "substantial factor" test.

\(^ {22}\) *Id.* at 244-45. *See infra* Part II for a complete discussion of the Court's analysis.
ing of the misrepresentation until after the adverse employment decision is made and the employee sues the employer for discrimination. Consequently, the embarrassing after-acquired evidence, by definition, can play no role in the discriminatory employment decision.

Furthermore, after the enactment of the Civil Rights Act of 1991, it would be an improper judicial intrusion upon the power of the legislature for courts to apply mixed motives analysis to these cases. The Civil Rights Act of 1991 codified the law on discrimination cases involving mixed motives. While retaining some of the Supreme Court's framework for analyzing mixed motives cases, Congress made it easier for plaintiffs to prove violations of the law. The legislative history shows that Congress never intended the mixed motives section of the Civil Rights Act of 1991 to apply to cases of after-acquired evidence of misrepresentation or misconduct. In fact, the application of 42 U.S.C. § 2000e-2(m), the mixed motives section of the 1991 Act, to after-acquired evidence cases would be a clear misinterpretation of the Act. It would be contrary to legislative intent to permit the courts to alter the mixed motives portion of the law by extending it to cover the after-acquired evidence defense.

Besides the constitutional limitation on the judiciary’s power created by the Civil Rights Act of 1991, public policy dictates that defendants be held liable for intentionally and illegally discriminating against their employees. In order for the Civil Rights Acts of 1964 and 1991 to work effectively to eliminate unlawful discrimination in the workplace, defendants must have no means or incentive to escape liability for their wrongful acts. If after-acquired evidence is subject to the mixed motives analysis, a defendant who discriminated illegally against its employee would have every incentive to search for information in the employee's background which could be used to question her truthfulness on her employment application. This search would take place whether or not the employee had misrepresented material facts on the application. It would lead to more costly, prolonged discovery in an age where the

23. Throughout this article, I will refer to discharge as an example of an “adverse employment decision.” This is a shorthand to avoid repetition. My argument also applies to failure to hire, failure to promote and unequal treatment at the workplace.
26. See infra discussion in Part IV.
27. See infra Part IV.
28. See infra Part IV.
courts are attempting to trim pretrial proceedings. Moreover, knowledge that the employer may search the employee's background if the employee files suit against the employer may have a chilling effect on civil rights claims, deterring deserving plaintiffs from bringing discrimination claims.

This Article analyzes the use of after-acquired evidence to defeat a discrimination victim's claim against her employer. Part II discusses the construct established by the Supreme Court to decide mixed motives cases in Mount Healthy and Price Waterhouse. Part III describes the Sixth, Seventh, and Tenth Circuit cases that have concluded that defendants can defeat a claim of discrimination by use of after-acquired evidence and the problems created by these cases. It examines the courts' rationales, both spoken and unspoken, for adopting the defense. Part IV analyzes how the enactment of the Civil Rights Act of 1991 affected Price Waterhouse. It argues that it would be an improper judicial intrusion upon the legislative branch to use mixed motives analysis in after-acquired evidence cases to defeat a discrimination victim's claims after the passage of the Act. Part V discusses the use of after-acquired evidence to limit a plaintiff's remedies in a Title VII case. Finally, it sets forth a proposal for dealing with after-acquired evidence in Title VII cases that accounts for employers' legitimate interests as well as those of employees and the public in eliminating discrimination in the workplace.

II. MIXED MOTIVES ANALYSIS: MOUNT HEALTHY AND PRICE WATERHOUSE

In Mount Healthy City School District Board of Education v. Doyle, the Supreme Court addressed how a plaintiff proves causation when the employer fires an employee for both legitimate and illegitimate reasons. In Mount Healthy, the plaintiff was a school teacher

29. For example, the newly amended Federal Rule of Civil Procedure 26 requires "a party . . . without awaiting a discovery request, [to] provide to other parties: (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts . . . ." Fed. R. Civ. P. 26(a)(1)(A).
34. The model of proof for single motive discrimination cases is quite different from that for claims involving mixed motives. There are two theories under which a plaintiff can sue in a
without tenure whom the Board of Education failed to reappoint.\textsuperscript{35} There were at least two plausible reasons for the Board’s action, one

single motive Title VII case. In a disparate treatment case, the plaintiff must prove that the defendant intended to discriminate against her on the basis of an illegitimate motive, i.e. race, color, religion, sex or national origin. In a disparate impact case, the plaintiff need not prove intent to discriminate, and will prevail by proving that facially neutral criteria, such as requiring a college degree, will have an adverse impact on the plaintiff’s class. See Ann C. McGinley, Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases, 34 B.C. L. Rev. 203, 213 & n.36 (1993). This article deals with disparate treatment cases only.

In disparate treatment cases, where there is only one motive for making the adverse employment decision and there is no direct evidence of discrimination, the courts will apply the \textit{McDonnell Douglas} test. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973). In a Title VII case, a plaintiff must prove that the defendant intended to discriminate against her when it made the adverse employment decision.

Plaintiffs in Title VII cases can prove discriminatory intent by direct evidence, just as plaintiffs in any other civil case would prove their cause of action. Direct evidence of discrimination is almost impossible for a plaintiff to acquire today, however, given the sophistication of defendants in this area. See McGinley, \textit{supra} at 213 n.37. More often than not, therefore, plaintiffs must prove Title VII violations by circumstantial evidence.

The Court has recognized that it is very difficult for a plaintiff to prove discriminatory intent by circumstantial evidence. Thus, in \textit{McDonnell Douglas}, the Court adopted a three-stage method of allocating burdens of production and persuasion in a Title VII case where the plaintiff seeks to prove by circumstantial evidence that the defendant discriminated against her in making its employment decision. \textit{McDonnell Douglas}, 411 U.S. at 802-04. Under \textit{McDonnell Douglas} and its progeny, see Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575 (1978); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 n.6 (1981), the plaintiff can make out a prima facie case of discrimination in a failure to hire case by proving that she is a member of the protected class; she applied for and is qualified for the position; defendant did not hire her; and it hired someone outside of the protected class or continued to look for another applicant after turning down plaintiff's application. The criteria for a prima facie case will vary slightly depending on whether it is a discharge or failure to promote case rather than a failure to hire. See McGinley, \textit{supra} at 216 n.48.

After the plaintiff makes out a prima facie case, the burden of production shifts to the defendant to “articulate some legitimate, nondiscriminatory reason” for the employment decision. \textit{McDonnell Douglas}, 411 U.S. at 802. Once the defendant has met its burden of articulating a reason for the decision, the burden of production shifts back to the plaintiff to demonstrate that the defendant’s articulated, legitimate, non-discriminatory reason is a pretext. That is, that it is not the true reason for the employer’s decision. \textit{Id.} at 804-05. If the factfinder disbelieves the employer’s alleged reason for its employment decision, it can, but is not compelled, to infer the ultimate finding of fact—that the employer intentionally discriminated against the plaintiff. See Saint Mary’s Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993). No additional proof is required. \textit{Id.} The burden of persuasion remains on the plaintiff throughout. \textit{Id.} For an extensive discussion of the three-stage method of proof, see McGinley, \textit{supra} at 214-21.

This methodology will work only if there is a single motive for the adverse employment decision. If, however, there are dual motives, one legitimate and one illegitimate, the plaintiff could never prove that the defendant was not motivated by the legitimate reason because, in fact, the defendant was motivated in part by the legitimate reason. Thus, the Court has set up a different model of proof for mixed motive cases. See \textit{Mount Healthy}, 429 U.S. at 287.

\textsuperscript{35} 429 U.S. 274, 282.
legitimate and one illegitimate. The plaintiff had made obscene gestures to students he was supervising and he had called a local radio station to report information concerning the Board of Education’s teacher dress code. The lower court held that the employee’s communication with the radio station was speech protected by the First Amendment and that it had played a “substantial part” in the employee’s firing. Therefore, the district court ordered reinstatement, even though it also found that the plaintiff had made obscene gestures to students, a legitimate reason for firing him. The Supreme Court agreed that the plaintiff’s communication to the radio station was protected speech and that he could not constitutionally be fired for making the call. It also agreed that the obscene gestures were unprotected speech. The Court did not agree, however, that the plaintiff should be reinstated if the defendant would have fired the plaintiff in the absence of his unprotected conduct.

Thus, the Court set up the evidentiary construct for proving a mixed motives case: the plaintiff has the burden of proving that the constitutionally protected conduct was a “substantial” or “motivating” factor in the dismissal. Once the plaintiff meets this burden, the burden shifts to the defendant to prove by a preponderance of the evidence that it “would have reached the same [employment] decision” even in the absence of the protected conduct.

The touchstone of the opinion is that an employee should not be placed in a better or worse position as a result of constitutionally protected conduct. The Court sought to guard against two possible situations: the first, where a borderline employee’s constitutionally protected conduct would be the decisive factor in his termination, (i.e., “the

36. Id.
37. Id. at 283.
38. Id.
39. Id. at 285.
40. The lower court appears, however, not to have decided whether the obscene gesture was a reason for the failure to reappoint. Rather, it concluded that it would be a legitimate reason for firing the plaintiff. Id.
41. Id. at 284.
42. Id. at 285.
43. Id. at 285-86.
44. Id. at 287.
45. Id.
46. Id. at 286.
47. Id. I speak of “termination,” but the Court was actually dealing with a case where the employer failed to reappoint the teacher. The reasoning, however, is applicable to any adverse
straw that breaks the camel’s back"); and the second, where the same candidate could immunize himself against termination by engaging in constitutionally protected conduct. 48

The opinion makes clear that an employee is not entitled to reinstatement with back pay if the employer proves that it would have fired the plaintiff even in the absence of protected conduct. 49 It is unclear, however, whether the Court held that no constitutional violation occurs if the employer meets its burden of proof. Although initially there was some disagreement over whether an employer that meets its burden of proof under Mount Healthy would still be liable for a constitutional violation, 50 more recently courts and commentators 51 have generally

employment decision such as failure to reappoint, failure to promote, etc.

48. Id.

49. Id. at 284-86.

50. See infra note 52. See also N.L.R.B. v. Wright Line, 662 F.2d 899, 905 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982) (finding that if the discharge would have occurred even without the improper motive, then an unfair employment practice will not be found).

51. In NLRB v. Transportation Mgt. Corp, 462 U.S. 393 (1983), the Court resolved the question of the burdens of proof in cases brought under the National Labor Relations Act, 29 U.S.C. §§ 151-69 (1976 & Supp. V 1981), which made it unlawful to discharge a worker because of his union activity. The Court granted certiorari to decide whether the National Labor Relations Board’s test announced in NLRB v. Wright Line, 251 N.L.R.B. 1033 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), was consistent with the National Labor Relations Act. In Wright Line, the Board had adopted the Mount Healthy formulation of the respective burdens of proof. 662 F.2d at 902. That is, the general counsel had the burden of proving that anti-union animus was a “substantial or motivating factor” in the decision to discharge the employee. Id. at 901-02. The burden then shifted to the employer to prove by a preponderance of the evidence that it would have dismissed the employee for cause absent the discrimination. Id. at 902. If the employer met this burden, there would be a finding that no unfair labor practice had taken place. Id. 29 U.S.C. § 158(q)(3) (1972 & Supp. V 1981) stated in pertinent part:

(a) It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

On appeal, the First Circuit disagreed with the allocation of the respective burdens of proof set forth by the Board. Wright Line, 662 F.2d at 904. The court of appeals agreed that the general counsel would make out a prima facie case by showing that anti-union animus was a “substantial or motivating factor” in the employer’s decision. Id. at 903. However, it parted with the Board with respect to the employer’s burden. It held that once the general counsel met its initial burden of proof, the burden of production, not the burden of persuasion, shifted to the employer to “com[e] forward with credible evidence to rebut or meet the general counsel’s prima facie case.” Id. at 904.

While the courts often confuse burdens of persuasion and production, the terms refer to two very different burdens. A party with the burden of production, as the term implies, has the burden of going forward to produce evidence supporting his or her version of the facts. See Candace S. Kovacic-Fleischer, Proving Discrimination After Price Waterhouse and Wards Cove: Semantics as Substance, 39 AM. U. L. REV. 615, 620 nn.20-22 (1990) (citing IX JOHN H.
accepted that *Mount Healthy* permits an employer to absolve itself of liability if it meets the "same decision" test.\(^{52}\)

Even once a consensus formed on the meaning of *Mount Healthy*, it was still unclear whether an employer under Title VII could escape liability by showing that it would have taken the adverse employment action absent the discriminatory motive. In *Bibbs v. Block*,\(^{53}\) the Eighth Circuit, sitting en banc, held that an employer who used race as a discernible factor in making an employment decision was liable in a Title VII case, even though it had showed it would have made the same decision absent discrimination.\(^{54}\) Thomas Bibbs, a black male, applied to his employer, the Agricultural Stabilization and Conservation Service, a division of the Department of Agriculture, for promotion to a supervisory position.\(^{55}\) The Division denied the promotion.\(^{56}\) Bibbs, the only black person applying for the position, was one of seven candidates.\(^{57}\) A selection committee composed of three whites chose the

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\(^{52}\) See *Kurtz v. Vickrey*, 855 F.2d 723, 731 (11th Cir. 1988) (interpreting *Mount Healthy* as holding that no constitutional violation occurs if the employer can meet the "same decision" test); *Hervey v. City of Little Rock*, 787 F.2d 1223, 1233 (8th Cir. 1986) (applying the *Mount Healthy* analysis to a suit brought under 42 U.S.C. § 1983 and therefore allowing a defendant to avoid liability if it proved that it would have made the same decision absent discrimination). *But see Bibbs v. Block*, 778 F.2d 1318, 1323 (8th Cir. 1985) (stating that it is unclear whether *Mount Healthy* absolved the employer of liability if it meets the "same decision" test and assuming that it does, refusing to apply the same test to absolve an employer of liability under Title VII). See also *Civil Rights Act of 1990: Hearing on S. 2104 Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. at 199-201 (1990) (discussing the Act's purpose of addressing and defining issues surrounding a finding of employer liability raised by the *Transportation Management, Mount Healthy*, and *Price Waterhouse* decisions).

\(^{53}\) 778 F.2d 1318 (8th Cir. 1985).

\(^{54}\) *Id.* at 1324.

\(^{55}\) *Id.* at 1319.

\(^{56}\) *Id.* at 1320.

\(^{57}\) *Id.* at 1319.
successful candidate, a white male. The district court found that the "key figure" on the selection committee had used racial slurs, calling Bibbs a "black militant" and referring to another black printshop employee as "boy" and "nigger." The district court found that race had "played a 'minor role in the selection process'," and later stated that it was a "discernible factor" at the time of the decision. Nevertheless, the court concluded that Bibbs "would not have been selected for the position even if his race had been disregarded." The district court found for the defendant because the plaintiff had not been able to establish "but for" causation.

The court of appeals, sitting en banc, reversed, taking some guidance from the Mount Healthy line of cases, but refused to permit the employer to escape all liability. As in Mount Healthy, the court concluded that the lower court should have shifted the burden of proof to the defendant after the plaintiff had proven that an unlawful motive was a discernible factor in the decision making process. Unlike Mount Healthy however, once the plaintiff proved that the unlawful motive was "a discernible factor," a violation was established. If the defendant could meet its burden of proving that it would have made the same decision absent discrimination, only the remedy would be affected. Although the plaintiff could collect attorney's fees, and receive declaratory and injunctive relief, the plaintiff would not be entitled to retroactive promotion or reinstatement.

