The After-Acquired Evidence Doctrine in Title VII Cases and the Challenge Presented by *Wallace v. Dunn Construction Co.*, 968 F.2d 1174 (11th Cir. 1992)

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I. INTRODUCTION

The Tenth Circuit endorsed the application of the after-acquired evidence doctrine as an affirmative defense in Title VII cases in 1988.1 Until the Eleventh Circuit decision in Wallace v. Dunn Construction Co., 968 F.2d 1174 (11th Cir. 1992),...
AFTER ACQUIRED EVIDENCE

Co.,2 employers were quite successful in winning summary judgment motions based on evidence of employee misconduct that was discovered after the employee’s termination and was unrelated to the employer’s reasons for terminating the employee.3

A hypothetical situation involving the after-acquired evidence doctrine may help to explain why the defense has been so controversial and received so much attention in the last four years.4 A typical after-acquired evidence doctrine scenario begins with an employee who is terminated by his or her employer for reasons that the employee feels are discriminatory under Title VII. Subsequently, the employee brings a lawsuit against the employer. During the pretrial discovery process, the employer discovers that the employee lied on his application about his criminal record or another material qualification. The employer then makes a motion for summary judgment on the grounds that the employee either would not have been hired or would have been fired because of the misrepresentation, and thus has no right to recover damages for losing a job to which the employee was never entitled. Courts often grant the employer’s summary judgment motion.5

2. 968 F.2d 1174 (11th Cir. 1992).
5. This fact pattern is analogous to some of the cases that have applied the after-acquired evidence doctrine in Title VII cases. See, e.g., Benson v. Quanex Corp., 58 Fair Emp. Pract. Cas. (BNA) 743 (E.D. Mich. March 24, 1992). However, it is only one of a number of potential fact patterns to which the doctrine is applicable. Employers have been granted summary judgment in several cases where the employee lied about something other than his or her criminal record. See Bonger v. American Water Works, 789 F. Supp. 1102 (D. Colo. 1992)(employee lied about education); Churchman v. Pinkerton’s Inc., 756 F. Supp. 515 (D. Kan. 1991)(employee lied about previous terminations for cause); O’Driscoll v. Hercules, Inc.,
The after-acquired evidence doctrine enjoyed wide acceptance with only minimal resistance until the Eleventh Circuit handed down its decision in Wallace v. Dunn Construction Co. The Wallace court expressly rejected the Tenth Circuit's reasoning from the seminal case regarding the doctrine, Summers v. State Farm Mutual Automobile Insurance Co. The Eleventh Circuit's decision in Wallace has thrown the use of the after-acquired evidence doctrine into complete turmoil.

The Wallace decision does raise some valid legal and theoretical questions about the use of the after-acquired evidence doctrine. However, the arguments in Wallace are somewhat suspect given the wide support the Summers doctrine has received. Future decisions addressing and implementing Wallace will hopefully serve to solidify the logically sound reasoning behind the after-acquired evidence doctrine, leading to its general acceptance in courts throughout the nation.

II. THE HISTORY OF THE CONTROVERSY

A. Summers v. State Farm Mutual Automobile Insurance Co.

A well-established principle of agency and contract law is that an employee cannot prevail in an action for wrongful discharge where the employee committed acts that would have been cause for termination, regardless of whether the employer knew of those acts at the time of the discharge. It is not material in such cases whether the employer knew of the grounds that in fact existed at the time of the discharge; the employer may avail itself of the employee's misconduct and use that misconduct as an affirmative defense to the employee's claim, notwithstanding its ignorance. This same principle, known as the "after-acquired evidence" doctrine, has recently been extended to situations involving summary judgment on claims of discriminatory

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745 F. Supp. 656 (D. Utah 1990) (employee lied about age). Additionally, the misconduct on which the employer bases the after-acquired evidence defense may have occurred during the plaintiff's course of employment. See Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988).


7. 968 F.2d 1174 (11th Cir. 1992).

8. 864 F.2d 700 (10th Cir. 1988).


discharge brought under Title VII and state civil rights laws.12

The first major case to apply the "after-acquired evidence" doctrine to a Title VII claim was *Summers v. State Farm Mutual Automobile Insurance Co.*13 The plaintiff in *Summers* brought a claim for age and religious discrimination after he was discharged for his alleged poor attitude, inability to get along with others, and other work-related problems. The employee had previously been suspended for falsification of records, but State Farm did not cite the falsifications as one of the reasons for the employee's termination.14

Four years after the employee's termination and while preparing for trial, State Farm discovered 150 additional falsifications in the employee's files. The employee, when confronted, did not deny the falsifications. On the basis of the after-acquired evidence, State Farm filed a motion for summary judgment, alleging that the employee failed to state a cause of action. The summary judgment motion was granted.15

In reaching its decision, the *Summers* court developed a set of elements which the defendant employer must prove in order to prevail on a summary judgment motion. The employer must demonstrate (1) that the plaintiff was guilty of some misconduct of which the employer was unaware; (2) that the misconduct would have justified discharge; and (3) that had the employer known of the misconduct, the employer would indeed have discharged the plaintiff.16 "Whether the misconduct is related to the plaintiff's claim is irrelevant."17

