

Washington Law Review

Volume 68 | Number 3

7-1-1993

Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of after-Acquired Evidence

Jennifer Miyoko Follette

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Jennifer M. Follette, Comment, *Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of after-Acquired Evidence*, 68 Wash. L. Rev. 651 (1993).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol68/iss3/4>

This Comment is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

COMPLETE JUSTICE: UPHOLDING THE PRINCIPLES OF TITLE VII THROUGH APPROPRIATE TREATMENT OF AFTER-ACQUIRED EVIDENCE

Jennifer Miyoko Follette

Abstract: Congress enacted Title VII of the 1964 Civil Rights Act to combat employment discrimination and to provide relief to discrimination victims. The 1972 and 1991 amendments strengthened the statute and delineated a clear congressional commitment to the statute's purposes. In most cases the courts have utilized the statute's remedial provisions to deter further discriminatory conduct and to provide relief to victims. However, the majority of federal circuit courts which have addressed the issue deny a remedy to plaintiffs in cases where an employer discovers evidence of an employee's misrepresentations on a resume or evidence of misconduct on the job after the discriminatory action. This Comment critically examines the majority view and concludes that using after-acquired evidence to withhold all remedies violates the purposes of Title VII and misapplies equitable principles. This Comment also urges the courts to follow the EEOC guidelines regarding use of after-acquired evidence and offers a proposal for treatment of after-acquired evidence under Title VII.

When employers discriminate against their employees in the workplace, the victims have the right to take their employers to court. Some courts, however, have ruled that employers may escape liability for their discriminatory behavior because of actions totally unrelated to the employers' conduct. Of the five circuits which have addressed this issue, four have concluded that if an employer, after the discrimination occurred, uncovers evidence that the employee lied on a resume or was guilty of on-the-job misconduct, they will use such evidence to nullify the plaintiff's right to relief. This majority view effectively exonerates a culpable employer for Title VII violations regardless of the evidence's lack of causal relevance to the discrimination claim and in spite of the fact that the discrimination occurred prior to the discovery of the evidence.

This Comment argues that using after-acquired evidence to bar relief under Title VII is erroneous. A total bar to recovery undermines the purposes of the statute and is inconsistent with the rules of equity. The discussion will begin with an examination of Title VII, its purposes, its remedies, and the Equal Employment Opportunity Commission (EEOC). Part II will survey the federal courts' treatment of after-acquired evidence in cases brought under Title VII. This review will lead into an explanation in part III of why the majority approach is incorrect. Finally, part IV will offer a proposal for treatment of

after-acquired evidence which is consistent with Title VII's purposes, language, and principles.

I. THE DEVELOPMENT OF TITLE VII

Title VII prohibits discrimination based on race, color, religion, sex, or national origin.¹ The statute not only outlaws disparate treatment of individuals and groups, it also outlaws employment systems which disparately impact minority employees.² Furthermore, Title VII creates a personal right in the victim to sue the discriminating employer in federal court.³ The original 1964 legislation and the subsequent amendments in 1972 and 1991 reflect the increasing congressional commitment to a national policy against discrimination. The policy, clearly supported in the purposes and remedies of Title VII and the establishment of the EEOC, embodies both a deterrent goal of eliminating discrimination in the workplace and a remedial goal of providing relief to discrimination victims.

A. Purposes of Title VII

The courts have consistently and clearly found both deterrent and remedial purposes behind Title VII in the legislative history and the statute's language.⁴ According to the Supreme Court, Congress intended Title VII to promote equality in employment and eliminate barriers that previously acted to limit opportunities for minority employees.⁵ Moreover, the statute aims to make victims of discrimination whole through appropriate equitable awards.⁶ To accomplish this "make-whole" purpose, the statute directs the courts to restore plaintiffs, as best as possible, to the positions they would have occupied absent the unlawful discrimination.⁷ In 1991, Congress rein-

1. 42 U.S.C.A. § 2000e-2(a) (West 1981). Years of effort to pass regulations regarding discriminatory private employment practices culminated in the passage of Title VII of the 1964 Civil Rights Act. For a more detailed history of the 1964 Title VII, see UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964 1-11 (1968).

2. See, e.g., *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

3. The employee acquires the right to sue in federal court after an informal administrative processing by the EEOC. See *infra* note 55 and accompanying text.

4. *Albemarle*, 422 U.S. at 421; *Griggs*, 401 U.S. at 429-30.

5. *Griggs*, 401 U.S. at 430-31.

6. *Albemarle*, 422 U.S. at 421 (citing 118 CONG. REC. 7168 (1972)).

7. *Id.*

forced the established purposes of Title VII and added the new specific purpose of eradicating harassment in the workplace.⁸

B. Remedies Under Title VII

From the Act's inception, Congress has expected the courts to fashion relief consistent with the goals of Title VII to eradicate discrimination and make plaintiffs whole.⁹ Congress has twice expanded the remedy provisions of Title VII to facilitate these goals. In 1972, the Equal Employment Opportunity Act broadened the courts' power to award equitable remedies and extended coverage to public employers. In 1991, the latest Civil Rights Act added the possibility of compensatory and punitive damages.