In reaching its conclusion, the court relied on the legislative history and statutory intent of Title VII. It stated:

Congress has made unlawful any kind of racial discrimination, not just discrimination that actually deprives someone of a job.

58. Id. at 1319-20.
59. Id. at 1319.
60. Id. at 1320.
61. Id.
62. Id. (quoting Bibbs v. Block, No. 81-0227-CV-W-6, slip op. at 7 (W.D. Mo. June 14, 1983)).
63. Id. (quoting Bibbs v. Block, No. 81-0227-CV-W-6, slip op. at 10 (W.D. Mo. June 14, 1983)).
64. Id. (quoting Bibbs v. Block, No. 81-0227-CV-W-6, slip op. at 7 (W.D. Mo. June 14, 1983)).
65. Id. at 1320.
66. Id. at 1323.
67. Id.
68. Id. at 1323.
69. Id. at 1323-24.
A defendant’s showing that the plaintiff would not have gotten the job anyway does not extinguish liability. It simply excludes the remedy of retroactive promotion or reinstatement.  

In Price Waterhouse v. Hopkins, the Supreme Court disagreed with Bibbs. Price Waterhouse addressed the “respective burdens of proof of . . . defendant[s] and plaintiff[s]” in Title VII suits where there were mixed motives, legitimate and illegitimate, for the adverse employment decision. Ann Hopkins, the plaintiff, had worked as an accountant for Price Waterhouse for five years. She was the only woman candidate proposed by the partners for partnership that year. The partnership did not decide the proposal, but rather it “held” for recon-

70. Id. Other courts deciding mixed motives cases in the Title VII context came to similar conclusions. See Ostroff v. Employment Exch., 683 F.2d 302 (9th Cir. 1982) (holding that plaintiff had established a violation of Title VII and shifting burden to defendant to avoid injunctive relief where female plaintiff had called defendant employment agency inquiring about a job, and defendant, without inquiring about her qualifications, told her the job had been filled, and where plaintiff’s husband called the defendant minutes later to ask about the same job and was told that the job was still open); Nanty v. Barrows, 660 F.2d 1327 (9th Cir. 1981) (holding a qualified American Indian applicant for a truck driver’s position proved unlawful discrimination where he appeared for a job interview, was asked nothing and told that the job was filled, and where the job remained open and two white males were hired as truck drivers three days later and shifting the burden to the defendant to prove that it would not have hired him absent discrimination in order to avoid injunctive relief). Compare Edwards v. Jewish Hosp. of St. Louis, 855 F.2d 1345 (8th Cir. 1988) (holding that under 42 U.S.C. § 1981, plaintiff’s showing that race discrimination was a substantial and motivating factor in his discharge established the defendant’s liability even though defendant would have fired him absent the discriminatory motive). But see Blalock v. Metal Trades, Inc., 775 F.2d 703 (6th Cir. 1989) (holding that there was no liability in a Title VII action if the employer meets its burden of proving that it would have taken the adverse discriminatory action absent discrimination); Spanier v. Morrison’s Mgt. Servs., 822 F.2d 975 (11th Cir. 1987) (ADEA case suggesting that Mount Healthy defense is a complete defense to liability).


72. Although the Court in Price Waterhouse characterized the decision as one deciding how to handle “mixed motives” cases, Price Waterhouse was not a case of mixed motives because the legitimate and non-legitimate reasons for the partnership’s refusal to accept Ms. Hopkins into its ranks were really one and the same. It was legitimate for the partnership to reject Ms. Hopkins based on her aggressive behavior toward staff members. It was illegitimate, however, to reject her for her aggressive behavior if the partnership’s view of the appropriate behavior for Ms. Hopkins was tainted by sexual stereotyping. The Court seemed to be struggling with what to do where blatant evidence of discriminatory taint existed but where the plaintiff would have problems proving causation because the discriminatory thoughts of the partnership may or may not have caused the adverse employment decision. The question is whether evidence of discriminatory feelings, atmosphere or thoughts alone establish causation or whether there should be a more specific link between the discriminatory sentiments and the adverse employment action.

73. Price Waterhouse, 490 U.S. at 233.

74. Id.
sideration the decision regarding her partnership until the next year.75
The following year, the partners in her office refused to propose her for
partnership again.76 Hopkins sued, alleging that the defendant did not
grant her membership into the partnership because of her sex.77
After a bench trial, the federal district judge concluded that the
defendant had legitimate and illegitimate motives for its refusal to make
Hopkins a partner.78 He found that Hopkins had played a key role in
securing major contracts,79 that she was generally viewed as highly
competent,80 and that she had good relations with clients.81 He also
found however that Hopkins was overly aggressive and harsh with
staff,82 and that the partnership had legitimately emphasized interper-
sonal skills in its partnership decision.83 Price Waterhouse’s reliance
on Ms. Hopkins’ bad interpersonal skills, he concluded, was not a pre-
text for discrimination.84
The lower court also found however that the partners had discrimi-
nated against Ms. Hopkins because of her sex by giving credence to
remarks made by partners in evaluating her that resulted from sex ste-
reotyping.85 For example, one partner described her as “macho,”86
while another advised that she “take a course in charm school.”87
Still another advised Hopkins to “walk more femininely, talk more
femininely, dress more femininely, wear make-up, have her hair styled,
and wear jewelry.”88 The lower court ordered the defendant to accept
Ms. Hopkins into the partnership because it did not carry the burden of
proving by clear and convincing evidence that it would not have grant-
ed her a partnership absent discrimination.89
The court of appeals affirmed, but departed from the district court’s
analysis in concluding that even though the plaintiff had proven sex
discrimination, the defendant could escape all liability, not just equitable relief, by proving by clear and convincing evidence that it would have made the same decision absent the impermissible motive.  

The Supreme Court filed four separate opinions. Justice Brennan wrote the plurality decision in which Justices Marshall, Blackmun and Stevens joined. Justices White and O'Connor filed separate opinions, concurring in the judgment. Justice Kennedy filed a dissent, in which Chief Justice Rehnquist and Justice Scalia joined.

The various opinions raise a number of key questions regarding the mixed motives construct: whether the plaintiff needs to prove that the illegitimate motive is a "substantial" or a "motivating" factor in the employer's decision and what the difference between these two standards is; whether direct evidence of an illegitimate motive is necessary to shift the burden to the defendant and, if so, what constitutes direct evidence; and whether once the burden is shifted to the employer, it must prove that it would have made the same decision absent the illegitimate reason for its act, or merely prove there were reasons that justified the adverse employment decision.

The opinions are laden with inconsistent statements, but the bottom line is that a majority of the Supreme Court Justices agreed that when the plaintiff can prove by direct evidence that the illegitimate reason for the adverse employment decision was a "substantial" factor in the decision, the burden shifts to the defendant to prove by a preponderance of the evidence that it would have reached the same decision absent the illegitimate motive. A majority of the Justices agreed that if the defendant were to meet its burden, it would be relieved of all liability, not only of equitable relief.

The question of the defendant's burden of proof is key to understanding how the courts should approach an after-acquired evidence

90. Id.
91. There is a question whether the decision requires proof by direct evidence. The four Justices in the plurality would not require direct evidence, but Justice O'Connor's concurrence would require proof by direct evidence. It is unclear whether Justice White would require proof by direct evidence. Although he does not mention direct evidence in his opinion, he states that he is adopting Justice O'Connor's characterization of the plaintiff's burden. Id. at 259. Thus, it appears that five Justices would require the plaintiff to prove the illegitimate motive by direct evidence. Perhaps more interesting and confusing is how these Justices would define direct evidence. Direct evidence can have a number of different meanings in this context. See McGinley, supra note 34, at 213 n.37.
92. Price Waterhouse, 490 U.S. at 259 (White, J., concurring).
93. Id. at 258.
94. Id.
case decided under Price Waterhouse.\textsuperscript{95} A majority of the members of the Court\textsuperscript{95} clearly adopted the Mount Healthy standard. That standard does not merely require that legitimate factors would have justified the decision, but rather that the employer, at the time the decision was made, would have made the adverse employment decision absent the il-
legitimate factors.\textsuperscript{97} Although the dissent attempts to characterize the majority of Justices as requiring the employer to prove only that “an adverse employment decision would have been supported by legitimate reasons,”\textsuperscript{98} this characterization is at best mistaken and at worst, dishonest.

III. A SURREAL APPROACH: DEFEATING DISCRIMINATION VICTIMS’ LEGITIMATE CLAIMS

The Sixth\textsuperscript{99} and Tenth\textsuperscript{100} Circuits have used after-acquired evidence as a complete defense\textsuperscript{101} to plaintiffs’ discrimination claims un-

\begin{itemize}
  \item 95. If the Court meant that the defendant could escape all liability by showing that there were legitimate reasons at the time of the dismissal, either known or unknown to the employer, that would justify the employer’s action, then perhaps the approach in Summers v. State Farm Mut. Auto. Ins., 864 F.2d 700 (10th Cir. 1988), which permits defendants to use after-acquired evidence as a complete defense, is proper under Price Waterhouse. It would be improper however if the case were brought under the Civil Rights Act of 1991. See infra Part IV. If, however, the Court intended that the employer prove that in the absence of its discriminatory motive, it would have fired the employee for the legitimate reason which actually partially motivated the employer’s decision, see EEOC v. Alton Packaging Corp., 901 F.2d 920, 925 (11th Cir. 1990) (concluding that Price Waterhouse requires the defendant to prove that the legitimate reason was a motivating reason at the time the employer made the adverse employment decision). Compare Goldberg v. Bama Mfg. Co., 302 F.2d 152 (5th Cir. 1962) (under Fair Labor Standards Act, relevant question is whether employer was motivated in part by the legitimate reason to take the adverse employment action, not whether the employer can prove that it was justified in making the decision), then the Summers approach totally distorts Price Waterhouse. For a full discussion of Summers, see infra part III.
  \item 96. See Price Waterhouse, 490 U.S. at 247 n.12 (Brennan, J., plurality) and 258 (White, J., concurring).
  \item 97. See supra discussion in Part II.
  \item 98. 490 U.S. at 280.
  \item 100. Summers v. State Farm Mut. Auto. Ins., 864 F.2d 700 (10th Cir. 1988).
der Title VII of the Civil Rights Act of 1964 in cases where the Civil Rights Act of 1991 was not at issue. While refusing to permit defendants to use after-acquired evidence as a complete defense to a valid discrimination suit, the Second, Fourth, and Eleventh Circuits have concluded that defendants can limit possible remedies available to the plaintiff by use of after-acquired evidence. The Seventh Circuit has done both: one panel has allowed after-acquired evidence as a complete defense, whereas others have permitted the evidence only to limit the plaintiff's remedies. These cases raise vital questions. Under any circumstances should courts consider after-acquired evidence in Title VII cases, and, if so, should after-acquired evidence provide an absolute defense to Title VII cases or merely permit lower courts to limit the plaintiff's remedies? Additionally, if the courts can use after-acquired evidence for the purpose of limiting a plaintiff's remedies, what is the proper use of the evidence to limit those remedies?

For cases brought before the effective date of the Civil Rights Act of 1991, the answers to these questions depend primarily on the interpretation of Mount Healthy and Price Waterhouse and the policies underlying the Civil Rights Act of 1964. As this Article demonstrates,

of sexual harassment by dismissed employee that was discovered after the employee brought a wrongful discharge suit under Virginia law admissible to prove that employee had been fired with "just cause".

102. *Summers* was decided before the enactment of the 1991 Civil Rights Act. In *Johnson* and *Milligan-Jensen*, the lawyers apparently did not argue that the Act applied retroactively, even though the cases were still pending at the time of enactment.


106. Other courts holding that a defendant can use after-acquired evidence to limit the plaintiff's remedies rather than as a complete defense are: *Smith v. Equitable Life Assurance Soc'y*, 60 Fair Empl. Prac. Cas. (BNA) 1225 (S.D.N.Y. Jan. 8, 1993); *Frinton v. Sterling Nat'l Bank*, No. 87 Civ. 4690, 1990 U.S. Dist. LEXIS 912 (S.D.N.Y. Jan. 31, 1990); *Kneisley v. Hercules Inc.*, 577 F. Supp. 726 (D. Del. 1983). *Compare* *Dotson v. United States Postal Serv.*, 977 F.2d. 976 (6th Cir. 1992) (affirming summary judgment of handicap discrimination case where plaintiff had omitted prior health and employment record); *Mantolle v. Bolger*, 767 F.2d 1416 (9th Cir. 1985) (in handicap discrimination case, lower court properly admitted evidence of plaintiff's medical condition discovered after defendant refused to hire plaintiff for sole purpose of allowing defendant to rebut plaintiff's prima facie case that she was qualified for the job, but not admissible to show that defendant did not have a discriminatory motive at the time it refused to hire plaintiff).

107. *See* *Washington v. Lake County*, Ill., 969 F.2d 250 (7th Cir. 1992).

108. *See* *Powers v. Chicago Transit Auth.*, 890 F.2d 1355 (7th Cir. 1989); *Smith v. General Scanning, Inc.*, 876 F.2d 1315 (7th Cir. 1989).
the mixed motives approach adopted in *Mount Healthy* and *Price Waterhouse* should never govern the after-acquired evidence cases although the key tenet of those opinions provides guidance to courts deciding these cases. That is, when assessing whether after-acquired evidence should be allowed to intrude upon an employee's Title VII suit, courts should, above all, analyze whether the employee is placed in a better or worse position because he asserts his rights under Title VII. Certainly, if the after-acquired evidence is a complete defense to the lawsuit, the employee is in a much worse position as a result of his membership in a protected class and his assertion of his rights under the statute. The complete defense penalizes members of a class protected by Title VII, the very persons Congress sought to protect in enacting the civil rights laws, by placing an undue burden on the assertion of their rights to be free from discrimination. This is true to a lesser extent where the evidence is used to deny the plaintiff back pay and other remedies.

For cases brought under the Civil Rights Act of 1991, the focus shifts away from *Price Waterhouse* and *Mount Healthy* to the Act's interpretation and the policies Congress sought to protect through its passage. The Civil Rights Act of 1991 clearly does not permit the intrusion of after-acquired evidence as an absolute defense, nor does it sanction the use of after-acquired evidence to limit remedies available to discrimination victims.

A. A Perceived Lack of Injury: An Absolute Defense

A number of courts have denied plaintiffs' relief because the employer discovered after the lawsuit commenced that the employee misrepresented a fact on her application or engaged in misconduct in the workplace.\(^{109}\) The prevailing rationale for denying plaintiff relief under these circumstances is that the plaintiff suffered no injury because the defendant either would not have hired the plaintiff or would have fired her once it learned of the misrepresentation.

The lack of injury justification, although purporting to limit remedies rather than to foreclose a plaintiff's option to sue,\(^{110}\) is actually a complete defense to liability\(^{111}\) and is very similar in application to a lack of standing,\(^{112}\) or a clean hands defense.\(^{113}\) In theory, the dif-

\(^{109}\) See supra notes 100-102.


\(^{111}\) See supra note 107 and accompanying text.