The *Summers* court applied the after-acquired evidence doctrine to this Title VII case utilizing the rationale of the Supreme Court decision in *Mt. Healthy City School District Board of Education v. Doyle.*18 The employer in *Mt. Healthy* discharged the plaintiff teacher for conduct that the teacher alleged was protected by the First and Fourteenth Amendments. The Court found that while one of the reasons cited for discharge was protected by the First Amendment, the other incident was clearly not protected, and thus constituted a legitimate ground for discharge.19

12. *Id.*
13. 864 F.2d 700 (10th Cir. 1988).
14. *Id.* at 702-03.
15. *Id.* at 703.
16. See *Id.* at 708. These elements are most clearly established in *O'Driscoll v. Hercules, Inc.*, 745 F. Supp. 656 (D. Utah 1990).
19. *Id.* at 282-83. The conduct for which the teacher was discharged included (1) the conveyance of an internal memorandum concerning a possible dress code for teachers to a disk jockey who announced the information on the air as a news item and (2) obscene gestures made by the teacher to two female students. The conveyance of the memorandum was protected conduct, but the obscene gestures were not.
The following language in the Mt. Healthy Court's opinion was quoted in Summers and forms the basis of the reasoning behind the application of the after-acquired evidence doctrine to Title VII cases:

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or other wise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. . .The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.20

Thus, the policy behind the after-acquired evidence doctrine is that the plaintiff could not have been injured by the employer's discrimination if the employer would not have hired or would have fired the plaintiff for other misconduct of which the employer was unaware.21 The after-acquired evidence doctrine as applied in Summers does not impact the prima facie claim of Title VII employment discrimination.22 Instead, the doctrine deals with the separate issue of whether, in light of the employee's misconduct, the employee is entitled to damages for the employer's alleged discrimination against the employee. Thus, the after-acquired evidence doctrine does not work to deny the employee's cause of action by repudiating any wrong-doing by the employer. It does, however, completely bar the plaintiff's claim by showing that the plaintiff is not deserving of any compensation for his "injuries."23

21. Id. at 708. See also Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302, 304-305 (6th Cir. 1992).
22. Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988)("[W]hile such after-acquired evidence cannot be said to have been a 'cause' for [the plaintiff's] discharge . . . it is relevant to [the plaintiff's] claim of 'injury,' and does itself preclude the grant of any present relief or remedy to [the plaintiff]."); See also Baab v. AMR Serv. Corp., No. 5:91 CV 2574, 1993 WL 4202, *12 (N.D. Ohio Jan. 6, 1993)("The after-acquired evidence doctrine stands for the proposition that the [discharge] would have and should have occurred despite the discrimination which allegedly occurred."); Punahele v. United Air Lines, Inc., 756 F. Supp. 487, 490 (D. Colo. 1991)(stating that rather than dealing with the elements that constitute liability for unlawful discrimination, the Summers court faced the issue of whether the plaintiff was injured by unlawful discrimination).
B. Summary Judgment Granted in Title VII Cases

The general formulation of the doctrine announced in *Summers* has received widespread support in Title VII cases. Several courts have granted summary judgment to the employer based on after-acquired evidence of resume or application fraud by the employee. Summary judgment has been granted when the employee misrepresented her criminal record,\(^{24}\) age,\(^{25}\) education\(^ {26}\) and previous terminations for cause.\(^ {27}\) Additionally, at least two courts have granted summary judgment in Title VII cases in which the employee committed an act during his course of employment that would have justified termination.\(^ {28}\) In each of the cases where summary judgment was granted, the plaintiff employee undisputedly made the alleged misrepresentations or performed the alleged misconduct.\(^ {29}\) The court in each case also stated that the plaintiff’s termination, in light of the misrepresentations, was not a genuine issue of fact.\(^ {30}\)

In addition to its application in Title VII cases, the after-acquired evidence doctrine has also been successfully applied by employers to cases based on state statutes that contained provisions similar to those found in Title VII.\(^ {31}\) Thus, the after-acquired evidence doctrine, as es-

28. Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988); O’Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466 (D. Ariz. 1992). See also Powers v. Chicago Transit Auth., 890 F.2d 1355 (7th Cir. 1989)(in which the plaintiff had somehow obtained defendant employer’s privileged attorney-client information. While not granting summary judgment, the court favorably cited *Summers*, stating that the circumstances surrounding the plaintiff’s acquisition of a certain memorandum might raise questions about the plaintiff’s ethical conduct and thus was relevant to the plaintiff’s right to injunctive relief).
30. See, e.g., id. at 660.
31. Johnson v. Honeywell Information Sys., Inc., 955 F.2d 409 (6th Cir. 1992) (court applied *Summers* to Michigan’s Elliot-Larsen Civil Rights Act, holding that the plaintiff’s falsification of her educational background would have been proper grounds for discharge by the employer); Baab v. AMR Serv. Corp., No. 5:91 CV 2574, 1993 WL 4202, *4 (N.D. Ohio Jan. 6, 1993)(“In light of Ohio’s general endorsement of the federal courts’ interpretation of anti-discrimination laws, the Ohio Supreme Court’s decision to apply the after-acquired evidence doctrine to its anti-bias statutes . . . seems a logical conclusion.”); O’Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466 (D. Ariz. 1992)(court held that the *Summers* rationale should be applied to the Arizona Civil Rights Act, since Arizona courts
established in Summers, has received broad support on both state and federal civil rights claims.