1. 1964 Remedies

Section 706(g) of the 1964 Act permits the courts to award remedies in order to deter and eradicate discrimination.¹⁰ This section grants the federal courts power to enjoin defendants engaged in unlawful employment practices and to order appropriate affirmative relief.¹¹ Affirmative relief under the 1964 Act includes reinstatement, hiring, and injunctions with or without an award of backpay¹² and attorney's fees.¹³

8. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. The bill's sponsors initially intended to reaffirm the principles of Title VII and to overturn a number of 1989 Supreme Court decisions which narrowed the scope of Title VII. As the bill progressed through Congress, however, the Clarence Thomas confirmation hearings affected the Act's development. The focus of debate increasingly centered on sexual harassment and the lack of federal remedies for such claims. Because of the heightened public awareness of sexual harassment which developed out of the hearings, commentators regard the possible negative impact of a presidential veto on George Bush's reelection campaign as a primary inducement for the Act's passage. See Timothy D. Loudon, *The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?*, 71 *NEB. L. REV.* 304, 304-07 (1992).

9. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763-64 (1976).

10. 42 U.S.C.A. § 2000e-5(g) (West Supp. 1992).

11. *Id.*

12. Backpay is the total economic compensation the individual would have earned, subject to standard mitigation requirements, from the date the individual is denied a position or discharged to the date of a court decree awarding the position or reinstatement. Significantly, the courts have found that backpay includes the loss of fringe benefits, commissions, cost of living expenses, tips, vacation leave, and sick leave. See BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1440-41 (2d ed. 1983). In addition to the backpay remedy, courts have awarded frontpay when it is not feasible to reinstate employees to their former positions because of extreme hostility or when no position is immediately available. See *id.* at 203-04 (2d ed. Supp. 1987-1989).

13. 42 U.S.C.A. § 2000e-5(g)(1), (k) (West Supp. 1992).

2. *The 1972 Equal Employment Opportunity Act*

The 1972 Equal Employment Opportunity Act expanded the courts' power to provide equitable awards and explicitly verified the principle that the courts must attempt to make plaintiffs whole. Congress amended section 706(g) to provide not only injunctions and affirmative relief, but also "any other equitable relief as the court deems appropriate."¹⁴ Consequently, this catch-all phrase directed the courts to be more flexible in fashioning relief and to consider a wider variety of remedies.¹⁵

The Supreme Court responded to the 1972 Act by declaring that judicially limiting remedies under Title VII is permissible only if it does not frustrate the central purposes of eradicating discrimination and making persons whole for injuries suffered.¹⁶ Although the statutory language repeatedly uses the word "may,"¹⁷ the Court consistently ruled that Title VII remedies presumptively include a backpay award.¹⁸ Despite the discretion involved in awarding equitable relief, the Supreme Court held that courts must exercise their powers "in light of the large objectives of the Act."¹⁹ The grant of equitable powers in a complex legislative scheme, the Court explained, mandates that remedies fairly reflect the purposes of the statute.²⁰ Therefore, a court administering Title VII must attempt to render "complete justice"²¹ and create the most comprehensive relief possible.²² Drawing on the idea of complete justice and supported by the new language in

14. *Id.*

15. Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301, 1325-26 (1990).

16. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 771 (1976).

17. Section 706(g) reads:

[T]he court *may* enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as *may* be appropriate, which *may* include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate."

42 U.S.C.A. § 2000e-5(g)(1) (West Supp. 1992) (emphasis added).

18. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 471 (D.C. Cir. 1976) (asserting that authority for partial denial of backpay "must be as narrowly constrained as authority to totally deny; its exercise, therefore, must be supported by reasons faithful to the dual purpose attributed to the backpay remedy by the *Albemarle* court"), *cert. denied*, 434 U.S. 1086 (1978).

19. *Albemarle*, 422 U.S. at 416 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944)); *see supra* part I.A.

20. *Albemarle*, 422 U.S. at 416-17.

21. *Id.* at 418.

22. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976) (stating that Title VII requires that remedies ensure that "persons aggrieved by the consequences and effects of unlawful employment be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination") (citing the section-by-section analysis of House Report 1746

Title VII and After-Acquired Evidence

the 1972 Act, the courts became more comfortable awarding equitable relief other than backpay after the 1972 amendments. Other equitable remedies awarded include expunging personnel records,²³ granting tenure, and awarding promotions.²⁴

3. *The 1991 Amendments*

The 1991 amendments to Title VII greatly expanded the ability of the courts to make victims of discrimination whole. Section 102 of the 1991 amendments entitles plaintiffs to recover compensatory and punitive damages for intentional discrimination.²⁵ The section also grants the right to a jury trial at the request of either party if plaintiffs seek compensatory or punitive damages.²⁶ Moreover, the amendments clarify that defendants cannot avoid liability under Title VII even if a discriminatory basis is only one of several factors in an adverse employment decision.²⁷ As a result, the amendments strengthen plaintiffs' claims for relief and provide remedies for previously unrecoverable injuries. The additional remedies not only reflect the continuing congressional belief in the principles of Title VII; they also reflect the gradual development and societal commitment to the national policy against discrimination.²⁸

accompanying the *Equal Employment Opportunity Act of 1972—Conference Report*, 118 CONG. REC. 7166, 7168 (1972)).

23. *Mead v. U.S. Fidelity & Guar. Co.*, 442 F. Supp. 114 (D. Minn. 1977).

24. *See SCHLEI & GROSSMAN, supra* note 12, at 1397.

25. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1073. The additional damages provisions of Title VII appear in 42 U.S.C.A. § 1981 rather than as an amendment to Title VII.

26. *Id.*

27. *See infra* notes 43–45 and accompanying text.

28. Section 2 of the Act states that “[t]he Congress finds that—(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace; . . . (3) legislation is necessary to provide additional protections against unlawful discrimination in employment.” Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071. This language also has sparked a debate over the question of the Act’s retroactivity. The Act never conclusively resolves whether or not it has retroactive effect. Because the term “additional” may signify a substantive change in the law, employers contend that this section supports the argument that the courts apply the Act only prospectively. *See* Niall A. Paul, *The Civil Rights Act of 1991: What Does It Really Accomplish?*, 17 EMPLOYEE REL. L.J. 567, 586–88 (1992) (discussing the dilemma surrounding the effective date and application of the 1991 amendments).

The Supreme Court will rule on the issue of retroactivity in the Fall Term of 1993. The two cases are *Landgraf v. USI Film Prod.*, 968 F.2d 427 (5th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3787 (1993), and *Rivers v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 1250 (1993).

i. Compensatory and Punitive Damages

Prior to the 1991 amendments to Title VII, backpay and an occasional award of frontpay were the only monetary remedies available to victims of discrimination.²⁹ The courts regularly interpreted the statute's 1972 amendment, which provided for "any other equitable relief," as a bar to legal damages.³⁰ Thus, except for a few early cases,³¹ the courts refused to allow compensatory or punitive recovery.³²

Many critics argued that the pre-1991 restrictions on Title VII damages acted as an insufficient deterrent and failed to make victims whole.³³ Because the courts considered recovery under Title VII as exclusively equitable, plaintiffs could not receive monetary damages for non-economic injuries. For example, plaintiffs who proved discrimination in the form of a hostile work environment or harassment could receive no monetary recovery unless they could also show a job-related economic injury. Because damages for humiliation, mental distress, and other emotional or even physical aspects of harassment were limited to equitable relief, they were effectively unrecoverable. Moreover, the mitigation requirements of Title VII³⁴ further discouraged plaintiffs with legitimate grievances from taking action against liable employers. If the plaintiff immediately found a better paying job, the mandatory reduction of the possible award by interim earnings rendered the claim monetarily insignificant. The insubstantial monetary awards also failed to encourage employers to voluntarily reform their discriminatory practices.

29. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 182 n.4 (1989) (noting Title VII is limited to backpay), *superseded by* Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1072; see also *United States v. Burke*, 112 S. Ct. 1867 (1992) (noting that remedies under pre-1991 Title VII were economic in nature and therefore taxable as gross income under the Internal Revenue Code).

30. The phrase "equitable remedies" is a term of art which in modern times serves to characterize damages in order to determine whether or not a case merits a jury trial. The Seventh Amendment guarantees the right to a jury trial if an individual's legal rights are at stake, but not if only equitable damages are at stake. Thus, until 1991, Title VII claims were not tried before a jury. See, e.g., *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969) (holding that backpay was not in nature a claim for damages but an integral part of Title VII equitable remedies).

31. See, e.g., *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87, 124 (E.D. Mich. 1973), *rev'd sub nom.* *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975) (awarding punitive damages), *vacated sub nom.* *Utility Workers Union v. EEOC*, 431 U.S. 951 (1977).

32. See SCHLEI & GROSSMAN, *supra* note 12, at 1452.

33. See Kotkin, *supra* note 15, at 1306-09, 1309 n.32.

34. The courts will offset a backpay award by "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against." 42 U.S.C.A. § 2000e-5(g)(1) (West Supp. 1992).

Title VII and After-Acquired Evidence

The 1991 amendments partially eliminated these limitations. Under these new amendments, plaintiffs may recover compensatory and punitive damages for intentional discrimination.³⁵ Compensation can include damages for pain and suffering, inconvenience, mental anguish, emotional distress, and humiliation.³⁶ And, if the discrimination is sufficiently egregious, the claim may also merit punitive damages.³⁷ The 1991 amendments thereby granted the courts a greater ability to administer the dual purposes of Title VII: to eradicate discrimination in the workplace and to make victims of discrimination whole.³⁸

Suits brought under Title VII will undoubtedly multiply on account of the additional remedies. The additional remedies significantly increase the potential recovery and may encourage plaintiffs to pursue previously negligible claims.³⁹ As a result, the amendments force employers to heighten their awareness of discrimination. The amendments also create a stronger likelihood that employers will reevaluate and reform their employment practices. Furthermore, the amendments extend Title VII's ability to make victims whole. This relief is particularly pertinent to harassment victims. Because most harassment claims involve intentional discrimination but may not include economic injuries, compensation awards and punitive damages create a remedy for previously insignificant claims.⁴⁰

35. *Id.* § 1981a(a)(1).

36. *Id.* § 1981a(b)(3).

37. A plaintiff may receive punitive damages if the employer "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *Id.* § 1981a(b)(1). Although compensatory and punitive damages are still unavailable if the plaintiff cannot show intent, at least one commentator predicts that "the 'reckless indifference' standard will implicate virtually every case involving allegations of intentional discrimination." Loudon, *supra* note 8, at 311.

38. *See supra* notes 4-8 and accompanying text.