\(^{112}\) In his dissent in Wallace v. Dunn, 968 F.2d 1174, 1185 (11th Cir. 1992), Judge
ference is that a defendant claiming the “lack of injury” defense must prove that it would not have hired the plaintiff or that it would have fired her had it known about the misrepresentation. If the employer meets its burden, the employee theoretically has not suffered an injury from the firing even if the reason at the time of the firing for the employer’s action was unlawful discrimination.114

Godbold argues that under 42 U.S.C. § 2000e-5(b) (1981) only “aggrieved” persons have standing to bring charges. This section states in pertinent part:

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . and shall make an investigation thereof . . . .


According to Judge Godbold, a person who lies on her job application is not “aggrieved.” Wallace, 968 F.2d at 1187. In other words, Judge Godbold contends Congress did not intend to confer standing in a Title VII case to a person who lied on her job application because if it were not for the plaintiff’s fraud, she would not have obtained the job. This argument, although attractively simple, is odd. There is no indication in the statute that a person who obtained her job fraudulently is not an “aggrieved” person under the statute. While there has been litigation concerning the meaning of an “aggrieved” person, the focus has been on whether members of a protected class who are not subject to the discriminatory practices are “aggrieved” or whether persons who are not members of the protected class are “aggrieved” for purposes of conferring standing. See BARBARA SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 966-88 (2d ed. 1983 & Supp. 1989). Moreover, the courts consistently have held that a plaintiff’s qualifications for the job or promotion are not relevant to the issue of standing to sue under this section of the statute. Id. at 382 (Supp. 1989). Given the broad statutory purpose of eliminating discrimination from the workplace, Congress did not intend to exclude from “aggrieved” persons those who had suffered illegal discrimination in the workplace. See infra part IV.

113. See infra Part III(C).

114. This reasoning reflects a flawed and cramped view of Title VII. Title VII was enacted to protect an employee who is a member of the protected class from adverse action because of race, gender, religious, or national origin discrimination. It, however, does more than protect an employee from the adverse results of such discrimination in the workplace. In Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the Court held that Title VII protects a woman from quid pro quo sexual harassment and a hostile work environment caused by sexual harassment. This reasoning has been extended to protect other members of protected groups from hostile work environments. See, e.g., Boutros v. Canton Regional Transit Auth., 997 F.2d 198 (6th Cir. 1993) (holding that harassment of plaintiff based on his Arab ancestry was sufficient to support a claim of hostile work environment); Jiles v. Ingram, 944 F.2d 409 (8th Cir. 1991) (finding of hostile work environment based on treatment of plaintiff who was African-American). Thus, Meritor Savings Bank and its progeny interpreted the Act to protect a person from working in an undesirable environment caused by sexual, racial or religious harassment. If hostile enough, the environment itself, absent any action by the employer that adversely affected the employee’s work opportunities, is now illegal under the Civil Rights Act of 1991. And now that Congress has added compensatory damages to the remedial scheme in the 1991 Civil Rights Act, see infra note 292 and accompanying text, the Act recognizes that a person may not be compensated adequately by equitable relief. This demonstrates that an employer who fires an employee because of intentional discrimination has harmed the employee even if the employer can show that it would have fired an employee if it had known of the employee’s resume fraud. The
There are two problems with this theory: First, practically, because of courts’ eagerness to dispose of these cases on summary judgment, the proof required of a defendant is minimal, and summary judgment generally is granted. Second, theoretically, the reasoning underlying the theory is flawed. Under the circumstances of the after-acquired evidence cases, the employer learns of the justification for the employee’s firing only because the employee seeks to enforce his rights under the statute. Thus, the employee does suffer a very cognizable injury—the elimination of his right to bring a successful suit for illegal discrimination against his employer—even though his employer admittedly fired the employee for unlawful reasons.

Summers v. State Farm Mutual Automobile Insurance Co. is the first in a series of after-acquired evidence cases that approve of a total denial of relief based on the plaintiff’s lack of injury. V. Ray Summers, a field claims representative for the defendant, was fired allegedly for falsifying company records, problems with customer relations, and poor attitude. Summers sued under Title VII and the Age Discrimination in Employment Act (ADEA), alleging that he was

amendment of the law to permit an employer defending a mixed motives case to escape only certain remedies rather than liability if it shows that it would have taken the same action anyway supports this argument. See infra Part IV.


117. 864 F.2d 700 (10th Cir. 1988). There were a few isolated cases before Summers that approved of permitting a defendant to limit a plaintiff’s remedies in a discrimination suit by reference to after-acquired evidence of misconduct or resume fraud. See, e.g., Froux v. Citibank, 681 F. Supp. 199 (S.D.N.Y. 1988), aff’d 862 F.2d 304 (2d Cir. 1988) (stating that it would permit evidence of lying that was discovered after the employee’s dismissal to limit the plaintiff’s remedy if the defendant could show that it would have found out about the misconduct and it would have discharged the employee); Mantolo v. Bolger, 767 F.2d 1416 (9th Cir. 1985) (refusing to overrule district court’s admission of after-acquired evidence of plaintiff’s medical condition); Smallwood v. United Air Lines, 728 F.2d 614 (4th Cir. 1984) (refusing to uphold injunction ordering defendant to hire 48-year-old pilot in age discrimination case where defendant had an unlawful policy to hire pilots under 35 and where plaintiff had been suspend-ed from a previous airline for misconduct for 18 months, a fact unknown to defendant at the time it refused to hire plaintiff which it would have found out during the hiring process and would legitimately have used to refuse to hire him); Kneisley v Hercules Inc., 577 F. Supp. 726, 734-35 (D. Del. 1983) (refusing to deny back pay to discrimination plaintiff on grounds that the employee falsified travel vouchers, but implying that it may reach a different result if the employee were guilty of resume fraud).

118. Summers, 864 F.2d at 701.

fired because of his age and religion.120 During his employment, the firm discovered Summers falsified various medical and pharmacy bills for services that defendant’s insurers had supposedly received.121 The defendant did not fire Summers for the falsifications, however, because he did not personally benefit from them.122 Instead, State Farm placed Summers on probation.123 After Summers’s discharge, State Farm discovered more than 150 additional falsifications, eighteen of which Summers completed after he returned from probation.124 State Farm moved for summary judgment, arguing that the after-acquired evidence of Summers’s misconduct was a complete defense to his Title VII suit. The federal district court granted the motion.125

On appeal, the Tenth Circuit upheld the district court’s order.126 Citing Mount Healthy City School District Board of Education v. Doyle,127 the court of appeals reasoned that because Summers’s misconduct would have justified discharge, the plaintiff suffered no injury.128 Therefore, even though the instances of employee misconduct were not a cause of the firing, they precluded all relief.129 The court concluded that summary judgment was appropriate because there was no genuine issue of material fact since, when faced with the knowledge of Summers’s pervasive misconduct, defendant State Farm would have fired Summers.130

Although Summers purported to limit relief only,131 it actually created a complete defense to valid discrimination claims.132 By

employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age;

(2) to limit, segregate, or classify his employees in any way which deprives or tends to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Id. § 623(a).

120. 864 F.2d at 702.
121. Id.
122. Id.
123. Id.
124. Id. at 703.
125. Id. at 702.
126. Id.
127. See supra note 35.
128. 864 F.2d at 708.
129. Id.
130. Id. at 709.
131. Id. at 708.
132. Id. at 709. In Summers, the defendant, State Farm, admitted that it had not discharged
analogizing to *Mount Healthy*, it implicitly recognized that if an employer proved that it would have fired the employee absent discrimination, there was no violation of Title VII. Moreover, if the court intended only to limit the plaintiff’s remedies, it should have required the lower court to reach the question of liability first. If the trial court found the defendant guilty of illegal discrimination, then it should have determined how the after-acquired evidence affected the plaintiff’s remedies. Even if the trial court chose not to reinstate the plaintiff as a result of his misconduct, it should have considered, in its discretion, granting the plaintiff one or more of the following available remedies: attorney’s fees and costs, back pay, a declaratory judgment, an in-

the plaintiff because of his falsification of records. *Id.* at 702-03. Rather, it argued that the court should consider his falsification of records in determining whether to grant relief to the plaintiff even if he proved that the defendant had discriminated against him unlawfully. *Id.* at 704. Additionally, State Farm argued that Summers should not get relief because he was guilty of pervasive misconduct at work. *Id.* In making its argument, the defendant relied on *Mount Healthy* and Smallwood v. United Air Lines, 728 F.2d 614 (4th Cir. 1984), apparently reading them to limit a plaintiff’s remedies upon a defendant’s proof that it would have taken the same employment action absent discrimination. The Tenth Circuit agreed with the defendant’s argument, interpreting *Mount Healthy* to hold that the effect of the employer’s proof was to limit the defendant’s remedies, not to exonerate the employer of liability. *Id.* at 705. It also read *Mount Healthy* to permit an employer to limit its remedies if it could have justified the adverse employment decision, not merely if there existed at the time of the decision another reason that, absent the discrimination, would have led to the dismissal. *Id.* at 705. Even assuming that the plaintiff had a valid age and religious discrimination claim, the court of appeals foreclosed any relief to the plaintiff because of his misconduct. Interestingly enough, although the court relied on *Mount Healthy*, it never seemed to follow the *Mount Healthy* reallocation of the burdens of proof. It merely assumed that the defendant would have fired the plaintiff had it known of his pervasive misconduct. Although the assumption seems much more reasonable in this case than in some of the other after-acquired evidence cases, the court should have at least required the defendant to meet its burden of proof on the issue. This mistake is compounded because the decision was made on a motion for summary judgment. *Id.* at 705. See infra discussion in Part III(B)(4).

133. *Summers*, 864 F.2d at 705-06.

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the cost, and the Commission and the United States shall be liable for costs the same as a private person.

A “prevailing party” is a litigant who has succeeded on “any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit,” Texas St. Teacher’s Ass’n v. Garland Indep. Sch. Dist., 489 U.S. 782, 791-92 (1989) (*quoting* Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)). If Mr. Summers was discriminated against, and the court issued an injunction and declaratory relief, he should get the attorney's fees reasonably expended in bringing his suit. *See* Ruffin v. Great Dane Trailers, 969 F.2d 989, 992 (11th Cir. 1992) (*"The touchstone of the prevailing party inquiry [under 42 U.S.C. § 1988 which has similar language as § 2000e-5(k)] must be the material alteration of the legal relationship of the parties*).
junction ordering the defendant not to engage in intentional discrimina-
tion in the future, front pay, or prejudgment interest.135 Instead of
reaching these questions, the trial court merely assumed that the
plaintiff was entitled to no relief and granted summary judgment to the
defendant.136 The court of appeals affirmed. Although the court of ap-
peals claimed that it was merely affirming the denial of a remedy, it
was really doing much more.137 In essence, the court held that the de-
fendant was not liable for its intentional discrimination because the
plaintiff had engaged in misconduct.138

In so holding, the Summers court ignored the dual purposes of the
Civil Rights Act — to compensate victims of discrimination and to
eliminate discrimination in the workplace.139 Rather than reaching a
balanced approach, the court’s one-sided conclusion gave a windfall to
the employer who the court assumed had unlawfully discriminated
against its employee.140 This decision actually encourages discrimina-

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136. Summers, 864 F.2d at 702.
137. The reasoning may be closer to the argument that the plaintiff lacked standing articulated
by Judge Godbold in his dissent in Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir.

The Summers reasoning is also akin to the “clean hands doctrine.” Because of the public
policy in enforcing the Civil Rights Act, the clean hands doctrine should not be applied to
after-acquired evidence cases. See infra Part III(C).

138. Two odd cases interpreting Summers to limit the plaintiff’s remedy rather than as a bar
to the defendant’s liability are O’Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466
cases distinguish Price Waterhouse, claiming that it dealt with the question whether a defendant
was liable for discrimination, whereas Summers dealt with whether the plaintiff was injured by
the unlawful discrimination. O’Day, 784 F. Supp. at 1469; Punahaole, 756 F. Supp. at 490. The
difference is unclear to this author.

139. See infra Part IV.

140. In a motion for summary judgment, the court must view the facts in the light most
favorable to the non-moving party, in this case, the plaintiff. See Fed. R. Civ. P. 56.
tion in contravention of the stated purposes of the Act.\textsuperscript{141}

Two cases extending the \textit{Summers} rationale to after-acquired evidence of employees' misrepresentations on their employment applications are \textit{Johnson v. Honeywell Information Systems, Inc.},\textsuperscript{142} and \textit{Milligan-Jensen v. Michigan Technological University}.\textsuperscript{143} In both cases, the Sixth Circuit adopted the use of after-acquired evidence of the employee's misrepresentations as a complete defense to liability.

\textit{Johnson} was decided under the Michigan Elliot-Larsen Civil Rights Act.\textsuperscript{144} In \textit{Johnson}, the plaintiff had worked for Honeywell for eight years as a field relations manager.\textsuperscript{145} She was responsible for providing assistance to Honeywell's branch managers in establishing affirmative action programs,\textsuperscript{146} and responding to charges of discrimination by the Equal Employment Opportunity Commission.\textsuperscript{147} After her dismissal, Johnson filed suit alleging that the defendant fired her in retaliation for her vigorous pursuit of affirmative action goals.\textsuperscript{148} The defendant learned during discovery that the plaintiff had made a number of misrepresentations on her job application.\textsuperscript{149} The most serious misrepresentation was that she had earned a bachelor of arts degree, even though she had completed only four courses toward a degree.\textsuperscript{150} The district court directed a verdict against the plaintiff on the civil rights claim based on the after-acquired evidence.\textsuperscript{151} The court of appeals

\textsuperscript{141} See infra Part IV. One of the purposes of the Civil Rights Act of 1964 was to "eliminate, through the utilization of formal and informal remedial measures, discrimination in employment based on race, color, religion, or national origin." 1964 U.S.C.A.N. 2401.

\textsuperscript{142} 955 F.2d 409 (6th Cir. 1992).

\textsuperscript{143} 975 F.2d 302 (6th Cir. 1992), cert. granted, 113 S. Ct. 2991 (1993), cert. dismissed, 114 S. Ct. 22 (1993).

\textsuperscript{144} Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS ANN. 37.210-02, 37.2202, 37.2203 (West 1993). \textit{Johnson} also decided whether the employer had "just cause" under the plaintiff's employment contract to fire her. 955 F.2d at 413. The complaint alleged that the discharge violated the just cause provision of her contract. \textit{Id.} at 411. On a motion for summary judgment, the district court held that evidence of misconduct discovered after the employee's termination was not a "just cause" under the contract. \textit{Id.} at 412.

\textsuperscript{145} \textit{Id.} at 411.

\textsuperscript{146} \textit{Id.}

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{Id.}

\textsuperscript{149} \textit{Id.}

\textsuperscript{150} \textit{Id.}

\textsuperscript{151} \textit{Id.} at 412. At trial, evidently applying the McDonnell Douglas single motives framework, the district court directed a verdict against the plaintiff on the civil rights claim, holding that the plaintiff had not established that the defendant's legitimate reasons for firing her were a pretext for retaliation against her. \textit{Id.} The court of appeals affirmed the directed verdict of the
affirmed the directed verdict. 152

In Milligan-Jensen, the plaintiff, a public security officer who was fired from her job at Michigan Technological University, brought a Title VII action alleging sex discrimination and retaliation for filing an EEOC complaint. 153 During discovery, the defendant found out the plaintiff had omitted a prior drunk driving conviction from her application. 154 Patricia Milligan-Jensen was the only female public security officer working for the defendant at the time of her employment. 155 Her immediate supervisor, Sergeant Fredianelli, continually harassed and criticized her, treating her differently from the men with the same title. 156 Most importantly, the plaintiff worked a “bump shift,” a job equivalent to that of a meter maid, 157 whereas her male counterparts had swing shifts, working out of patrol cars like police officers. 158 Upon learning that one of the male officers was retiring, the plaintiff asked her boss whether she could transfer from the bump shift to a swing shift. 159 Fredianelli answered, “You’re the woman, aren’t you?” 160 When the plaintiff responded affirmatively, Fredianelli said, “You’ve got the lady’s job. Don’t you like it?” 161 After this conversation, the plaintiff called the EEOC to complain. 162 Aware of the plaintiff’s complaint, Fredianelli placed two notes in the plaintiff’s file, one justifying his statement and another criticizing her for “spending too much time in the office.” 163

Because of the direct evidence of discrimination, the lower court

civil rights claim. Id. at 415-16. It agreed with Summers and held that even if Honeywell discharged Johnson in retaliation for her opposition to violations of the Act, she was not entitled to relief because Honeywell established that it would not have hired Johnson had it known that she did not possess a college degree, and that it would have fired her if it had become aware of her resume fraud during her employment. Id.