C. Cases in Which the Summers Doctrine Has Been Questioned

Summers has been challenged on several occasions by courts refusing to grant summary judgment to the employer in spite of the existence of after-acquired evidence pertaining to the plaintiff's misconduct. Some of these decisions are not really an affront to Summers. Instead, these cases present different fact patterns which did not lend themselves to disposition by summary judgment. Other cases, however, offer a more direct challenge to the Summers doctrine.

1. The Least Serious Threat: Milligan-Jensen v. Michigan Technological University

The court in Milligan-Jensen v. Michigan Technological University follows the principle that federal Title VII case law is persuasive in interpreting Arizona anti-discrimination law; O'Driscoll v. Hercules, Inc., 745 F. Supp. 656 (D. Utah 1990) ("Because of the soundness of the Summers approach and the absence of contrary indications, this court is of the opinion that the Utah State Supreme Court would apply Summers... "). But see Bazzi v. Western and Southern Life Ins. Co., 808 F. Supp. 1305, 1310 (E.D. Mich. 1992) (differentiating the Michigan Elliot-Larsen Civil Rights Act from Title VII, thus limiting the scope of the after-acquired evidence doctrine in cases brought under Elliot-Larsen); Flesner v. Technical Communications Corp., 575 N.E.2d 1107 (Mass. 1991) (The Massachusetts state court seemed reluctant to enforce the doctrine, but did not state that the rule was not valid. The court did refuse to grant summary judgment to the defendant because there was a factual dispute over whether the employer would have discharged the plaintiff in light of the after-acquired evidence).

It may be important to note that all the decisions in which summary judgment was granted on a state civil rights act claim were handed down by federal courts that could only estimate what the state court would do in the same situation. No state court to date has strictly enforced the Summers doctrine on a state civil rights act claim.

32. See, e.g., DeVoe v. Medi-Dyn, Inc., 782 F. Supp. 546, 553 (D. Kan. 1992) ("Genuine issues of fact remain regarding whether plaintiff's problems were so severe as to foreclose the possibility that defendant would have hired him in any event."); Punahel v. United Air Lines, 756 F. Supp. 487 (D. Colo. 1991) (court held that whether a pardoned conviction would have made a difference in the employer's decision not to hire the employee was a genuine issue of material fact); Flesner v. Technical Communications Corp., 575 N.E.2d 1107 (Mass. 1991) (court refused to grant summary judgment because disposition of the issue depended on disputed issues of material fact involving the employer's motive or intent).

33. In addition to the cases discussed infra notes 34-107 and accompanying text, consider Benitez v. Portland Gen. Elec., No. CV 91-864-PA, 1992 WL 278104 (D. Or. March 31, 1992), where the district court judge refused to dismiss the plaintiff's Title VII claim in spite of after-acquired evidence of the plaintiff's application fraud ("[i]n view of the absence of Ninth Circuit precedent, and the harshness of the result..."). Id. at *7.
evinced a reluctance to enforce the after-acquired evidence doctrine by attempting to distinguish *Summers*. Although the Sixth Circuit reversed the district court's decision in *Milligan*, the case warrants a brief discussion. *Milligan* was reversed on the basis of the decision in *Johnson v. Honeywell Information Systems*. Consequently, the Sixth Circuit never reached the merits of the reasoning of the district court decision that denied the employer's motion for summary judgment. Since the arguments and holding in the district court's decision could appear in subsequent decisions in other courts, they will be dealt with here.

The plaintiff in *Milligan* alleged a Title VII sex discrimination violation against the employer. The court found that the defendant had indeed discriminated against the plaintiff, but there was also proof that the plaintiff had made a material falsification about her criminal record on the employment application.

The *Milligan* court refused to directly apply the rationale of *Summers*. The court held that the two cases could be distinguished because while no discrimination was found to have occurred in *Summers*, there had already been proof of discrimination in the *Milligan* case. This distinction makes little sense since the *Summers* court expressly stated that it was making its decision assuming "that State Farm was motivated, at least in part, if not substantially, because of Summers' age and religion." Additionally, the *Summers* court equated the plaintiff's case with the following hypothetical:

[A] company doctor is fired because of his age, race, religion, and sex and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a "doctor" . . . the masquerading doctor would be

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36. 955 F.2d 409 (6th Cir. 1992). The *Johnson* decision was handed down by the Sixth Circuit subsequent to the district court's decision in *Milligan*. Since the Sixth Circuit expressly adopted the *Summers* after-acquired evidence doctrine in *Johnson*, the reversal of *Milligan* was almost automatic. See Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302 (6th Cir. 1992) (the Sixth Circuit stated that the *Johnson* decision precluded the district court judge's approach in *Milligan* and required that the case be reversed).
39. Id. at 1416.
40. Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988); see also Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1178 (11th Cir. 1992) (the court stated that "the *Summers* case fashioned a rule that an employer may avoid all liability for a discharge based solely on unlawful motives" by providing after-acquired evidence of employee misconduct); Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991, 994 (D. Kan. 1989) ("[T]he *Summers* court specifically assumed that the employee was dismissed in part due to his age and religion." (emphasis in original)).
entitled to no relief, and Summers is in no better position.\textsuperscript{41}