39. Commentators consider the 1991 amendments to be a significant victory for plaintiffs. In addition to the new remedies, the provision in section 102(c) of the Act which allows for a trial by jury at the request of either party when plaintiffs seek compensation or punitive damages will greatly increase the likelihood of plaintiffs' victories. *See* Loudon, *supra* note 8, at 312. Compensatory and punitive damages under section 102(b)(3) are capped at \$50,000 to \$300,000 depending on employer size. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1073.

40. The coverage will have the greatest effect in states that do not currently provide state law protection for discrimination comparable to Title VII. David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, in ALI-ABA RESOURCE MATERIALS, LABOR AND EMPLOYMENT LAW 33 (6th ed. 1992).

ii. Mixed-Motive Cases

The 1991 amendments also addressed mixed-motive cases in response to the 1989 Supreme Court decision in *Price Waterhouse v. Hopkins*.⁴¹ Mixed-motive cases are instances where both legitimate and illegitimate factors motivate an employment decision. In *Price Waterhouse*, the Supreme Court created a burden-shifting rule for mixed-motive cases. The rule required that a plaintiff first establish a discriminatory motive under Title VII.⁴² Then, if the plaintiff met the burden, the burden of proof would shift to the defendant to show by a preponderance of the evidence that it would have made the same decision in the absence of discrimination.⁴³ If the defendant carried this burden, the defendant would be absolved of liability.⁴⁴ Congress disagreed with the Court's holding that a legitimate motive for an otherwise discriminatory action could relieve a defendant from Title VII liability. It responded with the enactment of the 1991 amendments; legislatively overruling the *Price Waterhouse* burden-shifting rule in mixed-motive cases.⁴⁵

The 1991 amendments clarify that a legitimate motive, even if known by the employer at the time of the discriminatory action, will not excuse a defendant from Title VII liability. Similarly, the legitimate motive will not destroy a plaintiff's right to receive damages for discriminatory conduct. Under section 107(a), evidence showing that race, color, religion, sex, or national origin was a "motivating factor" for an adverse employment decision will conclusively establish an unlawful employment practice.⁴⁶ The courts may not weigh other motivating factors in order to justify a complete denial of Title VII recovery. At the minimum, the plaintiff is entitled to declaratory relief, injunctive relief, attorney's fees, and costs for pursuing the claim.⁴⁷

41. 490 U.S. 228 (1989).

42. *Id.* at 244.

43. *Id.* at 252-53.

44. *Id.* at 258. In *Price Waterhouse*, the Supreme Court noted that "Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations." *Id.* at 241. However, the Court held that it was not enough that an employee could prove that gender played a part in an employment decision. *Id.* at 258.

45. See Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425 (1992).

46. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075.

47. *Id.* at 1075-76.

C. The Role of the Equal Employment Opportunity Commission

In Title VII, Congress also created an administrative agency, the Equal Employment Opportunity Commission (EEOC), to promote the goals of the statute.⁴⁸ The EEOC had no enforcement powers for its first seven years and only served to process charges, conduct investigations and educational programs, and issue guidelines interpreting Title VII.⁴⁹ Although the EEOC guidelines do not have the force and effect of law,⁵⁰ the Supreme Court has held that the guidelines are generally entitled to deference as an administrative interpretation of the Act.⁵¹ In 1972, Congress transformed the EEOC into a law-enforcement agency by passing the Equal Employment Opportunity Act (EEOA).⁵² The EEOA strengthened the EEOC and empowered it to initiate litigation against violators⁵³ and intervene in private litigation⁵⁴ in order to deter discriminatory behavior.

Title VII grants the EEOC a central role in bringing justice to victims of discrimination. Before the plaintiff may file a claim in federal court, the plaintiff must file a written complaint with the EEOC and the appropriate state agencies.⁵⁵ The EEOC will investigate the charge in order to determine if there is "reasonable cause" to believe that illegal discrimination occurred.⁵⁶ If the EEOC finds reasonable cause, the agency will attempt to eliminate the discrimination through informal methods of conference, conciliation and persuasion.⁵⁷ If conciliation fails, the EEOC may bring an action in federal district court.⁵⁸ If the EEOC dismisses the charge, or fails to act within 180

48. In administering the law, the EEOC is authorized by law to "issue, amend, or rescind suitable procedural regulations to carry out the provisions of (Title VII)." 42 U.S.C.A. § 2000e-12(a) (West 1981).

49. Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 INDUS. REL. L.J. 7, 81-82 (1977).

50. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976).

51. *Albamarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971)); *cf.* *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1235 (1991) (stating that validity of guidelines depends on the thoroughness evident in their consideration, their reasoning, their consistency with earlier and later pronouncements, and all other factors which give guidelines power to persuade) (citing *General Elec.*, 429 U.S. at 141); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988) (holding that guidelines need only be reasonable to be entitled to deference).

52. Pub. L. No. 92-261, 86 Stat. 104 (1972).

53. 42 U.S.C.A. § 2000e-5(f)(1) (West 1981).

54. *Id.* § 2000e-4(g)(6).

55. *Id.* § 2000e-5(b).