152. Id. The defendant had filed a motion for summary judgment on the wrongful discharge issue. Id. at 412. The court refused to grant the motion. Id. A jury found for the plaintiff on the wrongful discharge claim. Id. at 410. On appeal, the Sixth Circuit held that the lower court abused its discretion in refusing to grant the summary judgment motion. Id. at 413-15.


154. 767 F. Supp at 1410.

155. Id. at 1407.

156. Id. at 1407-08.

157. Id. at 1407.

158. Id.

159. Id. at 1409.

160. Id.

161. Id.

162. Id.

163. Id.
applied the *Price Waterhouse* mixed motives approach.\textsuperscript{164} Concluding that the plaintiff had met her burden of showing that sex discrimination and retaliation were a "substantial factor" in the employer's decision to fire her,\textsuperscript{165} the court shifted the burden to the defendant to demonstrate that it would have fired the plaintiff anyway.\textsuperscript{166} The court concluded that the defendant had not met its burden.\textsuperscript{167} During the liability phase of the trial, the court properly declined to consider evidence of the plaintiff's misrepresentation because the defendant had not known of the misrepresentation at the time that it fired her.\textsuperscript{168} The district court also made findings of fact concerning the effect of plaintiff's misrepresentation on her application. It found that the defendant would have hired the plaintiff even if it had known of her conviction.\textsuperscript{169} It also found that the defendant would have fired the plaintiff for falsifying her application because it had dismissed others for lying on their applications.\textsuperscript{170} In determining what relief the plaintiff was due, the lower court considered that she had misrepresented a material fact on her application.\textsuperscript{171} The plaintiff had requested back pay, front pay, pre-judgment interest, and attorney's fees.\textsuperscript{172} The court cut the back pay in half, refused to grant front pay and prejudgment interest and granted the plaintiff attorney's fees.\textsuperscript{173}

On appeal, the Sixth Circuit reversed, holding that the circuit adhered to the *Summers* rule.\textsuperscript{174} Relying on the lower court's factual finding that the defendant would have fired the plaintiff if it had known of her misrepresentation, the court concluded that the misrepresentation was an absolute defense to plaintiff's discrimination claim,\textsuperscript{175} even in the presence of the defendant's blatant unlawful discrimination. The court stated:

This court, in *Johnson*, adopted the view that, if the plaintiff would not have been hired, or would have been fired, if the

\begin{footnotesize}
164. \textit{Id.} at 1413.
165. \textit{Id.} at 1413-14.
166. \textit{Id.}
167. \textit{Id.} at 1415-16.
168. \textit{Id.} at 1415 n.3.
169. \textit{Id.} at 1410.
170. \textit{Id.}
171. \textit{Id.} at 1416-17.
172. \textit{Id.} at 1417.
173. \textit{Id.}
174. 975 F.2d 302, 305 (6th Cir. 1992).
175. \textit{Id.} at 304-05.
\end{footnotesize}
employer had known of the falsification, the plaintiff suffered no legal damage by being fired.

Therefore, since the trial court found as a fact that falsification of the employment application, if discovered during her employment, would have resulted in appellee’s termination, it becomes irrelevant whether or not she was discriminated against, and we need not discuss the remaining issues raised in the briefs.176

In Washington v. Lake County Illinois,177 the Seventh Circuit affirmed a grant of summary judgment,178 permitting the lower court’s use of after-acquired evidence of resume fraud as an absolute bar to the plaintiff’s case.179 In reaching this conclusion, the court addressed the question of the proper framework for analyzing after-acquired evidence cases.180 Analogizing the case to Price Waterhouse v. Hopkins,181 the court stated that the issue in a “resume fraud” case, like that in a mixed motives case, was whether the plaintiff had actually been injured.182 It characterized the inquiry in both cases as a hypothetical concerning what the employer would have done under different circum-

176. Id. This opinion could also be interpreted as refusing to permit the lower court to exercise its discretion to grant plaintiff the remedies of back pay, etc. The court’s action, however, is more consistent with the theory that the after-acquired evidence created a complete defense. The court never even discussed the appropriateness of the remedies the lower court granted to the plaintiff. Rather, in a conclusory fashion, it stated that the circuit adhered to the Summers rule, and therefore there was no injury and no relief. This result is more consistent with a bar to liability than a reversal of the lower court’s discretion.
177. 969 F.2d 250 (7th Cir. 1992).
178. Id. at 257.
179. The plaintiff did not challenge the Summers rule, but argued that the district court improperly granted summary judgment because there were genuine issues of material fact. Id. at 253. The court of appeals noted that in previous cases the Seventh Circuit had not “squarely adopted” the Summers rule, but had merely concluded that injunctive relief was inappropriate where the defendant discovers evidence of an employee’s misconduct after the lawsuit commenced. Id. at 253 n.2. In the earlier cases, the court had implied that discrimination victims who had lied on their resumes could collect back pay from the date of the discharge to the date of the defendant’s discovery of the resume fraud. Id. Because, however, Mr. Washington did not challenge the Summers rule and did not request back pay for the period from his discharge to the date of the discovery of his misrepresentation, the court did not address the issue of the availability of back pay in after-acquired evidence cases. Id.
180. Id. at 253-54.
181. 490 U.S. 238 (1989). See supra Part II. The court did not reach the question of how to deal with an after-acquired evidence case if the Civil Rights Act of 1991 applies to the case because neither party cited to the Act. Washington, 969 F.2d at 255 n.4. It acknowledged that the Summers rule could be inconsistent with the Act. Id. at 255 n.4, 256 n.6.
182. 969 F.2d at 255.
stances. Because the inquiry was the same, the court concluded that the after-acquired evidence cases should apply the same evidentiary framework as that used in mixed motives cases. Thus, the court fashioned the test for after-acquired evidence cases: In situations involving “after-acquired” evidence, the employer must show by a preponderance of evidence that, if acting in a race-neutral manner, it would have made the same employment decision had it known of the after-acquired evidence.

B. Real Problems of an Unreal Defense

1. Injured Victims: Employers’ Windfalls

Although the after-acquired evidence cases claim to follow *Mount Healthy* and *Price Waterhouse*, they misinterpret the lack of injury theory established in those cases. In both *Mount Healthy* and *Price Waterhouse*, the key consideration in adopting an approach to mixed motives cases was assuring that the employee neither suffer nor benefit from exercising her rights. The Court set up the mixed motives formula to achieve this goal. Under *Mount Healthy* and *Price Waterhouse*, the employer escapes liability if it would have made the same employment decision absent the discrimination because there is no injury to the plaintiff. In theory, assuming that the defendant meets its burden, the plaintiff is not injured because, absent discrimination, the employer would have hired the plaintiff for a legitimate reason that actually partially motivated the defendant’s adverse employment action. Thus, the employee’s rights to protection under the First Amendment and Title VII respectively would not suffer.

Unlike the plaintiffs in true mixed motives cases, the plaintiffs in after-acquired evidence cases do suffer a very real injury. An employee who is fired and files a suit alleging race discrimination, for example, is worse off if the employer can allege resume fraud as a defense. If the employer would not have found out about the employee’s misrepresentation but for the discrimination lawsuit, the discrimination victim suffers substantial harm directly resulting from filing the lawsuit. Additionally, rather than discouraging discrimination, this defense actually

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183. Id.
184. Id.
185. Id.
encourages it. Persons outside of the protected classes who lie on their job applications will continue their employment without the resume fraud ever being detected. Therefore, only those persons who Congress intended to protect are affected by this defense. Consequently, the defense strictly curtails the victim's civil rights to equal treatment and, in the absence of such treatment, to seek redress for discrimination through the courts. It also creates a windfall for the employer who escapes liability even though it is guilty of unlawful discrimination. Neither Mount Healthy nor Price Waterhouse stands for this proposition.

2. Causation: No Proof of Motivation or Intent

The use of the mixed motives construct to defeat a plaintiff's discrimination case where the employer discovers after-acquired evidence of a misrepresentation or misconduct distorts Mount Healthy and Price Waterhouse's causation requirements. In situations where there is no discovery of after-acquired evidence of resume fraud, both the traditional modes of proving causation in a civil suit and the McDonnell Douglas single motive construct may fail to help the employee prove that the employer's adverse employment action resulted from discriminatory motives where the plaintiff could prevail under the Price Waterhouse mixed motives analysis.

The Supreme Court set up the Price Waterhouse construct for precisely that reason: to aid deserving plaintiffs where the traditional allocation of burdens of proof may fail to attain a just result. The Court was concerned, however, that it not create a windfall for the employee. Thus, if the employer can prove that it would have fired the employee absent the discrimination, under Price Waterhouse the employer is relieved of liability. Although the construct requires the employer to prove a hypothetical, i.e., what it would have done absent

187. This argument is equally applicable to the plaintiffs in First Amendment employment cases. It makes little sense to permit the employer who has fired his employee for engaging in protected speech to use after-acquired evidence to justify the discharge. Certainly, an employee who wishes to exercise his First Amendment rights may be chilled if he knows that if he is fired the employer will have the right to discover reams of information about him.

188. See supra note 34.

189. See Price Waterhouse, 490 U.S. at 247-48 (describing the reasoning behind the allocation of the burdens of proof where an employer has allowed gender to affect its employment decision).

190. Id. at 249.

191. Id. at 252.
discrimination, it does not layer hypothetical upon hypothetical as the Summers approach does. In Mount Healthy and Price Waterhouse, the Court considered whether a legitimate reason for taking action against the employee was known to the employer at the time that the employment decision was made, and, whether in fact, it partially motivated the employer to make the adverse employment decision.\textsuperscript{192} Thus, in Mount Healthy and Price Waterhouse respectively, the teacher’s making of obscene gestures at his students\textsuperscript{193} and the accountant’s rude and abrasive treatment of her staff\textsuperscript{194} were actual considerations at the time the employers made the adverse employment decisions. Both of these legitimate reasons for refusing to reappoint the teacher and for denying the accountant partnership in the firm were tainted, however, because there also existed illegitimate, discriminatory reasons for the adverse employment decisions.\textsuperscript{195} Thus, in order to escape liability, the defendants had to prove that if the process had not been tainted by discrimination, they would have reached the same result due to legitimate reasons that actually played a role in the employer’s decision.\textsuperscript{196}

The Summers approach requires defendants to make a much larger leap into the hypothetical abyss. Because it is acknowledged that the

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\textsuperscript{192} Mount Healthy, 429 U.S. at 287; Price Waterhouse, 490 U.S. at 252.
\textsuperscript{193} Mount Healthy, 429 U.S. at 282.
\textsuperscript{194} Price Waterhouse, 490 U.S. at 234-35.
\textsuperscript{195} Mount Healthy, 429 U.S. at 282-83 n.1; Price Waterhouse, 490 U.S. at 257-58.
\textsuperscript{196} On remand, the federal district court in Mount Healthy, based on the evidence previously presented by the defendant, concluded that the defendant had met its burden of proving that it would not have renewed Mr. Doyle’s contract even in the absence of his protected activity. See Doyle v. Mount Healthy Sch. Dist. Bd. of Educ., 670 F.2d 59, 61 (6th Cir. 1982). The court of appeals affirmed. \textit{Id.}

On remand to the district court, Price Waterhouse chose to rely on evidence in the record in order to sustain its burden of proof. The court concluded that Price Waterhouse had not met its burden of proving by a preponderance of the evidence that it would have decided not to offer partnership to Ms. Hopkins in the absence of discrimination. Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1207 (D.D.C. 1990), aff’d 920 F.2d 967 (D.C. Cir. 1990). It opined that Price Waterhouse could have presented more detailed information concerning Ms. Hopkins’s relationship with staff members and expert testimony to provide a basis for the court to make “appropriate findings.” \textit{Id.} The district court granted to Ms. Hopkins \$371,175 in back pay, attorney’s fees and costs; it ordered Price Waterhouse to accept the plaintiff into its partnership and it enjoined the defendant from retaliating against Ms. Hopkins for asserting her discrimination claims. \textit{Id.} at 1216-17. The court of appeals affirmed. 920 F.2d 967, 970 (D.C. Cir. 1990). It also noted that Price Waterhouse’s decision not to add to the record on appeal may have been fatal. \textit{Id.} at 972-73. Price Waterhouse “might have helped to tip the balance in its favor by introducing its own expert testimony or by offering some more objective evidence in support of its case.” \textit{Id.} at 972.
\end{flushright}
employee's misrepresentation is discovered after the employer makes the adverse employment decision, the misrepresentation cannot possibly have been even a partial cause for the employer's action. Therefore, the employer cannot prove, as required by Mount Healthy and Price Waterhouse, that it would have taken the same action absent discrimination at the time of the employment decision. It must prove that it would have taken the same action absent discrimination had it known at the time of the employment decision of the employee's misrepresentation. Thus, the Summers approach requires the factfinder to conclude that the employer would have reached the same decision absent discrimination even though the employer admittedly never even considered the "legitimate" reason for its actions at the time it made the adverse employment decision.

This is an improper result under Mount Healthy and Price Waterhouse. Both cases focused on the intent and motives of the employer at the time of the adverse employment decision, that is, on the actual reasons for firing the employee. Under Summers, courts permit the factfinder to search for a legitimate reason for firing the employee after the employee's dismissal. To permit this analogy to Price Waterhouse is to misunderstand the role motives and intent have played in Title VII law. In disparate treatment cases, the courts have consistently required plaintiffs to prove that employers intentionally discriminated when they took the adverse employment action that is the subject of the litigation. Allowing an employer to defend against this proof of motive or intent by raising a permissible reason for the adverse employment action even though that reason played absolutely no role in the decision making plays havoc with this precedent.

197. See Mount Healthy, 429 U.S. at 287 (explaining that since Doyle had carried his burden to show that his conduct was constitutionally protected, the Board must show that it would have reached the same decision as to Doyle's reemployment even in the absence of the protected conduct); Price Waterhouse, 490 U.S. at 252 (explaining that the employer must show that it would have reached the same employment decision based on its legitimate reason standing alone).


199. See, e.g., Hong v. Children's Memorial Hosp., 993 F.2d 1257 (7th Cir. 1993); Sanchez v. Philip Morris, 992 F.2d 244 (10th Cir. 1993).
3. Struggling with the Standard: "Would Not Have Hired" versus "Would Have Fired"

Some courts adopting the no injury justification have required the defendant to prove that it would not have hired the plaintiff had it known of the resume fraud, while others have required the defendant to prove it would have fired her once it learned of the misrepresentation. This Article argues that using the mixed motives construct to decide the after-acquired evidence cases is wrong. The use of the "would not have hired" standard is particularly inappropriate.