Thus, the argument that the \textit{Milligan} decision can be distinguished because there was an actual finding of discrimination is not persuasive. The \textit{Summers} court was quite explicit in stating that it, too, was applying the after-acquired evidence doctrine with the assumption that the employer had discriminated against the plaintiff.\textsuperscript{42}

The \textit{Milligan} court went yet another step. The court held that it was striking a middle ground by refusing to deny relief to a plaintiff who was found to have been wronged, but not fully rewarding a plaintiff found to have falsified her employment application.\textsuperscript{43} Thus, the \textit{Milligan} court struggled with the questions of how the after-acquired evidence of the plaintiff's application fraud should affect the plaintiff's rewards of back pay, prejudgment interest and front pay.\textsuperscript{44} Eventually, the court decided to award back pay the plaintiff would have made in her position with the defendant, minus mitigation, and reduced by 50 percent.\textsuperscript{45}

The arbitrary formula developed by the district court in \textit{Milligan} is clearly not the ultimate solution to the after-acquired evidence controversy.\textsuperscript{46} The district court offered very little in terms of substantial reasoning behind the formula, even admitting that it was simply guessing the date on which the employer would have discovered the falsification.\textsuperscript{47} Obviously, a more logical and substantive reason must be established in order to deny the employer's right to summary judgment based on the after-acquired evidence doctrine.

\textsuperscript{42} \textit{Id.}
\textsuperscript{44} \textit{Id.} Ironically, just before stating the formula for determining the award, the court stated that "In attempting to make the plaintiff whole, the court is left to the \textit{futile task of guessing} when, if ever, defendant would have discovered the falsification. The court cannot speculate as to what this date would have been" (emphasis added).
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} See Milligan-Jensen v. Michigan Technological University, 975 F.2d 302 (6th Cir. 1992)(in the case that reversed the district decision, the court referred to the district court judge's decision as the "Solomon-like division of the baby," indicating its dislike of the arbitrariness of the formula). \textit{But see} Mitchell H. Rubinstein, \textit{The Use of Predischarge Misconduct Discovered After an Employees' Termination as a Defense in Employment Litigation}, 24 \textit{SUFFOLK U. L. REV.} 1, 28 (1990)("Perhaps there would be less conflict if some form of mitigation principle were accepted. There is something wrong with a body of law which allows an employer to cover up its illegal activities by searching an employee's past for unknown falsifications.").

The United States Supreme Court in *Price Waterhouse v. Hopkins*48 announced a holding that at first glance appeared to weaken the use of the after-acquired evidence doctrine in Title VII cases. The case involved a plaintiff who alleged sex discrimination when she was denied a promotion in favor of a male employee. The employer asserted a "mixed-motive" defense. The employer claimed that even if the plaintiff proved that sex discrimination had played a part in the employer's decision to promote the male employee, the plaintiff was burdened with the additional requirement of showing that the promotion decision would have been different had the employer not discriminated.49 The plaintiff countered with an argument that if any discrimination on the employer's part could be proven, the employer should face liability under Title VII.50

The Court sided with the plaintiff, holding that Title VII was meant to condemn employment decisions based on illegitimate considerations, even if those misguided notions were mixed with legitimate reasons for denying the promotion.51 A rule was announced which stated:

> [O]nce a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role [footnote omitted].52

Thus, one could draw the analogy from the *Price Waterhouse* holding that an employer who fired a female employee because she was a poor worker and because she was female would be liable for damages under Title VII.

An employee who claimed a Title VII violation attempted to assert that the *Price Waterhouse* holding rendered the *Summers* after-acquired evidence doctrine useless in *Punahele v. United Air Lines*.53 The *Punahele* court, however, disagreed with the plaintiff's reading of *Price Waterhouse* stating that *Price Waterhouse* "dealt solely with the elements that constitute liability for forbidden employment discrimination."54 The *Summers* doctrine, on the other hand, was concerned with determining whether the plaintiff was actually injured by the alleged discrimination.55

49. Id. at 237-38.
50. Id. at 238.
51. Id. at 241.
52. Id. at 244-45.
54. Id. at 490 (emphasis in original).
Therefore, the presence of all the elements of a Title VII discrimination claim are irrelevant under the Summers doctrine. In deciding whether summary judgment for the defendant is proper, the after-acquired evidence is used solely for determining whether the plaintiff is deserving of any damages for the discrimination that is assumed to have been practiced against him or her.\textsuperscript{56}

3. \textit{Washington v. Lake County, Illinois}

Another case involving the mixed-motive doctrine was the Seventh Circuit decision in \textit{Washington v. Lake County, Ill.}.\textsuperscript{57} The plaintiff in \textit{Washington} alleged Title VII race discrimination when he was fired from his job with the County Sheriff's Department. The employer had stated in a letter to the plaintiff that he had been terminated for bringing discredit to the department by being arrested for criminal assault and because of twelve violations of department policy, including insubordination and violation of jail security.\textsuperscript{58} After the plaintiff was terminated, the employer discovered that the plaintiff had lied on his employment application. One of the questions on the application asked if the applicant had ever been convicted of a felony offense. The plaintiff responded that he had not, despite prior convictions for criminal trespass and third-degree assault.\textsuperscript{59}