56. *Id.*

57. *Id.*

58. *Id.* § 2000e-5(f)(1).

days after filing, the plaintiff has 90 days to bring a personal action in federal district court.⁵⁹

II. THREE APPROACHES TO AFTER-ACQUIRED EVIDENCE

Despite statutory attempts to eliminate employment discrimination and make plaintiffs whole through remedial awards, the federal appellate courts differ in their rules for determining the effect that after-acquired evidence will have on a plaintiff's claim for relief under Title VII. After-acquired evidence is unfavorable evidence about the employee that the employer discovers after the discriminatory act occurs. For example, if an employer discriminates against an employee because of sex and race but later discovers that the employee lied about receiving a college degree in the original employment application, proof of the lie is after-acquired evidence.⁶⁰ The majority view, which four of the five circuits follow, concludes that after-acquired evidence can bar a plaintiff's right to recovery. The minority view, on the other hand, does not permit after-acquired evidence to serve as an affirmative defense to Title VII liability. Under the minority view, the courts will allow some forms of Title VII recovery to victims of discrimination regardless of the after-acquired evidence assembled against the plaintiff. The EEOC guidelines support the minority view.

A. *The Majority View*

The majority view disregards culpable discrimination once the defendant proves that after-acquired evidence of the plaintiff's misrepresentations or misconduct would be material in either circumstances of hiring or firing.⁶¹ The majority rule reasons that if employers had known of the material evidence they would not have hired or would have terminated the plaintiff.⁶² Thus, the discrimination cannot

59. *Id.*

60. *See, e.g.,* *Bonger v. American Water Works*, 789 F. Supp. 1102 (D. Colo. 1992).

61. *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992) (granting summary judgment for defendant based on after-acquired evidence of plaintiff's driving under the influence conviction prior to employment when evidence would have resulted in immediate termination), *petition for cert. filed*, 61 U.S.L.W. 3523 (U.S. Jan. 15, 1993) (No. 92-1214); *Washington v. Lake County*, 969 F.2d 250 (7th Cir. 1992) (granting summary judgment for defendant where after-acquired evidence would have resulted in immediate termination if known to the employer); *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992) (affirming directed verdict for defendant under Michigan's Elliot-Larsen Civil Rights Act where employer relied upon plaintiff's application misrepresentation in making the hiring decision).

62. *See, e.g., Milligan-Jensen*, 975 F.2d at 304.

legally damage the plaintiff in after-acquired evidence cases.⁶³ Although the evidence does not affect the defendant's culpability, the courts allow the evidence to affect the availability of a remedy.⁶⁴ The courts reason that if the evidence materially affects the plaintiff's position as an employee, then the plaintiff no longer has the right to recover as an employee.⁶⁵ If the plaintiff has no remedy, the claim merits dismissal.

For example, in *Milligan-Jensen v. Michigan Technological University*,⁶⁶ the plaintiff was fired for filing a claim with the EEOC alleging sexual discrimination on the job. The trial court found that the employer was guilty of discrimination. The court of appeals, however, ruled that the discrimination issue became irrelevant as a result of the after-acquired evidence.⁶⁷ The court barred recovery based on evidence that the plaintiff had a driving under the influence (DUI) conviction five years prior to being hired by the defendant and that discovery of the conviction during the course of employment would have resulted in immediate termination.⁶⁸ Even though the previous DUI conviction and the subsequent discriminatory conduct were wholly unrelated, the evidence barred relief for the plaintiff and allowed the defendant to avoid penalty. The total effect of this rule, in addition to leaving many victims without a remedy, is that many defendants escape scot-free.

Courts often refer to the majority approach as the *Summers* rule because decisions following this approach frequently cite a hypothetical scenario first introduced in *Summers v. State Farm Mutual Automobile Insurance Co.*⁶⁹ The *Summers* court analogized after-acquired evidence cases to a hypothetical in which a company doctor alleges violations of Title VII due to age, race, religion, and sex.⁷⁰ If the employer discovers after the discriminatory conduct that the plaintiff was not, in fact, a doctor, then the "masquerading" plaintiff would not be entitled to relief.⁷¹

The majority approach implicitly applies the unclean hands doctrine in after-acquired evidence cases. The unclean hands doctrine is

63. *Id.*

64. *Id.*

65. *Id.*

66. 975 F.2d 303 (6th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3523 (U.S. Jan. 15, 1993) (No. 92-1214).

67. *Id.* at 305.

68. *Id.* at 303.

69. 864 F.2d 700 (10th Cir. 1988).

70. *Id.* at 708.

71. *Id.*

an affirmative defense in equity which allows courts to balance the equities and consider whether plaintiff's own conduct should bar or reduce an award.⁷² The approach of the courts applying the majority rule satisfies this definition; these courts use their equitable powers to eliminate a plaintiff's claim for relief based on the plaintiff's own dishonesty or misconduct.