As a theoretical and a practical matter, use of the "would not have hired" standard under most circumstances makes little sense. The theory behind the "would not have hired" standard is that the plaintiff is not entitled to the job because the employer never would have hired her if it had known of the misrepresentation. Thus, the reasoning goes, because the plaintiff has no property interest in the job, she has no right to sue when she loses the job.

In Washington v. Lake County, Illinois, the Seventh Circuit debunked this reasoning. Eddie Washington, an African-American, was fired from his position as a jailer at the Lake County, Illinois Sheriff's Department. The plaintiff sued the defendant, alleging that the defendant had fired him because of his race, unfairly singling him out and either falsifying or exaggerating negative incidents reported in his file. The complaint further alleged that his most recent employment appraisal, conducted less than two months before his firing, gave him all "excellent" and "proficient" ratings and contained uniformly positive additional comments. The defendant discovered after Washington filed suit that the plaintiff had lied on his employment application by answering "no" to a question asking whether the applicant had any previous convictions. In fact, Washington had pled guilty to a criminal trespass charge twelve years before he applied for his job as jailer, and had been convicted of third-degree criminal assault five years be-

202. 969 F.2d 250 (7th Cir. 1992).
203. Id. at 251.
204. Id. at 252.
205. Id.
206. Id. at 251-52.
fore his application. The defendant moved for summary judgment and the lower court granted the motion.

The plaintiff appealed the order, arguing that there were genuine issues of material fact as to whether the defendant would not have hired or would have fired him if it had known about Washington's prior convictions. The defendant argued that it would never have hired the plaintiff. Thus, he had no legitimate "entitlement" to the job and his firing was legal, even if it was motivated by race discrimination. Although the court decided the case for the defendant, it rejected the "would not have hired" standard. Rather, the court concluded that where an employer discovers evidence after the firing that its former employee misrepresented credentials on his application, the proper test is whether the employer would have fired the employee if it had found out about the resume fraud during the employee's tenure.

The court rejected the "would not have hired" test because it concluded rightfully that use of this test would unjustifiably import the notion that an employee must have a property right in his job before making an employment discrimination claim. Under Title VII, an employee with no property right in his job still has a federal cause of action for unlawful discrimination. That an employee is "at-will" is no defense to a discrimination claim. Even though a plaintiff in an after-acquired evidence case may have acquired the job fraudulently, she had performed the job for which she was hired.

For an example of the improper use of the "would not have hired" standard, consider Johnson v. Honeywell. The plaintiff worked for Honeywell for eight years. Although at the time the defendant hired Johnson it was searching for an applicant with a college degree, Honeywell could no longer credibly argue that a college degree was necessary to perform the job after the plaintiff had successfully per-

207. Id. at 252.
208. Id.
209. Id. at 253.
210. Id. at 254. This argument is similar to the standing argument made by Judge Godbold in his dissent in Wallace v. Dunn, 968 F.2d 1174, 1185 (11th Cir. 1992) (Godbold, J., dissenting). See supra note 112.
211. Washington, 969 F.2d at 254-57.
212. Id. at 256.
213. Id.
214. Id.
216. Id. at 411.
formed the job for years. Thus, the proper inquiry should have been whether the defendant would have fired the plaintiff had it learned during her tenure of her misrepresentation. Even though Honeywell may not have hired Ms. Johnson if it had known that she did not have a degree, she functioned effectively in her job despite her lack of a college degree. The facts in Honeywell are particularly compelling because the plaintiff established that during her interview no one focused on her degree;\(^{217}\) rather, the interviewer appeared to be much more interested in her experience.\(^{218}\) Moreover, the plaintiff’s immediate supervisor possessed no college degree and presumably was capably performing his job.\(^{219}\)

Although the “would have fired” standard is preferable to the “would not have hired” standard, permitting an employer to use after-acquired evidence to defeat the plaintiff’s claim of discrimination at all, whether by the “would not have hired” or the “would have fired” standard, defeats the policies of the anti-discrimination laws. Whether or not the employee is working for the employer because she misrepresented facts on her resume, the employee continues to work for the employer, and the employer continues to evaluate the employee’s work. If the credential that the employee misrepresented in the application is so essential to the performance of the job in question, the employer should realize that the employee is not aptly performing her job. In that case, the employer would have every right to dismiss the employee for poor performance. The after-acquired evidence should not, however, make legal the unlawful action of an employer who fires an employee due to discriminatory motives.

4. Procedural Pitfalls: Shifting Burdens and Summary Judgments

By misapplying the Price Waterhouse formula on motions for summary judgment, Summers and its progeny further intrude upon the rights guaranteed by Title VII. While asserting that they are following Price Waterhouse, courts do not shift the burden to the defendant as the Price Waterhouse model requires. Instead, courts actually place the burden on the plaintiff to prove that she would not have been fired.\(^{220}\) Furthermore, because courts often resolve these cases on motions for summary judgment, the courts are deciding important questions of mo-

\(^{217}\) Id. at 414.
\(^{218}\) Id.
\(^{219}\) Id.
\(^{220}\) Or that she would have been hired.
tive and intent without legitimate fact finding, improperly drawing all
inferences in the defendant’s favor, even though the defendant brought
the motion and has the burden of persuasion on the issue.\textsuperscript{221}

After the plaintiff demonstrates that illegal discrimination is a “sub-
stantial factor” in the employment decision, \textit{Price Waterhouse} would
shift the burden to the defendant to prove by a preponderance of the
evidence that it would have fired\textsuperscript{222} the plaintiff absent the discrimina-
tory motive. In the after-acquired evidence context, the defendant has to
prove that it would have fired the plaintiff had the defendant known at
the time of the firing about the resume fraud or the misconduct. These
cases, however, are not shifting the burden of persuasion to the defen-
dant on this issue.

Consider, for example, \textit{Washington v. Lake County, Illinois}.\textsuperscript{223} The
court allowed the defendant to meet its burden on summary judgment
by submitting two self-serving affidavits,\textsuperscript{224} made by persons who
would not have been the ultimate decision makers, that in a conclusory
fashion aver that they would have fired Washington immediately if they

\textsuperscript{221} See, e.g., Milligan-Jensen v. Mich. Technological Univ., 975 F.2d 302, 305 (6th Cir.
1992) \textit{cert. granted} 113 S. Ct. 2991 (1993), \textit{cert. dismissed} 125 L. Ed. 2d 772 (1993) (revers-
ing trial court’s findings of fact and law based on motive and intent); Washington v. Lake
County, Ill., 969 F.2d 250, 256-57 (7th Cir. 1992) (affirming summary judgment granted in
favor of Lake County); Johnson v. Honeywell Info. Sys., 955 F.2d 409, 411 (6th Cir. 1992)
(reversing denial of summary judgment on a wrongful discharge claim and affirming directed
verdict granted in favor of Honeywell on a civil rights claim); Summers v. State Farm Mut.
Auto. Ins., 864 F.2d 700, 709 (10th Cir. 1988) (affirming summary judgment granted in favor
of State Farm).

\textsuperscript{222} In order to make the discussion easier to follow, I employ only the “would have fired”
test here. There may be limited circumstances where the employer should use the “would not
have hired” test, such as when the employee is fired during his probationary period.

\textsuperscript{223} 969 F.2d 250 (7th Cir. 1992).

\textsuperscript{224} \textit{Id.} at 256. Accepting as true, defendant’s simple, self-serving affidavits without requiring
objective documentary proof or giving the plaintiff the opportunity to cross-examine the witness
on the company’s past policies is totally improper given the defendant’s burden.

If the plaintiff can establish through cross-examination that the company did not investigate
the plaintiff’s background, the plaintiff could argue to the factfinder that the company did not
attach much significance to the plaintiff’s background. Thus, the jury could draw the reasonable
inference that the company would not have fired the plaintiff for misrepresenting facts on his
application because the facts on the application are not material to the plaintiff’s job. The
factfinder could also infer that had the employer considered any given question on the applica-
tion essential to the position, it would have investigated whether the applicant had answered the
question truthfully. Given that the employer may choose not to investigate, the jury could con-
clude that the company made a financial decision that the need for accuracy in the application
did not outweigh the cost of the investigation. Thus, a jury could conclude that the employer
did not meet its burden of proving that it would have fired the plaintiff had it learned of the
misrepresentation.
had discovered that he had lied on his application about previous convictions.\textsuperscript{225} The plaintiff, in contrast, produced strong evidence that created genuine issues of material fact concerning whether the defendant would have fired the plaintiff absent race discrimination.\textsuperscript{226} He showed that the department had only suspended for three days a white female jailer who was arrested for drunk driving and leaving the scene of an accident while she was in uniform.\textsuperscript{227} He also proved that he had received very positive employment appraisals.\textsuperscript{228} Washington noted that the defendant’s affidavits neither demonstrated the existence of a department policy to fire employees for resume fraud, nor showed that the department had ever fired an employee for resume fraud.\textsuperscript{229} Given this evidence, a reasonable jury could have concluded that Lake County Illinois would not have fired Washington if it had learned that he had lied about his previous convictions.

The Seventh Circuit saw it differently. In affirming the lower court’s grant of summary judgment, the court did not place the burden of persuasion on the defendant to prove that it would have fired Washington, even though it purported to do so. Instead, it squarely placed the burden on the plaintiff to prove in defense of a motion for summary judgment that the defendant would have treated a similarly situated employee differently. Moreover, it improperly drew all reasonable inferences in the defendant’s favor, even though the defendant was the moving party on the summary judgment motion and had the burden of persuasion on the issue of whether it would have fired Mr. Washington. Although it should have allowed the factfinder to draw the reasonable inference that the defendant would not have fired the plaintiff, the court invaded the province of the factfinder and found that the white co-worker’s situation was distinguishable.\textsuperscript{230} This is a particularly egregious result considering that the defendant should have had an extremely heavy burden in bringing the motion.\textsuperscript{231}

There are two problems with the court’s approach. First, the defendant has the burden of proving that it would have fired the plaintiff if it had known of his resume fraud. The only way it can prove what it

\begin{itemize}
  \item \textsuperscript{225} Id.
  \item \textsuperscript{226} See id. at 257.
  \item \textsuperscript{227} Id. at 252.
  \item \textsuperscript{228} Id.
  \item \textsuperscript{229} See id. at 257.
  \item \textsuperscript{230} See id.
  \item \textsuperscript{231} See infra note 232 and accompanying text.
\end{itemize}
would have done is to demonstrate a company policy that it faithfully adhered to in the face of resume fraud or misconduct. Without proof that the defendant fired other similarly situated employees who lied on their job applications, defendant’s mere statement that it would have fired the plaintiff is an empty allegation.

Second, the defendant’s lack of proof is compounded because the issue arises on a motion for summary judgment. Because the defendant has the burden of persuasion on this issue, on summary judgment the defendant has the same burden a plaintiff moving for summary judgment would have in an ordinary civil case. This is a very heavy burden. The defendant must eliminate all genuine issues of material fact concerning whether it would have fired the plaintiff. Thus, the defendant must prove that a reasonable factfinder could not find that the defendant would not have fired the plaintiff once the defendant acquired the knowledge of the resume fraud. The defendant in Lake County did not meet this burden.

Johnson v. Honeywell is another example of misuse of summary judgment in the after-acquired evidence cases. In Johnson, the court held that under Michigan law summary judgment is appropriate in a wrongful discharge claim where the misrepresentation or omission is material, directly related to measuring a candidate for employment, and relied upon by the employer making the hiring decision. In response to Honeywell’s claim that it would not have hired Ms. Johnson had it known she did not have a college degree, the plaintiff averred

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233. Id. The burden may be even greater for cases brought under the Civil Rights Act of 1991. Before passage of the Act, it was generally accepted that damages and jury trials were not available to litigants suing under Title VII. See Matthew F. Davis, Comment, Beyond the Dicta: The Seventh Amendment Right to Trial by Jury under Title VII, 38 Kan. L. Rev. 1003, 1016 & nn.125-26 (1990) (listing cases where courts have found that since an award of back pay in Title VII cases is “intrinsically bound up in the equitable relief,” jury trials were inappropriate). The Act makes damages available to successful plaintiffs. 42 U.S.C. § 2000e-5(g) (1992). Because damages are a remedy permitted by the Act, the Seventh Amendment to the United States Constitution requires that the parties have a right to demand a jury trial. This constitutional right may mandate a very heavy burden on a party with the burden of proof when moving for summary judgment. See Louis, supra note 232, at 1043. The party with the burden of proof at trial “must present proof so strong no reasonable person may reject it.” Id. at 1043 n.141.

234. 955 F.2d 409 (6th Cir. 1992).

235. Id. at 414-15.
that at her job interviews the defendant questioned her about work experience only, never asking about her education.\textsuperscript{236} She also swore that her supervisor at the time of her firing lacked a college degree. The court concluded that the plaintiff’s affidavit did not create a question of fact concerning Honeywell’s reliance on her misrepresentation.\textsuperscript{237} Relying on the affidavit of the personnel manager who hired the plaintiff and the job announcement stating that the company sought a candidate with a college degree, the court of appeals concluded that Honeywell would not have hired the plaintiff had it known that she did not possess a degree.\textsuperscript{238} It then concluded in a most circular fashion that since Honeywell relied upon the misrepresentation, it was material.\textsuperscript{239} The court did not even discuss whether a college degree is material or necessary to the job of field relations manager, even though the plaintiff’s supervisor did not possess a college degree,\textsuperscript{240} and the defendant’s representatives focused on her experience rather than on her education during her interview.\textsuperscript{241}

Once again, the court failed to shift the burden to the defendant to prove that it would not have hired the plaintiff had it known of her misrepresentation. If the court had properly shifted the burden, it would have been impossible for it to conclude that the defendant had met its burden on summary judgment of proving that a reasonable factfinder could not find that the defendant would not have hired the plaintiff had it known that she did not possess a college degree.

\section{C. Undeserving Plaintiffs and Unclean Hands}

The notion underlying the courts’ use of after-acquired evidence as a complete defense is that an undeserving plaintiff has no right to use the court system to redress unlawful discrimination, no matter how

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\textsuperscript{236} \textit{Id.} at 414.
\textsuperscript{237} \textit{Id.}
\textsuperscript{238} \textit{Id.}
\textsuperscript{239} \textit{Id.} The court’s opinion is confusing and misguided. On its face, at least two prongs of the test it sets forth for summary judgment on the resume fraud issue are objective: the misrepresentation must be material and directly related to measuring the candidate for employment. The third prong, requiring proof that the employer relied on the misrepresentation, seems to be subjective. As it is applied by the court, however, the test is a subjective one which contains only one prong. The only question the court asked is whether the defendant relied on the misrepresentation. Once reliance is established, the court assumed that the misrepresentation was material and directly related to measuring the candidate for employment.
\textsuperscript{240} \textit{Id.}
\textsuperscript{241} \textit{Id.}
\end{flushleft}
egregious the employer’s discriminatory actions were. This notion is very similar to the clean hands doctrine. Only two courts known to this author have discussed the clean hands doctrine in Title VII cases, however, and neither of them applied the doctrine to bar a Title VII claim. The theory behind the clean hands doctrine is similar to the lack of injury and lack of standing justifications in after-acquired evidence cases. The clean hands doctrine is historically an equitable defense. It has been applied only recently and infrequently to bar damages actions. Its purpose is to protect judicial integrity, ensure a fair result, and to promote the public interest. It protects judicial integrity by denying to the undeserving the benefit of the judicial process. It assures a fair result by preventing a wrongdoer from “enjoying the fruits of his transgression.” Finally, it promotes the public interest by denying a remedy to a wrongdoer whose transgression causes injury to the public.