In reaching its decision, the \textit{Washington} court questioned whether the Summers doctrine applied to the "would have fired" or "would not have hired" standard or both.\textsuperscript{60} The \textit{Washington} court attempted to align itself with the decision in \textit{Bonger v. American Water Works}\textsuperscript{61} by analyzing the following language found in the latter case:

\begin{quote}
There are many situations, however, in which an employer would not discharge an employee if it subsequently discovered resume fraud, although the employee would not have been hired absent that resume fraud [footnote omitted]. In such situations, the employee indeed would suffer injury if discharged because of discrimination.\textsuperscript{62}
\end{quote}

The \textit{Bonger} court granted the employer's motion for summary judgment based on the finding that the employer would have discharged the employee on the basis of the misconduct. The court did not, however, elaborate on its distinguishing of the "would not have hired" and "would have fired" standards.\textsuperscript{63}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{56} See cases cited supra, note 55.
\item \textsuperscript{57} 969 F.2d 250 (7th Cir. 1992).
\item \textsuperscript{58} \textit{Id}. at 252.
\item \textsuperscript{59} \textit{Id}. at 253.
\item \textsuperscript{60} \textit{Id}. at 253.
\item \textsuperscript{61} 789 F. Supp. 1102 (D. Colo. 1992).
\item \textsuperscript{62} \textit{Id}. at 1106.
\item \textsuperscript{63} \textit{Id}. at 1107.
\end{itemize}
\end{footnotesize}
The Washington v. Lake County, Illinois court chose to greatly expand the distinction between the "would have fired" and "would not have hired" standards. The court stated that in the context of a case where the plaintiff was discharged during the course of employment, the only question that could be asked was whether the employer would have fired the plaintiff in light of the after acquired evidence.\(^6^4\) An assertion by the employer that the employee would not have been hired because of the after acquired evidence was considered "misguided."\(^6^5\) Such an assertion was misguided, the court stated, because the focus on whether the plaintiff would have been hired constituted "an unjustified importation of 'property right' concepts into employment discrimination law."\(^6^6\) Since a property right in the plaintiff's job was not a requirement for showing injury in a Title VII claim, the court felt that the employer should not be allowed to assert the lack of a property right as a defense.\(^6^7\)

In addition to the distinction between the "would not have hired" and "would have fired" standards, the Washington court articulated an argument similar to the "mixed-motive" argument discussed in Price Waterhouse v. Hopkins.\(^6^8\) The Washington court's mixed-motive argument is a dramatic departure from the cases that have distinguished Price Waterhouse;\(^6^9\) however, the Seventh Circuit offers no compelling arguments for application of the mixed-motive rule to the after-acquired evidence doctrine. The court in Punahele v. United Air Lines\(^7^0\) adequately dealt with the mixed-motive arguments offered by the Washington court,\(^7^1\) so those arguments need not be refuted again.

Combining all these arguments, the Washington court stated as its final rule that the employer's after-acquired evidence defense would only be effective if the employer, "acting in a race-neutral fashion,

\(^6^4\) Washington v. Lake County, Ill., 969 F.2d 250, 255 (7th Cir. 1992).

\(^6^5\) Id. at 256.

\(^6^6\) Id. According to the Seventh Circuit, only a person who would not have been hired has lost his "property right" in his employment with the defendant employer. Conversely, a employee who would have been fired for the misconduct that constitutes the after-acquired evidence maintains his or her property right in the job since that person honestly earned the position on his or her application. The "property right" argument that relates to the "would not have hired" and "would have fired" distinction is irrelevant to a construction of the after-acquired evidence doctrine, unless the argument is related directly to the standing of the plaintiff to bring the case. See discussion infra notes 87-95 and accompanying text.

\(^6^7\) Washington v. Lake County, Ill., 969 F.2d 250, 256 (7th Cir. 1992).

\(^6^8\) 490 U.S. 228 (1989). For an explanation of the mixed-motive argument and its application to Title VII cases, see supra notes 48-55 and accompanying text.


\(^7^0\) 756 F. Supp. 487 (D. Colo. 1991).

\(^7^1\) See supra notes 53-56 and accompanying text.
would have fired the employee upon discovery of the misrepresenta-
tion.”72 This rule applies the Price-Waterhouse mixed-motive analysis
and adds the additional stipulation that the employer cannot base its
defense on the fact that the plaintiff would not have been hired had
the employer known about the application fraud. The rule appears to
be too strict to overcome the body of case law that has allowed the
employer to assert that the plaintiff would not have been hired, even
though the plaintiff was terminated after he or she had begun working
for the employer.73

While the Washington court made no effort to distinguish or dis-
credit the Summers decision, the Washington decision still serves as a
blow to employers in the Seventh Circuit who try to assert the after-
acquired evidence defense. The holding in Washington revives the
school of thought that Summers will not be applicable to mixed-mo-
tive cases by requiring that the employer would have made the same
employment decision in a “discrimination-neutral” setting. The addi-
tional stipulation that the employer may not allege that the plaintiff
would not have been hired in light of the application fraud is a direct
affront to Summers, since the basis of the stipulation is that property
rights are not an element of injury in Title VII cases. Other courts
that have supported Summers have been consistent in holding that
whether the elements of injury are fulfilled is irrelevant to the after-
acquired evidence defense.74