B. The Minority View

The minority view refuses to permit evidence regarding the plaintiff acquired after the discriminatory act to completely eliminate recovery.⁷³ The minority approach rejects the majority rule as adverse to the purposes of Title VII.⁷⁴ A rule which allows employers to escape liability on grounds totally unrelated to the alleged discrimination does not encourage employers to eliminate discrimination.⁷⁵ The minority approach contends that the majority rule will invite employers to establish low thresholds for legitimate termination and rummage through unlawfully-discharged employees' background for damaging information.⁷⁶ Thus, the rule actually encourages employers to search through the employees' past for any evidence that would convince the court that an employee is unworthy of relief.⁷⁷ Employers can then use this damaging information to manufacture a legitimate motive for discharge.⁷⁸ More disturbing to the minority view is the possibility that employers with a proclivity towards unlawful employment practices will "sandbag" employees,⁷⁹ especially in sex discrimination cases. Consequently, the minority view concludes that after-acquired evidence should only affect the prospective remedies of reinstatement, frontpay, and injunctive relief.⁸⁰

72. DAN P. DOBBS, HANDBOOK ON THE LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION § 2.4 (1973).

73. *Wallace v. Dunn Constr. Co.*, 968 F.2d 1174 (11th Cir. 1992) (refusing to permit after-acquired evidence of material misstatements to serve as an affirmative defense to a discrimination claim).

74. *Id.* at 1180.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. "Sandbagging" occurs when an employer hires employees, despite knowledge of legitimate motives to not hire them, destroys any evidence of such knowledge, pays them less, discriminates until an employee protests, and then "discovers" the legitimate motive during the ensuing litigation. Under the majority view, the employer will escape any liability for this egregious treatment. *Id.* at 1180-81.

80. *Id.* at 1183.

C. *The EEOC Guidelines*

The EEOC guidelines issued on July 14, 1992, support the minority view.⁸¹ If the employer produces proof of a legitimate reason to terminate the employee, discovered after the discriminatory action, the EEOC suggests action similar to that taken in mixed-motive cases.⁸² The EEOC guidelines do not require the employer to reinstate the employee.⁸³ However, the employee would be entitled to receive backpay until the date that the employee's misconduct or misrepresentation was discovered and, for post-1991 employer conduct, the employee would also be entitled to compensatory damages until the date of discovery.⁸⁴ Furthermore, in after-acquired evidence cases the employer will be subject to punitive damages if the employer's conduct occurs after 1991 and the conduct was sufficiently egregious to merit recovery under section 107 of the 1991 amendments.⁸⁵ The EEOC guidelines do not allow the employer to use after-acquired evidence to eliminate any legal injury to the employee.⁸⁶

III. THE MAJORITY VIEW MISAPPLIES TITLE VII IN AFTER-ACQUIRED EVIDENCE CASES

The majority approach to after-acquired evidence misconstrues Title VII in five ways. First, the majority view does not deter or eradicate discriminatory employment practices. Second, the approach does not make the victim of discrimination whole. Third, the majority view unjustifiably applies the unclean hands doctrine. Fourth, the majority view contradicts the guidelines outlined by the EEOC. And finally, the majority approach contradicts the intent of the 1991 amendments.

A. *The Majority View Does Not Deter or Eradicate Discriminatory Employment Practices*

In contrast to the earliest stated purpose of Title VII,⁸⁷ the majority view fails to encourage employers to rectify their discriminatory behavior. The majority view permits evidence unrelated to the discrimination, discovered after the discriminatory conduct, to bar relief.⁸⁸ By denying relief to plaintiffs, courts fail to penalize employ-

81. EEOC Decision No. 915-002, 1992 WL 189088 (E.E.O.C.) (July 14, 1992).

82. See *supra* notes 45-47 and accompanying text.

83. EEOC Decision No. 915-002, *supra* note 81, at 9.

84. *Id.*

85. *Id.*

86. *Id.*

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

88. See *supra* note 61 and accompanying text.

ers for illegal conduct. Without penalties for illegal employment actions, these employers have no incentive to alter their behavior. Remedial awards force noncompliant employers to evaluate their employment practices and to eradicate discrimination.⁸⁹ Courts have long recognized that employers, in order to reject dubious employment practices, must face more than a prospect of an injunctive order.⁹⁰ An employer who may disagree with the national policy will nonetheless make appropriate accommodations if faced with economic penalties. The 1991 amendments reinforced this principle by increasing the potential financial penalties in order to deter continuing discriminatory behavior.⁹¹

B. The Majority View Does Not Make the Victim Whole

In addition to violating the first purpose of the statute, the majority rule also disregards the second principle of Title VII. The Supreme Court has clearly stated that Title VII intends to make victims of unlawful discrimination whole by returning them to the point at which they would have been, absent the discrimination.⁹² Contrary to this purpose, the majority approach places plaintiffs where they would have been if their employers had known of the after-acquired evidence prior to the discrimination. The majority approach creates a revisionist history of events that allows employers to benefit from information they did not possess at the time of their culpable conduct. This rule unfairly grants employers a windfall while plaintiffs, despite the fact that they would conceivably still be employed without their employers' discriminatory conduct, suffer disproportionately.

Allowing after-acquired evidence related only to the plaintiff's position as an employee and unrelated to the discrimination charge to nullify any relief implies that the employee must have a right to the job in order to suffer an injury. This is incorrect. Title VII does not require that an employee have a property right in the job.⁹³ Title VII forbids discrimination against "individuals," not employees.⁹⁴ This distinction is significant. The statute includes not only those actually employed, but also applicants and others whose status as a potential

89. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) (citing *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)).

90. See *id.* at 417.

91. See *supra* notes 35-39 and accompanying text.

92. See *supra* notes 6-7 and accompanying text.

93. *Washington v. Lake County*, 969 F.2d 250, 256 (7th Cir. 1992) (noting that focusing on whether the applicant would have been hired is an unjustified importation of "property right" concepts into employment discrimination law).