The courts have conservatively permitted the defense, focusing on the latter two interests — ensuring fairness to the parties and protecting the public interest. In order to interpose the defense, the defendant must prove either that the plaintiff’s misconduct injured the defendant or that the plaintiff’s misconduct is directly related to the activities the defendant seeks to enjoin. Showing merely that the plaintiff’s actions harmed the public interest is not sufficient. For example, in Shondel v. McDermott, one of the plaintiffs, McKechnie, alleged that his em-

243. See infra note 275 and accompanying text.
244. See supra Part III(A).
245. See supra note 112.
246. See William J. Lawrence, Note, The Application of the Clean Hands Doctrine in Damage Actions, 57 NOTRE DAME L. REV. 673 (1982) (arguing for the application of the doctrine at law as well as in equity). Professor Zechariah Chafee Jr. demonstrates that although “clean hands” is considered to be an equitable doctrine, the notions underlying the doctrine of a refusal to grant a remedy to a plaintiff who has done something wrongful also appears in many legal actions. Zechariah Chafee, Jr., Coming into Equity with Clean Hands, 47 MICH. L. REV. 877, 904-06 (1949).
248. See Lawrence, supra note 246, at 673.
249. See id. at 675.
251. See Lawrence, supra note 246, at 675.
252. See, e.g., Shondel v. McDermott, 775 F.2d 859 (7th Cir. 1985).
253. Id.
ployer fired him from his city job in violation of his First Amendment rights because he had openly supported and campaigned for the mayor’s opponent. Assuming that McKechnie was not a policy making employee, this allegation would state a cause of action under Elrod v. Burns.255 The district court, on its own initiative, denied McKechnie’s request for a preliminary injunction because he had violated an obscure provision of the Hatch Act,256 which forbids city employees whose agencies receive federal funds from openly using their authority or influence in order to affect the result of a political election.257 The Seventh Circuit reversed, holding that the defendant must prove a direct nexus between the object of the injunction and the plaintiff’s misconduct.258 The court concluded that if McKechnie had “threatened to fire workers under him who supported the challenger... unclean hands might bar McKechnie from getting an injunction against being fired for his political activities” because the plaintiff would be asking for protection against the same wrong that he had committed against subordinates.259

Likewise, in patent260 and copyright261 cases, although the defendant need not show that it suffered harm from the plaintiff’s behavior, the defendant must demonstrate that there is a nexus between the behavior that is the object of the defense and the public interest served by the patent and copyright laws. The courts will deny equitable relief to the owner of a copyright or patent bringing an infringement suit if the plaintiff has misused the limited privileges conferred on her by the copyright or patent in an attempt to extend her economic control in another area that is not covered by the copyright or patent.

Both the patent and the copyright laws encourage benefits to the

254. Id. at 861-62.
256. 5 U.S.C. §§ 1501-1508 (1988); Shandel, 775 F.2d at 862.
258. Shandel, 775 F.2d at 869.
259. Id. See also United States Jaycees v. Cedar Rapids Jaycees, 614 F. Supp. 515, aff’d 794 F.2d 379 (8th Cir. 1986) (plaintiff cannot obtain relief if it has dealt unjustly with defendant in the same transaction upon which the cause of action is based); Nowling v. Aero Services Int’l, Inc., 734 F. Supp. 733 (E.D. La. 1990) (clean hands doctrine requires nexus between alleged misconduct and the activity sought to be enjoined).
260. See Morton Salt Co. v. Suppiger Co., 314 U.S. 488 (1942) (upholding clean hands defense to patent infringement case because the plaintiff had used its patent of one device to monopolize a related market in violation of public policy).
261. See Lasercomb America Inc. v. Reynolds, 911 F.2d 970 (4th Cir. 1990) (recognizing copyright misuse as an equitable defense to charge of copyright infringement).
public by granting authors and inventors exclusive rights in their works.\footnote{Morton Salt, 314 U.S. at 493-94; Lasercomb, 911 F.2d at 974-75.} Rather than intending to stifle competition, the patent and copyright laws have the long term goals of enhancing and expanding "ideas, devices, approaches, competition, innovation, and economic growth."\footnote{Peter W. Hohenhaus, Misuse of Copyright as a Defense to Infringement Actions: Does a "Clean Hands" Doctrine Apply to Software?, 1991 WL 330762.} The courts have permitted defendants to interpose the unclean hands defense because plaintiffs have violated the public interest promoted by the statutes.\footnote{Id. 265.

265. If the employer had fired the plaintiff in a civil rights suit for discriminating against his subordinate in the workplace, the case would be more analogous to Shondel and the patent and copyright cases. In that situation, the plaintiff would have violated the very provisions and policies of the act that he resorts to for protection.

266. Certainly, judicial integrity would not suffer from enforcing the discrimination laws against an employer who intentionally discriminated against its employee because the employee's "wrong" was so minor and could have easily been detected by the employer had the employer investigated the employee's background. A slightly more difficult problem arises if, during discovery for the Title VII lawsuit, the employer discovers evidence of the employee's illegal conduct. Because the misconduct rises to the level of illegal conduct, the courts may have more of a stake in refusing to entertain the discrimination suit. One could argue that such a refusal would protect judicial integrity by closing the courthouse gates to discrimination plaintiffs who have acted illegally in the workplace and that the public would be served by stemming the tide of this sort of illegal conduct. Even where the conduct is illegal, however, the balance should weigh in favor of denying the application of the clean hands doctrine. The antitrust suits are a good model. Even where the plaintiff in an antitrust suit has illegally restricted competition, the courts do not permit the clean hands defense. If the plaintiff has violated the antitrust laws,
Furthermore, the plaintiffs in civil rights suits play an important role in enforcement of the Act. This role, even in cases where a nexus is established should forbid the use of the clean hands doctrine. For example, in antitrust suits the courts have not permitted the clean hands defense because there is a strong public policy underlying the antitrust laws and the public interest must be "protected by their vigorous enforcement through private suits."\(^{267}\) This is true even where the plaintiff has engaged in illegal anticompetitive behavior.\(^{268}\) Although admittedly there is a nexus between the anticompetitive behavior that is the object of the clean hands defense and the public interest protected by the antitrust laws, the courts have focused on the role the plaintiffs play in antitrust enforcement. This role is strikingly similar to the role played by plaintiffs bringing civil rights suits.\(^{269}\) Like plaintiffs in antitrust cases, plaintiffs who bring suits under the civil rights statutes are private "attorneys general" who serve the public interest by promoting the policies of the Civil Rights Acts.\(^{270}\) It would harm the public interest to permit an employer to deny a remedy to an employee who has suffered from unlawful discrimination.

Because the doctrine is an equitable one, the courts have discretion to refuse to apply it.\(^{271}\) The Supreme Court has stressed that courts should not rigidly enforce the doctrine where "to do so would frustrate a substantial public interest."\(^{272}\) In deciding whether to permit the clean hands defense, the courts must keep in mind that they should use their equitable powers to "effectuate the policy goals underlying legislation."\(^{273}\) Courts should refuse to exercise their equitable powers if such exercise would be "contrary to the public interest."\(^{274}\)

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269. See Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401 (1968) ("When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.");
270. Id. at 401-02; Red Bull Assocs. v. Best Western Int'l, 862 F.2d 963, 966 (2d Cir. 1988); Burns v. Thiolol Chem. Corp., 483 F.2d 300, 302 (9th Cir. 1973).
272. Id.
273. Id.
274. Id. at 754 (quoting Morton Salt Co. v. Suppiger Co., 314 U.S. 488, 492 (1942)).
At least one federal court of appeals used this standard to refuse to apply the clean hands doctrine in a Title VII case.275 In EEOC v. Recruit U.S.A.,276 the Ninth Circuit upheld a lower court’s grant of an injunction ordering the defendant not to destroy certain documents that were vital to the agency’s proof that the defendant intentionally and unlawfully discriminated against non-Japanese nationals by refusing to employ them.277 The defendant argued that the lower court improperly granted the injunction because the EEOC violated the statute by publishing information about its charges against Recruit to the public.278 The court held that even if the EEOC had violated the statute, the lower court properly refused to exercise its equitable powers to dismiss the case under the clean hands doctrine.279 In so holding, the court emphasized the compelling governmental interest in ferreting out invidious discrimination.280 It noted that if the court were to apply the clean hands doctrine, it would frustrate congressional purpose and the public interest.281 It stated: "[A] contrary decision holding that the public interest can never override the clean hands doctrine would permit employers to continue unlawful discrimination and leave their victims uncompensated solely because of governmental misconduct unrelated to the validity or substantiality of the discrimination charges."282

Because there is no public interest in applying the clean hands doctrine in after-acquired evidence cases, the courts should refuse to exercise their equitable powers in this way. In fact, a refusal to apply the clean hands doctrine would actually promote the public interest in eliminating invidious discrimination in the workplace and would further the congressional purpose of creating equal economic opportunity for all persons.

275. Id. Additionally, in Calloway v. Partners Nat’l Health Plans, 986 F.2d 446 (11th Cir. 1993), the court declined to decide whether the “clean hands” doctrine is a defense to Title VII actions because the defendant had not satisfied the requirements necessary to assert the defense. Id. at 451 n.4. According to the court in Calloway, in order to make out the defense, the defendant would have to show that the plaintiff’s wrongdoing is “directly related to the claim against which it is asserted” and that the defendant was personally injured by the plaintiff’s wrongdoing. Id. at 451.
276. 939 F.2d 746 (9th Cir. 1991).
277. Id. at 748.
278. Id. at 753.
279. Id. at 754.
280. Id. at 753.
281. Id. at 754.
282. Id.
IV. THE CIVIL RIGHTS ACT OF 1991: AFTER-ACQUIRED EVIDENCE AS A STATUTORY DEFENSE

The Civil Rights Act of 1991 was passed "[t]o amend the Civil Rights Act of 1964, to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes."\(^{283}\) With this policy statement and after an intense two-year struggle, the Civil Rights Act of 1991 became law on November 21, 1991.\(^{284}\) Congress enacted the Civil Rights Act of 1991 in reaction to a series of Supreme Court decisions decided in the summer of 1989 that cut back significantly on the civil rights of victims of illegal employment discrimination.\(^{285}\) One of the stated purposes of the Act was "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."\(^{286}\)

*Price Waterhouse* was one of the cases that Congress amended through its legislative action. Although *Price Waterhouse* was more favorable to plaintiffs than the other decisions of the summer of 1989, the Congress sought to amend it particularly to establish a violation of the discrimination laws upon plaintiff's proof. Thus, the new legislation, unlike the Court's decision in *Price Waterhouse*, does not permit a defendant to escape liability once a plaintiff 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."\(^{287}\)

Although the Act permits a plaintiff to establish an unlawful employment practice by proving that her membership in a protected class was a "motivating factor" in the practice, it also allows a defendant to limit the remedies against it.\(^{288}\) Where the plaintiff proves an unlawful


\(^{285}\) See McGinley, supra note 34, at 203-05.


employment practice, and the defendant demonstrates "that the respondent would have taken the same action in the absence of the impermissible motivating factor," the court can limit the plaintiff's remedies to the portion of attorney's fees and costs directly attributable to the chain of impermissible employment practices, as well as declaratory and injunctive relief.\(^{289}\) Under these circumstances, the defendant is not subject to back pay or injunctive relief that would require any admission, reinstatement, hiring or promotion,\(^{290}\) nor is the defendant subject to compensatory or punitive damages.\(^{291}\) If the defendant cannot prove that it would have reached the same employment decision absent discrimination, it is subject to the full panoply of Title VII relief: compensatory and punitive damages, and equitable relief including reinstatement, hiring, promotion, and back pay.\(^{292}\)

The legislative history of the Act clearly shows that Congress never contemplated that the "mixed motives" provisions could be used to bar a valid discrimination claim upon the discovery of after-acquired evidence. Indeed, the legislative debate over this provision of the Act centered around a few core concepts: whether *Price Waterhouse* should be overruled to hold the employer liable upon a showing of discriminatory motive;\(^{293}\) if so, what showing should the plaintiff make to subject the employer to liability;\(^{294}\) and, assuming that the plaintiff succeeds, to what remedies should the plaintiff be entitled if the employer proves it would have taken the same action absent discrimination.\(^{295}\)

\(^{291}\) *Id.*
\(^{295}\) *See* 136 CONG. REC. S9757 (daily ed. July 16, 1990) (Senator Gorton's statement con-
Those favoring a liberal expansion of *Price Waterhouse* sought initially to make two key changes to the Act. First, they argued that the result in *Price Waterhouse* benefitted employers who engaged in intentional discrimination by permitting the employer to escape liability by proving that it would have made the same decision absent discrimination.296 This group argued that *Price Waterhouse* was a departure from the established law at the time and that *Price Waterhouse* severely undercut the dual purpose of the anti-discrimination laws — compensating victims and deterring employers from engaging in discriminatory conduct.297 Permitting employers who have intentionally engaged in unlawful discrimination to escape liability on a theory that the plaintiff has not been injured because she would have been fired anyway undermines the purpose of deterring unlawful discriminatory practices.298 Thus, the “same decision” analysis should not act as an affirmative defense to liability, but should be permitted to limit the plaintiff’s remedies only.299 Advocates of this position proposed that while back pay and reinstatement could not be awarded if the employer met its burden, attorney's fees and both declaratory and injunctive relief (other than reinstatement) could be awarded.300 For example, a court could order


296. See Lichtman Statement, supra note 293, at 223.
297. Id.
298. Id. at 224.
299. Id. at 228.
300. Id. at 221. Although proponents did not advocate the imposition of compensatory and punitive damages on the defendant if it proves that it would have engaged in the same practice absent discrimination, initially there was another section of the bill that would likely have granted punitive and compensatory damages to the plaintiff upon a showing of a violation. This section was passed as part of the Act but specifically does not apply to plaintiffs who would have been discharged anyway. See Civil Rights Act of 1991, Pub. L. No. 102-165 § 102, 105 Stat. 1072 (1991) (amending § 1977 of the Civil Rights Act of 1964, 42 U.S.C. § 1981 (1988)). In response to the concerns of persons opposed to damages, the bill was amended to give plaintiffs compensatory and punitive damages that were directly attributable to the injury the plaintiff suffered as a result of the discrimination. See Metzenbaum Amendment, 136 Cong. Rec. S9788 (daily ed. July 16, 1990).
changes in the decision-making process or in the grievance procedures. According to proponents, this formulation would achieve the proper balance between the two goals of the statute: it would "force the employer to disregard characteristics such as race, gender, national origin, and religion while simultaneously vindicating the victim of proven discrimination."^{301}

In response, opponents argued that *Price Waterhouse* needed no amending because it was a liberal decision favorable to civil rights. Citing to *Mount Healthy*,^{302} *Wright Line*^{303} and *Transportation Management*,^{304} they argued that *Price Waterhouse* was "swimming in the mainstream."^{305} Like the employers in *Mount Healthy*, *Wright Line* and *Transportation Management*, the employer in *Price Waterhouse* can escape all liability by showing that it would have made the same decision absent the unlawful motive. Opponents condemned the bill, arguing that by holding the employer liable upon a finding that race, color, religion, sex or national origin was "a motivating factor" for the adverse employment decision, the proposed legislation would, in effect, punish employers for "bad thoughts."^{306} It would subject the employer to liability upon a showing that he harbored discriminatory thoughts or attitudes that did not necessarily proximately cause the adverse employment decision.^{307} Opponents objected particularly to the availability of attorney's fees, punitive and compensatory damages upon a finding of a violation.^{308}

Both sides proposed numerous amendments: one deleting the section altogether;^{309} one requiring that the plaintiff prove that discrimination was "a major contributing factor" in reaching the adverse employment decision.