D. The 1991 Civil Rights Act

Congress codified the mixed-motive holding in Price Waterhouse
v. Hopkins through the 1991 amendments to Title VII. The applicable
subsection reads:

Except as otherwise provided in this subchapter, an unlawful employment
practice is established when the complaining party demonstrates that race,
color, religion, sex, or national origin was a motivating factor for any employ-
ment practice, even though other factors also motivated the
practice.75

72. Washington v. Lake County, Ill., 969 F.2d 250, 256 (7th Cir. 1992).
73. See, e.g., Johnson v. Honeywell Information Sys., 955 F.2d 409, 415 (6th Cir.
1992)(granting directed verdict for employer since employer “established that it
would not have hired [plaintiff] and that it would have fired her had it become
aware of her resume fraud during her employment.”). Additionally, several fed-
eral district courts have granted summary judgment on the “would not have
(BNA) Cases 743 (E.D. Mich. 1992); Dotson v. United States Postal Serv., 794 F.
Supp. 654 (E.D. Mich. 1991), aff’d 977 F.2d 976 (6th Cir. 1992), cert. denied, 113 S.
1989).
McDonnell Douglas Helicopter Co., 784 F. Supp. 1456, 1469 (D. Ariz. 1992); Mathis
Since a strict reading of the *Summers* version of the after-acquired evidence doctrine was unaffected by the *Price Waterhouse* decision, this statutory provision should not have any additional adverse effects.\(^7\) Regardless of whether an unlawful employment practice is established, the fact remains that the after-acquired evidence doctrine deals only with the question of whether the plaintiff is entitled to any damages for the discriminatory practice. The statute should only affect cases where the court determines that the employee would not have been terminated in spite of the misconduct discovered after the actual termination.\(^7\)

III. WALLACE V. DUNN CONSTRUCTION CO.

A. Facts of the Case

The reasoning behind the *Summers* doctrine was explicitly rejected by the Eleventh Circuit in *Wallace v. Dunn Construction Co.*\(^7\) The plaintiff in *Wallace* alleged, among other claims, a hostile work environment, a sexual harassment claim and a retaliatory discharge under Title VII. During the deposition of the plaintiff, whose case was being decided on interlocutory appeal, the defendant employer became aware that the plaintiff had previously pled guilty to possession of cocaine and marijuana. The plaintiff had lied on her application when she omitted these convictions. The employer filed a motion for partial summary judgment based on this after-acquired evidence, but the trial court denied the motion.\(^7\) The Eleventh Circuit reversed the decision of the trial court expressly rejecting the reasoning behind the after-acquired evidence doctrine as established in *Summers*.\(^8\)

B. The Court's Reasoning

1. *Summers* Misinterpreted the Mt. Healthy Principle

The *Wallace* court based its decision on several grounds. The first flaw the *Wallace* court found in *Summers* was that the doctrine as announced in *Summers* constituted an unwarranted extension of the *Mt. Healthy* rule by ignoring the lapse of time between the employment decision and the discovery of a legitimate motive for that decision.\(^8\) The *Wallace* court felt that the *Summers* doctrine went one

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7. See supra notes 53-56 and accompanying text.
7. See Douglas L. Williams & Julia A. Davis, *Title VII Update - Skeletons and a Double-Edged Sword*, C669 ALI-ABA 303 (December 5, 1991) ("[I]t appears likely the after-acquired evidence defense will continue to be available to employers at least on the issue of damages.").
7. 968 F.2d 1174 (11th Cir. 1992).
7. Id. at 1177.
8. Id. at 1179.
8. Id.
step too far by "excus[ing] all liability based on what hypothetically would have occurred absent the alleged discriminatory motive assuming the employer had knowledge that it would not acquire until sometime during the litigation arising from the discharge." This doctrine, the court stated, clashed with the Mt. Healthy principle that "the plaintiff should be left in no worse position than if he had not been a member of a protected class."83

One of the employer's responses to this argument might be the unfairness of allowing an employee to lie and cheat his way into the job and then allowing him to file a discrimination claim for losing a job to which he was never really entitled. This argument is the fundamental basis for the after-acquired evidence doctrine. At least one author, however, feels that this fairness argument might be refuted by the plaintiff by an assertion of estoppel.84 Under the estoppel theory, the plaintiff would argue that because of the type of infraction or misconduct, the employer's failure to investigate or even the passage of time, the employer essentially waived its right to use the after-acquired evidence as justification for termination.85 The argument is seriously flawed. Decisions would reach the pinnacle of unfairness if the after-acquired evidence defense was stripped from employers based on an argument that since the employee was clever enough to hide the misconduct for a long period of time, the employer should be estopped from making a motion for summary judgment based on evidence of the misconduct. Additionally, the fact that the employer was unaware of the employee's misconduct is an essential element of the after-acquired evidence defense.86 The plaintiff asserting an estoppel argument would have a difficult time overcoming the mass of case law that views the after-acquired evidence defense as a logically sound doctrine.