94. 42 U.S.C.A. § 2000e-2(a)(1)-(2) (West 1981).

Title VII and After-Acquired Evidence

employee might suffer adverse effects as a result of an employer's discriminatory action. Thus, the courts should not use after-acquired evidence unrelated to the discrimination charge to eliminate available Title VII remedies.

C. The Majority View Misapplies the Unclean Hands Doctrine to Title VII

The unclean hands doctrine also should not completely bar recovery in after-acquired evidence cases. The doctrine is inapplicable for two reasons. First, the after-acquired evidence and the discrimination are not causally related. Second, the doctrine is inapplicable when a national policy such as that embodied in Title VII overrides the particular equities between the plaintiff and the defendant.

In after-acquired evidence cases an insufficient causal nexus exists to invoke the unclean hands doctrine. The unclean hands doctrine is not a license to destroy the rights of a person whose conduct is unethical.⁹⁵ A plaintiff's inequitable conduct must be directly related to the plaintiff's claim.⁹⁶ In after-acquired evidence cases, the plaintiff asserts a claim for relief from discrimination. By definition, however, the after-acquired evidence of the plaintiff's inequitable conduct bears no relation to the discriminatory behavior. The after-acquired evidence was unknown to the employer when the discrimination occurred.⁹⁷ The plaintiff's unclean hands concededly may affect the expectation of prospective relief,⁹⁸ but the plaintiff's behavior does not directly affect the defendant's culpability.

Moreover, even if the evidence of plaintiff's misconduct is relevant to the remedy sought, public policy considerations outweigh the unclean hands defense.⁹⁹ Where private litigants serve an important function of enforcing a national policy, the courts have a duty to sustain actions by plaintiffs with unclean hands in order to effectuate the congressional purpose.¹⁰⁰ Even when a blameworthy plaintiff will

95. *DOBBS*, *supra* note 72, at 46.

96. *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 (1933).

97. *See supra* note 60 and accompanying text.

98. *See infra* part IV.C.

99. *Pan Am. Petroleum & Transp. Co. v. United States*, 273 U.S. 456, 506 (1927) (stating that unclean hands cannot be applied to "frustrate the purpose of [the] laws or to thwart public policy").

100. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138 (1968) ("We have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes."), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) (noting that where a civil action serves as a weapon of enforcement, "it is

unfairly recover a windfall, courts will disregard unclean hands in order to promote a larger policy goal.¹⁰¹ Accordingly, in after-acquired evidence cases the courts must give significant weight to the public interest behind the statute. The courts must acknowledge the important role private actions play in enforcing Title VII and deterring future discriminatory conduct.¹⁰² A plaintiff's misrepresentation or misconduct should not destroy an action for discrimination because the claim itself, aside from the plaintiff's personal ethics, enforces an important public policy.¹⁰³ It is better to remedy a wrong that is clearly labeled as contrary to public policy, than to leave two wrongs at large.¹⁰⁴

D. The Majority View Erroneously Disregards the EEOC Guidelines

In after-acquired evidence cases, the majority view clearly contradicts the EEOC guidelines. The EEOC guidelines do not allow unrelated after-acquired evidence to destroy a right to relief.¹⁰⁵ While the guidelines do not have the same effect as law, the federal courts cannot completely disregard the guidelines without enumerating grounds why deference is unwarranted.¹⁰⁶ The courts should give great deference to the guidelines because they are reasonable in light of Title VII's history and purposes and serve the practical function of disseminating uniform information.

Congress created the EEOC to promote and administer Title VII.¹⁰⁷ Congress not only gave the EEOC enforcement powers under the 1972 amendments, but it also afforded defendants a defense under Title VII

the duty of the courts to be alert" to sustain such actions in order "to make effective the congressional purpose").

101. For example, courts have allowed plaintiffs involved in anticompetitive schemes to bring antitrust claims against others despite the plaintiffs' culpable conduct. *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1186 (8th Cir. 1979); *Trebuhs Realty Co. v. News Syndicate Co.*, 107 F. Supp. 595, 598 (S.D.N.Y. 1952) (noting that the necessity of maintaining free competition overrides the particular equities which might exist between the immediate parties to the action); see also George E. Murray III, *Securities Regulation—In Pari Delicto as a Bar to Private Antifraud Action by Tippee Against Tipper*, 43 MO. L. REV. 378, 381 (1978) (arguing that in securities cases, the public policy of preserving the integrity of the market necessitates maintaining private enforcement actions even if a windfall may accrue to a culpable plaintiff).

102. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974) (recognizing the important role Congress gave private individuals in the enforcement process of Title VII).

103. *Id.* ("[T]he private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.").

104. *Tube Forgings of Am., Inc. v. Weldbend Corp.*, 788 F. Supp. 1150, 1153 (D. Or. 1992).