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301. *See* Lichtman Statement, *supra* note 293, at 221.
308. *Id.* at 931. In response, the proponents pointed out that the proposed bill did not punish employers for "bad thoughts" because the bill required an employee to demonstrate that there is a nexus between the discrimination and the employer's action. H.R. REP. No. 40(t), 102d Cong., 1st Sess., pt. 1, at 48 (1991); *reprinted in* 1991 U.S.C.C.A.N. 549, 586.
decision;\textsuperscript{310} and another requiring proof that discrimination was “a contributing factor\textsuperscript{311} in the adverse employment decision. In the end, Congress passed a bill making the employer liable upon a showing that discrimination is “a motivating factor” in the employment decision.\textsuperscript{312} A compromise was reached on the available remedies. Although the employer is liable for attorney’s fees, declaratory and injunctive relief (other than back pay and reinstatement), it is not liable for compensatory and punitive damages if it can show that it would have made the same employment decision absent discrimination.\textsuperscript{313}

There was virtually no disagreement concerning the employer’s proof. All sides seemed to agree that once the plaintiff proves unlawful discrimination, the burden shifts to the employer to prove by a preponderance of the evidence that it “\textit{would have} taken the same action in the absence of [the impermissible motivating factor].”\textsuperscript{314} There is no discussion in the legislative history that would suggest that this section should be interpreted to mean that the employer can meet its burden by demonstrating that it \textit{could} have taken the action or that it \textit{would have been justified} in taking the action. Rather, both sides, Republicans and Democrats alike, assumed that the lawful reason for taking the action must have been present, known to the employer at the time it made its decision, and an actual motivator for its decision.\textsuperscript{315} This interpretation is consistent with the language of section 703(m) which states in part: “[A]n 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, \textit{even though other factors also motiated the practice}.”\textsuperscript{316} This language, especially in the absence of legislative history to the contrary, demonstrates unequivocally that Congress did not intend that the other factors “could have” motivated the practice or “justified” the practice.

In passing this section of the Act, Congress’s clear intent was to deal with situations in which mixed motives existed at the time the employer made the decision. It neither contemplated nor condoned using

\begin{flushleft}
\textsuperscript{310} Id.
\textsuperscript{311} Id. at 9788.
\textsuperscript{315} Id.
\end{flushleft}
the carefully crafted mixed motives standard in cases in which the employer did not even know about the reason justifying the employee's discharge at the time the employer dismissed the employee. Nowhere in the legislative history is there even so much as a passing mention of *Summers* or of any of the other cases that held that defendants could use after-acquired evidence to bar a valid discrimination claim. Thus, the letter of the law and the legislative history establish that 42 U.S.C. § 2000e-2(m), the mixed motives section of the Civil Rights Act, should not be interpreted to permit a defense based on after-acquired evidence. Given Congress' clear intent, any court applying this section to the after-acquired evidence cases would be acting outside of the constitutional boundaries established by the separation of powers doctrine.\(^{317}\)

317. Moreover, given the Congressional purpose in passing the Civil Rights Act in general, and the mixed motives sections of the Act in particular, courts should tread gingerly before establishing a new common law defense to a valid Title VII claim. According to Congress, "America is a better country because we as a people have moved forward toward the goal of eradicating discrimination. Nowhere is this more important than in the workplace." H.R. REP. NO. 40, 102d Cong., pt. 1, at 15 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 553. The mixed motives section of the bill is a good example of Congress's mindset with respect to the entire Act. Congress refused to let *Price Waterhouse* stand as good law because it seriously undermined Title VII's effectiveness in eliminating discrimination from the workplace. Instead, it altered the mixed motives approach set forth in *Price Waterhouse* in order to restore the effectiveness of Title VII in dealing with mixed motives cases. See JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. CONF. REP. NO. 856, 101st Cong., 2d Sess. 15 (1990); H.R. REP. NO. 40, 102d Cong., pt. 2, at 17-18 (1991). A House of Representatives Committee on Education and Labor Report explained its recommendation that the House adopt the proposed changes in the law, citing to statements by Jane Lang, a former General Counsel of the Department of Housing and Urban Development, and Judith Lichtman, the President of the Women's Legal Defense Fund:

To appreciate the potential damage caused by *Price Waterhouse*, it is important to remember the dual purpose of private enforcement of Title VII. On the one hand, the object is to make whole the individual victims of unlawful discrimination . . . . But this is only part of it. The individual Title VII litigant acts as a "private attorney general" to vindicate the precious rights secured by that statute. It is in the interest of American society as a whole to assure that equality of opportunity in the workplace is not polluted by unlawful discrimination. Even the smallest victory advances that interest.


[Under *Price Waterhouse*, Title VII's statutory objectives will be undermined as employers' discriminatory conduct escapes liability and victims of discrimination receive no redress. Unless clarified to be consistent with the legislative purposes of Title VII this decision will result in proven yet unremedied instances of gender, racial, color, religious, and national origin prejudice—prejudice, in effect, excused and condoned by the courts.

Id. (quoting Statement of Judith L. Lichtman).

A conference report accompanying the bill from the House of Representatives stated its reasons for supporting the bill:
Furthermore, from this section of the Act, one can infer that courts should never use after-acquired evidence as a total defense or as a basis for refusing to grant an injunction, declaratory relief, attorney's fees and costs. Under the Act, an employer proving that it was actually motivated by a legitimate reason for firing the employee and that the legitimate motivation would have caused the firing in the absence of the discriminatory motive is subject to injunctive and declaratory relief, attorneys fees and costs. It would make little sense to conclude, therefore, that a guilty employer that had not been motivated at all by the after-acquired evidence when it made its decision should avoid injunctive, declaratory relief, fees, and costs. Thus, the Civil Rights Act in the very least establishes a floor below which courts should not go in considering after-acquired evidence. It is not clear under the Act, however, whether back pay, reinstatement, front pay, or damages should be limited by after-acquired evidence.

V. RECLAIMING REALITY: RESOLVING THE DILEMMA

A. Reality Revisited: Limiting Remedies, Not Liability.

In Wallace v. Dunn, the Eleventh Circuit concluded that after-acquired evidence of resume fraud should not bar a plaintiff's right to prevail in a Title VII lawsuit, although it may limit the plaintiff's remedies. In Wallace, the plaintiff alleged that her former employer vio-

The Court's holding in Price Waterhouse severely undermines protections against intentional employment discrimination by allowing such discrimination to escape sanction completely under Title VII. Under this holding, even if a court finds that a Title VII defendant has clearly engaged in intentional discrimination, the court is powerless to end the abuse if the particular plaintiff who brought the case would have suffered the disputed employment action for some alternative, legitimate reason.

The impact of this decision is particularly profound because the factual situation at issue in Price Waterhouse is a common one. As the Justice Department observed, "virtually every Title VII disparate treatment case will to some degree entail multiple motives."

If Title VII's ban on discrimination in employment is to be meaningful, proven victims of intentional discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions.


Congress's purpose in amending the Civil Rights Act to restore the law to its strength before the Supreme Court issued its 1989 decisions, implies strongly that permitting a defendant to use after-acquired evidence as a complete bar to a plaintiff's discrimination suit even in the presence of proven discrimination would totally contravene congressional intent in passing the 1991 Civil Rights Act and its interpretation of the Congress's intent in initially passing the Civil Rights Act of 1964.

318. 968 F.2d 1174 (11th Cir. 1992). The E.E.O.C.'s position is that the after-acquired evi-
lated the Equal Pay Act and Title VII, among other federal statutory provisions. During discovery, the defendant learned that the plaintiff had pled guilty to cocaine and marijuana possession before applying to work for the defendant and had lied about it on her application. Dunn filed a motion for summary judgment arguing that the misrepresentation on the plaintiff's application and her guilty plea were legitimate reasons for her termination. The lower court denied the motion as a matter of law.

On appeal, the Eleventh Circuit criticized Summers for distorting Mount Healthy. The Eleventh Circuit noted that in Mount Healthy, the employer had to prove that it would have made the same employment decision based on the presence of a legitimate cause at the time the employer made the decision. Summers, on the other hand, permitted the employer to avoid liability based on what the employer hypothetically would have done if it had had certain knowledge at the time of the adverse employment decision. This result violated one of the key tenets of Mount Healthy: not to put the employee in a worse position as a result of her exercise of her rights. The Summers court clearly put Summers in a worse position than he would have been in, had he not been a member of the protected class, a result which is contrary to the reasoning in Mount Healthy.

The Wallace court also concluded that the use of after-acquired evidence to defeat a Title VII suit contravened the policies of the Act. The court noted that two principal purposes of Title VII are to "achieve equality of employment opportunity" and to eliminate discrimination. The Summers approach, according to Wallace, did not encour-

cence should be permitted to limit back pay and compensatory damages (in cases decided under the 1991 Act) to the date of discovery. See E.E.O.C. POLICY GUIDE, 405:6915, 6926 (July 7, 1992). As this Article demonstrates, this scheme does not adequately compensate victims for their injuries while it encourages the employers to discriminate.

319. 968 F.2d at 1174, 1176.
320. Id. at 1176-77.
321. Id.
322. Id.
323. Id. at 1179.
324. Id.
325. Id.
326. Id.
327. Id. at 1179-80.
328. Id. at 1180-81.
329. Id. at 1180 (citation omitted).
330. Id.
age employers to eliminate discrimination in the workplace. Rather, it encouraged employers engaged in litigation to rummage through an employee’s background for a legitimate reason for firing him. It also created an incentive to “sandbag.” That is, to hire a member of the protected class knowing of a legitimate reason not to hire her and to discriminate against her on the job, knowing that if she ever sues it will have a complete defense to the lawsuit.

1. Remedies — Back Pay

Although the court in Wallace was convinced that Summers improperly precluded the defendant’s liability, the court agreed that the discovery of after-acquired evidence could affect the employee’s remedies under both the Equal Pay Act and Title VII. The court decided that a guilty employer can limit the employee’s back pay only if the employer proves by a preponderance of the evidence that it would have discovered the after-acquired evidence before the end of the back pay period, in the absence of the allegedly unlawful acts and ensuing litigation. If the employer meets that burden of proof, the employee’s back pay is cut off on the date when the employer would have discovered the evidence of misconduct or resume fraud.

2. Reinstatement and/or Front Pay, Injunctive Relief

Assuming that the after-acquired evidence would have led to the plaintiff’s discharge, the court in Wallace wrongly opined that an order of reinstatement or front pay would give the plaintiff a windfall and unnecessarily trammel on the defendant’s right to discharge employees as it pleased. Furthermore, the Eleventh Circuit decided if a court does not order reinstatement, the employee does not have a right to an injunction.

331. Id.
332. Id.
333. Id.
334. Id. at 1183. The court would not permit the after-acquired evidence to affect the availability of declaratory relief or of nominal damages for the plaintiff’s hostile-environment sexual harassment claim. Id. at 1182.
335. Id. at 1182.
336. Id.
337. Id.
338. Id.
3. Attorney's Fees

The Wallace court would also grant attorney's fees and costs depending on the employee's remedies and whether he is a "prevailing party" in the litigation.\textsuperscript{339} Because the decisions whether to grant fees at all and the amount of fees depend on the relief the employee wins, the court's mistakes in deciding whether an employee is entitled to an injunction, reinstatement and front pay may affect the employee's right to fees or the amount of fees collected.

Although the Wallace court made a valiant effort to reach a fair means of deciding after-acquired evidence cases, it failed in one respect: it inconsistently imported the Mount Healthy notion of injury to assess which remedies the court should grant a victim of discrimination.

4. Mount Healthy Notions of Injury

The Wallace court properly refused to limit the employee's back pay automatically to the date of the employer's discovery of the employee's misconduct, because such a limit would place a burden on the plaintiff's rights to seek redress in the courts for unlawful discrimination. Instead, the court required the defendant to prove that it would have found the information independent of the lawsuit, and that it would have fired the employee upon discovering it. Once the plaintiff meets this burden, the court limits back pay to the date the employer would have discovered the information. This decision protects the employee from the injury that Summers failed to recognize.

However, in linking injunctive relief to reinstatement, the court erred. If an employer is guilty of unlawful discrimination, even if the court ultimately decides not to reinstate the victim of discrimination, the plaintiff should be entitled to injunctive relief.\textsuperscript{340}

Moreover, if a guilty employer would not have discovered the victim's misrepresentation but for the litigation, denying the employee reinstatement and/or front pay penalizes the victim by curtailing his right under the Civil Rights Acts to be made whole for the unlawful discrimination.\textsuperscript{341}

\textsuperscript{339} Id. at 1182-83. For a complete discussion of the availability of attorney's fees when suing under Title VII, see supra note 134.

\textsuperscript{340} See E.E.O.C. POLICY GUIDE, 405:6915, 6927 (July 7, 1992) (stating that even in actions not brought under the 1991 Act, the E.E.O.C. will seek injunctive and declaratory relief "to prevent [the respondent] from discriminating in a similar fashion in the future.").

\textsuperscript{341} Because the availability of injunctive relief may depend on an order of reinstatement, Wallace, 968 F.2d at 1182, the refusal to reinstate may affect whether an employee can get an injunction. (This apparently is not true under the mixed motives section of the Civil Rights Act
The Wallace court had the right idea but it failed in its execution. In order to limit back pay, it was proper to place on the employer the burden of proving it would have discovered the information independently and that the discovery would have resulted in the employee's firing. Theoretically, the employer should meet the same burden before avoiding reinstatement and front pay. There are times, however, when the employer cannot meet this heavy burden, yet a court in its discretion should properly refuse to reinstate an employee.

B. Proposal: Dealing with After-Acquired Evidence

As this Article has already argued, neither misrepresentations on a job application nor on-the-job misconduct should create a complete defense to a Title VII action. During the liability phase of the trial, after-acquired evidence should not be admissible for any reason. In determining the employee's remedy for discrimination, the after-acquired evidence is relevant for only two purposes: first, if the employer can prove by a preponderance of the evidence that it would have discovered the misrepresentation absent the litigation, the court should cut off the back pay at the date of presumed discovery and should deny reinstatement and/or front pay.

Second, even assuming that the defendant cannot meet this heavy burden, the court should consider the after-acquired evidence in determining whether to reinstate the employee. Under these circumstances, the court should refuse to reinstate if the employer proves by a preponderance of the evidence that it would suffer serious harm if the employee is reinstated. The purpose for permitting an employer to avoid reinstatement is purely practical. Still, under these conditions, because the employer learned of the misconduct from the litigation and would not have learned of it otherwise, the employee would not be made whole by a refusal to reinstate. In this situation, the court, in its discre-
tion, should seriously consider granting front pay to the employee as a surrogate for reinstatement.