Another interesting argument for granting the employer's summary judgment motion in Wallace may be that the plaintiff did not have standing to sue the employer due to her falsification on the employment application. According to the dissenting opinion in Wallace, the enforcement of Title VII depends on the employee status of the plaintiff.87 Congress intended that "employees" are the only pro-

82. Id. (emphasis in original).
83. Id.
84. Williams & Davis, supra note 77.
85. Id.
86. This element is rarely expressed, but it is implied by the language of the decisions. See, e.g., Johnson v. Honeywell Information Sys., Inc., 955 F.2d 409, 412 (6th Cir. 1992) ("Generally, an employer may defend a wrongful discharge claim on the basis of facts unknown at the time discharge and, therefore, not an actual or inducing motive for the termination.").
tected class under Title VII. Since the plaintiff in *Wallace* lied on her job application, she never rightfully attained the status of an employee for the purposes of Title VII. If the plaintiff did not rightfully become an employee, she was not a member of the protected class that was allowed to sue, and her case should have been dismissed for lack of standing.

The dissenting opinion's reasoning is very persuasive, but such a result might create more problems than it would solve. Since the dissent focuses on the fact that the plaintiff would not have been *hired* if the employer had known of the application fraud, the controversy returns to the fight over the distinction between the "would not have hired" and "would have fired" criteria. The dissenting opinion hints at the same distinction between *Wallace* and *Summers* that the court in *Washington v. Lake County, Ill.* proposed. Both *Washington* and the *Wallace* dissent rejected the *Summers* analysis that examined only whether the plaintiff is entitled to relief since his or her employment would have ended before the employee's actual termination. Instead, both decisions would limit successful application of the doctrine; the *Wallace* dissent would limit the doctrine to cases in which the plaintiff would not have been hired, while the *Washington* court would limit the doctrine to cases where the plaintiff would have been fired. The standing argument of the *Wallace* dissent is much more persuasive than the *Washington* court's distinction between the "would not have hired" and "would have fired" standards. In fact, the standing argument appears to be an inherent part of the *Summers* reasoning that the employee's misconduct bars the employee from claiming any damages.

However, neither the *Wallace* dissent nor the *Washington* decision are sufficient as currently drafted. If courts are to focus on whether

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88. *Wallace v. Dunn Constr. Co.*, 968 F.2d 1174, 1188 (11th Cir. 1992) (Godbold, J., dissenting) (quoting 42 U.S.C. § 2000e-5(g)(2)(A)). ("No order of the court shall require . . . the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title." (emphasis added)).
89. See supra notes 57-64 and accompanying text.
90. 969 F.2d 250 (7th Cir. 1992).
91. Courts adopting the *Summers* analysis generally enforce the after-acquired evidence doctrine under both the "would not have hired" and "would have fired" standards. See, e.g., *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302, 304-05 (6th Cir. 1992) and cases cited supra note 73.
93. See discussion infra note 108 and accompanying text.
the employer would not have hired or would have fired the employee, the effect on employers will be unfair and the after-acquired evidence doctrine eroded. The doctrine should be expanded to include misconduct that occurs at any time in the hiring and employment process.94 Employee conduct that is grounds for termination should remove the employee from the protected class under Title VII regardless of whether the employee had already attained valid employment with the employer.95 The distinction between the "would not have hired" and "would have fired" standards makes little sense if the courts are to focus on the standing of the employee to sue.

2. Employers Will Have the Incentive to Hire Employees with Knowledge of the Employee's Prior Misconduct

Another argument on which the Wallace court based its decision was the feeling that the Summers doctrine was a direct affront to the purpose behind Title VII, since one of the purposes behind Title VII was "to make persons whole for injuries suffered on account of unlawful employment discrimination."96 The Eleventh Circuit reasoned that the Summers rule which completely barred the plaintiff from recovery even in the presence of discriminatory practices by the employer was unjustified. Rather than giving employers the incentive to eliminate discrimination, the Summers doctrine was alleged to invite employers to establish outlandishly low thresholds for legitimate termination and avoid liability for discrimination by rummaging through the plaintiff's records.97 Even more troubling to the Eleventh Circuit was the incentive for employers to hire members of a protected class with prior knowledge of a pre-existing reason for terminating the employee, mistreat the employee, and then to "discover" a legitimate reason for termination during the ensuing litigation.98

This argument has been addressed in past decisions construing the after-acquired evidence doctrine with much more logical reasoning than the Wallace court provides. Those decisions concluded that the danger of an employer combing through the employee's records for

94. The Sixth Circuit agrees with this proposition. See Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302, 304-05 (6th Cir. 1992)("[I]f the plaintiff would not have been hired, or would have been fired, if the employer had known of the falsification, the plaintiff suffered no legal damage by being fired.").
97. Id. at 1180.
98. Id. at 1180-81. The court referred to this complex subversion as "sandbagging."
any shred of incriminating evidence is minimal. The Wallace court's concerns over the employer setting an abnormally low standard for termination is not justified. Since the courts tend to look at the pattern and practice of how employers treat employees who have committed similar improper acts, an employer would have to systematically hire and fire several employees for very minor infractions in order to establish the low standard. It seems highly illogical that an employer would engage in such a practice in hopes of getting away with discrimination in the future.

Additionally, a few courts have shown a tendency to stray from the usual subjective standard in these cases and have applied the objective "reasonable employer" standard to determine whether the employer would actually have terminated the employee. The proper standard is probably a mixture of the objective and subjective standards. Courts should look at whether a reasonable employer in the defendant's business would have terminated that employee in light of the discovered misconduct. The standard must be somewhat subjective because different companies have different priorities regarding the activities and qualifications of their employees. The objective restriction on the subjective standard will prevent the results from becoming too extreme when the after-acquired evidence defense is strictly applied. Obviously, the concern of the Wallace court re-

99. See Johnson v. Honeywell, 955 F.2d 409, 414 (6th Cir. 1992)(requiring necessary elements "to prevent an employer from combing a discharged employee's record for evidence of any and all misrepresentations, no matter how minor or trivial, in an effort to avoid legal responsibility for an otherwise impermissible discharge."). See also Washington v. Lake County, Ill., 969 F. 2d 250, 255-56 (7th Cir. 1992); O'Driscoll v. Hercules, 745 F. Supp. 656, 659 (D. Utah 1990). Both cases contain similar language to that found in Johnson. But see Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991, 995 (D. Kan. 1989)(stating that "in some cases a strict application of the Summers holding may lead to extreme results.").


103. See Baab v. AMR Serv. Corp., No. 5:91 CV 2574, 1993 WL 4202, *10 (N.D. Ohio Jan. 6, 1993) ("[W]hile the condition of one's knees may be quite material to a baggage handler, football player, or policeman on foot-patrol, that same condition would likely be, as a matter of law and/or simple proof, inconsequential for a book editor or accountant.").

104. This would help to alleviate the concern expressed by the court in Mathis v. Boe-
garding the setting of an senselessly low standard for termination by employers can be alleviated by implementing many of the ideas that have already been expressed by other courts construing the doctrine.

Even more absurd than the "low standard" argument is the hypothetical proposed by the Wallace court in which an employer

with a proclivity for unlawful motives [hires] a woman—despite knowledge of a legitimate reason that would normally cause the employer not to employ her—[destroys] any evidence of such knowledge, [pays] her less on the basis of her gender, [sexually harasses] her until she protests, [discharges] her, and ["discovers"] the legitimate motive during the ensuing litigation, thus escaping any liability for the unlawful treatment of the erstwhile employee.105

Until a case comes along to indicate that an employer would even consider such a complicated scheme, this argument has little practical support. In past cases, employers have been surprised to find that the employee defrauded them. Often the employer does not discover the evidence for a long period of time after the litigation has begun,106 and the employer has already incurred very substantial legal fees. Logic would indicate that the risk and expense of having to face litigation, along with the cost of preparing such an elaborate scheme, would prevent an employer from attempting such an involved plan. If the court is really worried about such a situation, the plaintiff should be allowed to show that the employer was aware of the misconduct and did not immediately terminate the employee. Since an essential element of the defense is that the evidence was found after the actual termination took place,107 it would not be unreasonable to make the employer show that it had no knowledge of the misconduct prior to the termination.

IV. CONCLUSION

The use of the after-acquired evidence doctrine in Title VII cases is in a state of disarray and requires a more uniform formula. The courts need to establish a system that keeps the essential elements of the doctrine as established in Summers. This goal may be achieved by justifying the doctrine with a modified version of the standing justification set forth in the dissenting opinion in Wallace.

Summary judgment is granted based on the after-acquired evidence of employee misconduct because the employee is unable to prove that he or she deserves any damages. The arguments proposed by the courts that have questioned the reasoning behind the doctrine

106. See, e.g., Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988)(evidence was uncovered during pretrial discovery, four years after the actual termination).
107. See supra note 86.
are flawed. The doctrine does not subvert the purposes of Title VII, which purports to make the victim of discrimination whole. A plaintiff who has obtained employment through fraudulent means or who has committed misconduct so egregious as to warrant dismissal cannot justifiably stand in front of the court and claim standing as an "injured employee." Since the plaintiff has no standing to bring a Title VII case, the case is properly dismissed on a summary judgment motion. It should not matter whether the employee would not have been hired or would have been fired. The result is the same in both cases. The employee has committed misconduct serious enough that for the purposes of Title VII, he or she never rightfully attained the status of an "employee."108

Additionally, concerns about evil employers plotting to "set up" potential discrimination victims with complex plans of mistreatment or digging through the employee's past for any trivial piece of misconduct can be alleviated by placing a relatively high burden of proof on the employer. If the employer can prove that a reasonable employer in the same business and circumstances as the defendant employer in the pending case would have terminated the employee for the established misconduct, summary judgment should be granted.

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108. At least one court appears to have recognized the validity of this conclusion. See Dotson v. United States Postal Serv., 794 F. Supp. 654, 659 (E.D. Mich. 1991), aff'd, 977 F.2d 976 (6th Cir. 1992), cert. denied, 113 S. Ct. 263 (1992)(holding that postal employee who lied on his application about his medical history and previous terminations for cause had disqualified himself from the position through his deception and could not recover for discrimination "when he was not initially entitled to the job").