The liability phase of the trial would proceed as any other. Either the plaintiff will allege a single motive case, following the *McDonnell Douglas* framework, or the case will involve mixed motives to be decided under *Price Waterhouse* if the 1991 Civil Rights Act is not applicable, or under 42 U.S.C. § 2000e-2(m) if the 1991 Act applies.

1. Single Motive Cases

If the plaintiff has a single motive case which she intends to prove by circumstantial evidence, the court should apply the *McDonnell Douglas* framework. The court should not admit after-acquired evidence of resume fraud at this stage, nor should the court permit the employer to use it to contest whether the plaintiff is qualified in order to make out a prima facie case. Additionally, the court should not permit the employer to use a resume fraud defense as a "legitimate, non-discriminatory reason" for its actions.

Assuming that the plaintiff establishes liability, in a suit brought under the 1991 Act, the jury will then consider damages, compensatory and punitive, to award to the plaintiff. The after-acquired evidence should not be admitted at this phase either.

The judge should then determine the equitable remedies of back pay, front pay, reinstatement, injunctive, and declaratory relief. She should also determine attorney's fees and costs. The judge should consider the after-acquired evidence only if the employee seeks back pay and/or reinstatement and only for the purposes of determining whether to limit back pay or to order the defendant to reinstate the plaintiff. The judge should hear evidence on this issue to determine first whether the employer would have discovered the evidence independently, and, if

343. There is a question to be resolved this term by the Supreme Court of whether the Act is retroactive; that is, whether it protects employees against conduct that took place before November 21, 1991, the enactment date of the Act. See, e.g., Hicks v. Brown Group, Inc., 982 F.2d 295 (8th Cir. 1992), cert. granted 112 S. Ct. 1255 (1993) (holding that the Act does not apply retroactively to cases pending at time of its enactment); see also Landgraf v. USI Film Products, U.S. Sup. Ct., No. 92-757 (Oct. 13, 1993) (dealing with the retroactive application of the 1991 Civil Rights Act); Rivers v. Roadway Express Inc., U.S. Sup. Ct., No. 92-938 (Oct. 13, 1993) (same).

344. As a practical matter, it would make little sense for an employer to use after-acquired evidence as a "legitimate non-discriminatory reason" for its actions since by admitting that the evidence was acquired during discovery, the employer defeats the argument that it was this information that caused it to fire the employee. Therefore, the employer would actually be proving that its own reason was pretextual.
not, whether reinstating the employee would be deleterious to the functioning of the workplace, over and above the difficulties presented by reinstatement of an employee who has just sued his employer.

The employer should bear the burden of proving by a preponderance of the evidence that it would have discovered the evidence absent the litigation. This is a very difficult fact to prove, and the judge should require objective evidence of the employer’s practices that demonstrate that the employer would have otherwise found the after-acquired evidence and would have fired the employee upon its discovery. Assuming the employer cannot prove that it would have discovered the after-acquired evidence absent the litigation, the employer has the burden of proving by a preponderance of the evidence that the employee’s reinstatement would seriously harm the employer’s interests. The employer can meet this burden only by showing that the employee’s misconduct or resume fraud would materially affect the employee’s ability to do her job or the ability of another employee to do his job. This proof would require specific evidence that the misconduct or subject of the misrepresentation in question itself would cause harm. If the court determines that the employer proved that reinstatement would seriously harm the employer’s business, it should seriously consider granting the employee front pay to compensate for the failure to reinstate. This approach would serve the court’s proper goal to grant the broadest relief possible.

For an example of how this formula will work, return to the story of Jane Pianin’s sexual harassment described in the introduction to this Article. Because Jane can offer direct evidence of intentional illegal discrimination, she will easily make out a prima facie case without resorting to McDonnell Douglas. The defendant will respond by denying Jane’s allegations. This becomes a credibility question which the factfinder must resolve. At this point, the defendant should not be permitted to submit evidence of Jane’s misrepresentation on her job application. Nor should the defendant be permitted to use it to attack Jane’s credibility on the issue of whether Sam sexually harassed her. Instead, the jury should listen to the evidence and conclude who is telling the truth, Jane or Sam. Assuming that the jury believes Jane, it will find the defendant liable and consider the amount of compensatory and

345. See, e.g., Smallwood v. United Air Lines, 728 F.2d 614 (4th Cir. 1984) (allowing admission of facts which would have developed in a reasonable processing of the plaintiff’s application).

346. See supra part I.
punitive damages to award to her.

Next, the judge will consider her right to receive her bonus, injunctive and declaratory relief, attorney's fees and costs. In deciding whether to grant injunctive and declaratory relief, the judge should not take into account the after-acquired evidence of Jane's misrepresentation. Because Jane was not discharged and she is not asking for reinstatement or promotion, the judge should not consider the after-acquired evidence of resume fraud unless the employer can prove by objective evidence of the company's policies and practices that it would have discovered evidence of Jane's misrepresentation absent the litigation and that it would have fired Jane because of it, limiting her bonus to the date of the presumed discovery.

Changing the hypothetical slightly, assume that Sam does not sexually harass Jane but that he discriminates against her because he does not like female sales personnel. He treats her differently from the men by paying her a lower base salary, giving her worse territories, and assigning her less interesting products to sell. Finally, he discharges her allegedly because she was late for work although he has never discharged any of the men for the same offense. After Sam fires Jane, he hires a white male, Dan, to take her place. Jane sues, demanding reinstatement, front pay, back pay, damages, injunctive and declaratory relief, attorney's fees, and costs.

Jane has no direct evidence, so she makes out a prima facie case of sex discrimination by using the *McDonnell Douglas* framework. The defendant articulates a legitimate non-discriminatory reason for the discharge, stating that Jane was late three times in a two-month period. Jane can prove that this articulation is a pretext by demonstrating that Sam did not fire the male employees who arrived late at work and by producing other evidence of unequal treatment. The jury can infer discrimination from the prima facie case and from its finding that defendant's reason for firing Jane is pretextual.\(^\text{347}\) The after-acquired evidence of Jane's resume fraud is not admissible at this stage.

Assuming that the jury finds the defendant liable, it will then consider whether Jane is entitled to compensatory and punitive damages. The after-acquired evidence is not relevant to this determination either. Once the jury determines the damages, the judge will consider whether to grant back pay, reinstatement, front pay, other injunctive relief, declaratory relief, attorney's fees and costs. The judge should consider the

after-acquired evidence to limit her back pay if the employer can meet its burden of proving that it would have discovered the evidence absent the litigation. Failing this proof, the judge should consider the after-acquired evidence of Jane's misrepresentation only for the purpose of deciding whether it should order the defendant to reinstate Jane. In order to avoid Jane's reinstatement, the employer will attempt to prove that Jane's lack of a four year college degree seriously harms the defendant's business. Given that Jane has been a very satisfactory employee, the defendant probably will not meet this burden.

If, on the other hand, the defendant finds out during discovery that Jane had been stealing money from the company or encouraging potential customers to buy products from her own fledgling business instead of from her employer, the defendant should be able to prove that Jane's reinstatement would seriously harm the employer's business. Under these circumstances the court may exercise its discretion to deny Jane's bid for reinstatement. The justification for the failure to reinstate is not that Jane should suffer because she has harmed her employer. Nor is it that reinstatement would create a windfall for the employer. Instead, the justification is purely practical. There are times when reinstatement would seriously harm the employer's business and the courts should decline to reinstate. If Jane is not reinstated, however, she still suffers an injury. Although she is a member of the protected class who suffered illegal discrimination, she cannot totally vindicate her rights. Therefore, in the event that the court decides that it should not reinstate Jane, it should seriously consider granting her front pay to compensate for the failure to reinstate her.

2. Mixed Motives Cases

If the court determines that the case involves mixed motives, the plaintiff, like any other plaintiff in a mixed motives case, should prove that discrimination was a motivating factor in the employment decision. If the case is brought under the 1991 Act, liability will attach if the

348. This would also be the case in the situation of an employee who misrepresents his credentials in an area that is regulated by statute. For example, a lawyer who misrepresents on his application for a job as a litigator that he passed the bar exam should not be reinstated. That the lawyer has no license to practice law will seriously harm his ability to do his job, and therefore will seriously harm the employer's business. The same is true for a "doctor" who works at a hospital but who hasn't completed her medical degree.

349. See supra discussion in Part III(A).

350. It is possible that if Jane gets compensatory damages, front pay would be duplicative. In that event, the court should decline to grant front pay.
plaintiff meets this burden. The burden will shift to the employer to prove that it would have made the same decision absent discrimination. In sustaining its burden, the employer must show that the legitimate reason for the firing was present at the time of the firing, and actually motivated the employer, in part, at the time of the firing. After-acquired evidence of resume fraud should not be admissible at this stage.

If the employer fails to meet its burden, the jury should consider compensatory and punitive damages. As in the single motive cases, the judge will decide the equitable remedies of back pay, front pay, injunctive and declaratory relief. She will also consider attorney's fees and costs. Once again, the judge should take after-acquired evidence of resume fraud into consideration only for the purpose of limiting the back pay (where the employer can prove it would have discovered the evidence absent the litigation) and for the purpose of determining whether to order the defendant to reinstate the plaintiff (where the plaintiff seeks reinstatement). The same test as that set forth in the single motive cases would apply.

If the employer in the mixed motives case meets its burden, the plaintiff cannot collect damages and cannot get back pay or reinstatement. The judge would consider whether to grant injunctive relief (other than reinstatement) or declaratory relief, attorney's fees and costs. Given that reinstatement and back pay are not available remedies under this scenario, the judge should not consider after-acquired evidence of resume fraud for any purpose.

The proposed methodology is workable and consistent with the dual purposes of the civil rights laws. Congress bestowed on courts discretion to award remedies to civil rights violations "as part of a complex legislative design directed at a historic evil of national proportions." In judging whether the lower courts have properly exercised their discretion, courts of appeal must consider the civil rights law's objectives. The primary purpose is to achieve equal opportunity and to

351. If the Act is not applicable, under Price Waterhouse, liability does not attach unless the defendant fails to meet its burden on its affirmative defense. See supra Part I.
352. See supra Part IV.
353. See supra Part IV.
357. See id. at 417.
remove barriers to equal employment. Injunctive or declaratory relief alone may not achieve this purpose. It is the employer's fear of a monetary award—in the form of back pay, front pay, or damages—that encourages the self-examination and self-evaluation of the employer's practices necessary to eliminate discrimination in the workplace. The secondary objective of the civil rights laws is to make discrimination victims whole for their injuries. Congress granted lower courts discretion in order to "make possible the 'fashion[ing] [of] the most complete relief possible." If the employer would not have discovered the misrepresentation absent the litigation, a limitation on the employee's back pay and a refusal to reinstate would harm the employee.

This proposal argues for the broadest remedy possible to foster the employer's self-evaluation and to make the discrimination victim whole. By permitting an employer to limit back pay only by a showing of objective evidence that it would have discovered the employee's misconduct and would have fired the employee once the evidence was discovered, this proposal fosters the deterrent effect of the statute and compensates for the plaintiff's injuries while avoiding a windfall to the plaintiff. A rule permitting after-acquired evidence as a complete defense, or even one encouraging the courts as a matter of course to limit back pay or damages would harm the public interest by focusing on the employee's wrongdoing rather than on the employer's illegal discrimination. It would discourage employers from analyzing how to eradicate discrimination from their firms. Instead, it would encourage employers selectively to investigate their minority and female workers in order to learn of any wrongdoing that it could use to avoid paying back wages or damages.

Because the employer's right to limit back pay is narrowly circumscribed, and the employer will know without discovery whether it has in force in its workplace regular, non-discriminatory methods of discovering misconduct and resume misrepresentations, the proposal discourages, in most cases, the additional burden and costs presented by additional discovery. Moreover, because after-acquired evidence of resume fraud and misconduct is not a defense to liability and the test for avoiding reinstatement is a rigid one, employers will recognize that it does not

358. Id.
359. Id. at 417-18.
360. Id. at 418.
361. Id. at 421 (quoting 118 Cong. Rec. 7168 (1972)).
pay to spend excessive resources attempting to discover resume fraud or misconduct after the plaintiff sues for unlawful discrimination.

VI. CONCLUSION

Resume fraud is rampant. An executive recruiter estimates that over ninety-five percent of all Americans overstate their compensation when applying for a job change. A recent article in Fortune magazine reported that more than two-thirds of all job applicants lie on their resumes. The National Credit Verification Service reports that twenty-five percent of the MBA degrees it investigates on resumes are fake. Law schools regularly find that students misrepresent credentials on their resumes. That so many people exaggerate or misrepresent their credentials on their resumes does not excuse their lack of integrity. It does, however, raise serious questions about how to deal with evidence of resume fraud where the plaintiff has a legitimate discrimination suit against her employer. Title VII is not the proper instrument for dealing with either misrepresentations on an employee’s job application or on-the-job misconduct. Permitting an employer to use after-acquired evidence of misrepresentations as a defense to a Title VII lawsuit penalizes the victim’s right to achieve equal status and treatment in the workplace. It places an undue burden on members of the protected class while leaving untouched classes of persons who may be equally as guilty of lying on their resumes, but who have historically reaped the advantages in the workplace.

Employee resume fraud is a costly problem for employers, and, of course, employers have every right to refuse to hire a job applicant or to fire an employee when they find out that the employee has lied on his resume. Employers, however, can effectively and inexpensively prevent resume fraud by checking an applicant’s credentials at the time of her application. By choosing not to do a background investigation,

362. Because of the prevalence of resume fraud, investigative agencies are increasingly popular. They search not only job applicants but also persons inside the company who are eligible for promotions. See John Flinn, Career Objective: To Obtain Job By Using Bogus Resume, St. Petersburg Times, Mar. 5, 1992 at 1E; Nancy Marx Better, Fishing For the Workplace Imposter, N.Y. Times, Apr. 14, 1991, at F23.


364. Flinn, supra note 362.

365. Id.

366. See Nancy Millich, Ethical Integrity in the Legal Profession: Survey Results Regarding Law Students’ Veracity on Resumes and Recommendations for Enhancing Legal Ethics Outside the Classroom, 24 ARIZ. ST. L.J. 1181 (1992).
the employer makes the economic decision that it is not worth the cost of investigating the applicant for the position. In effect, the employer’s own conduct estops it from later claiming that the criterion was material.

Although employee misconduct is not as easily prevented as hiring a person who has lied on his resume, it too is a surmountable burden for employers. By carefully keeping books and going over employee travel vouchers and submissions for reimbursements, employers can eliminate a good deal of employee misconduct. An employer who suspects serious misconduct in its workforce can hire an investigator to look into the problem. This Article proposes a solution to the problem of after-acquired evidence of resume misrepresentations and misconduct. It concludes that the employer should never be permitted to defend a Title VII suit based on after-acquired evidence, nor should after-acquired evidence be relevant to determine an employee’s damages, front pay, injunctive relief (other than reinstatement), declaratory relief, attorney’s fees, and costs. Only where the employer can prove that it would have discovered the after-acquired evidence independent of the lawsuit should the judge consider after-acquired evidence to limit back pay. Barring this proof, the judge should consider the after-acquired evidence in deciding whether to reinstate. If the employer can prove that the employee’s presence would seriously harm the employer’s business interest, the judge should refuse to reinstate the employee. It is only under these limited circumstances and for these limited purposes that the judge should consider the after-acquired evidence of an employee’s misrepresentation.