105. See *supra* notes 81-86 and accompanying text.

106. See *supra* note 51 and accompanying text.

107. See *supra* part I.C.

if they can show good faith reliance on an EEOC interpretation.¹⁰⁸ Consequently, the evidence demonstrates that Congress intended to grant the EEOC a central role in interpreting and administering the statute. The guidelines regarding treatment of after-acquired evidence are not inconsistent with any previous administrative ruling and they are consistent with the purposes of Title VII. If the courts do not defer to reasonable guidelines created by the EEOC, they frustrate the primary purpose for the Commission's existence.¹⁰⁹

The EEOC has the expertise necessary to more comprehensively address complex questions and determine appropriate remedies in the area of employment discrimination. The EEOC has firsthand experience administering Title VII.¹¹⁰ The EEOC is also better equipped than the courts to evaluate the complex range of issues that impact the employment community.¹¹¹ Moreover, deference to the guidelines will encourage parties to settle claims before they reach litigation, thus promoting the EEOC's goal of conciliation.¹¹² The courts should therefore defer to the guidelines in fashioning equitable relief.

The guidelines help employers and employees understand the law's requirements and ramifications. The guidelines are the highest interpretation of the law and create a clear standard to which employers should look for direction. Clear expectations create less confusion and, if accepted as controlling in the courts, will allow the EEOC to serve its statutory function more effectively. In fact, with the passage of the 1991 amendments, uncertainty regarding the amendments' effects will undoubtedly arise. Rather than wait until the courts determine what the 1991 amendments mean for the working world, the EEOC should be afforded the flexibility to create uniform guidelines which reflect changing conditions and laws.

E. The Majority View Contradicts the Intent of the 1991 Amendments

The majority view contradicts the 1991 amendments which establish congressional intent to provide relief to all proven discrimination claims under Title VII. The amendment which overruled the mixed-motive balancing test established in *Price Waterhouse* confirms that

108. 42 U.S.C.A. § 2000e-12(b) (West 1981).

109. See *supra* note 48.

110. See *supra* notes 51-59 and accompanying text.

111. See Susan K. Goplen, Note, *Judicial Deference to Administrative Agencies' Legal Interpretations After Lechmere, Inc. v. NLRB*, 68 WASH. L. REV. 207 (1993) (arguing that deference to administrative agencies should take preference over stare decisis).

112. See *supra* notes 55-57 and accompanying text.

even in instances where a legitimate motive is known to the employer at the time of the adverse action, the employee can recover if an illegal motive also was a motivating factor in the decision.¹¹³ In after-acquired evidence cases, the employment decision is motivated entirely by discrimination.¹¹⁴ The employer does not have any legitimate motives at the time of the discriminatory action. If a known legitimate basis for an adverse employment action does not eliminate remedies under Title VII, surely an unknown legitimate basis also should not eliminate remedies. Clearly, therefore, a rule which allows a legitimate motive discovered after the discrimination occurs to completely eliminate a plaintiff's claim is inconsistent with the amended statute.

IV. A PROPOSAL FOR TREATMENT OF AFTER-ACQUIRED EVIDENCE

The courts should underscore an employee's Title VII claim by treating an employer's unlawful discrimination and the after-acquired evidence as two causally and temporally distinct issues. Once a plaintiff establishes liability, the courts should always award backpay and a reasonable attorney's fee. The defendant should be required to prove that the after-acquired evidence would be material to a termination decision. Finally, such evidence should only eliminate prospective relief.

A. Courts Should Always Award Backpay for the Period Between the Discriminatory Act and the Discovery of the Material Evidence

Courts should always award backpay to successful plaintiffs in after-acquired evidence cases. A central aim of the statute is to make plaintiffs whole.¹¹⁵ Backpay forces an employer to account for wages and other benefits that employees would have otherwise earned had the discrimination not taken place.¹¹⁶ Because an employee would have been employed, absent any discrimination, until the after-acquired evi-

113. See *supra* notes 46-47 and accompanying text.

114. Mixed-motive cases are analogous to after-acquired evidence cases because both involve the weighing of legitimate and illegitimate factors in determining an amount of damages. They can be distinguished from after-acquired evidence cases, however, in that in the latter case the legitimate motive cannot have "caused" the adverse employment action because, unlike mixed-motive situations, the employer does not have any knowledge of the information at the time of the action.

115. See *supra* notes 6-7 and accompanying text.

116. See *supra* note 12 and accompanying text.

Title VII and After-Acquired Evidence

dence was eventually discovered, the backpay award should at the very least span from the point of discrimination to the point of discovery. Even if the fraud is material and the employee is unqualified for the position held, the courts should award a reasonable attorney's fee and backpay, subject to the usual offsetting and mitigation provisions, up to the time of defendant's discovery of the falsification.

Moreover, if the claim merits, the plaintiff should recover compensatory and punitive damages.¹¹⁷ Compensatory damages for non-economic injuries have no relationship to the after-acquired evidence and are necessary to make the victims whole. Punitive damages also have no relationship to the after-acquired evidence and should be awarded, not to make the victim whole, but to discourage employers from continuing their discriminatory employment practices.

B. Courts Should Place the Burden of Proof on the Defendant to Show that the Falsification Would be Material at the Time It Was Discovered

If the plaintiff proves a prima facie case of discrimination, the burden of proof should shift to the defendant to show that the after-acquired evidence is material. Evidence would be material if, in a neutral situation, it would result in the plaintiff's immediate termination. Not all evidence of misrepresentations or misconduct would compel the employer to discharge the employee. For example, situations exist where evidence of resume fraud may not merit firing the employee even though the employer may not have hired a person who committed such fraud. The employer may have invested training in the employee and the misrepresentation may be insignificant.¹¹⁸ Thus, the courts should require that employers prove that information of the kind discovered would actually affect an employee's status in non-discriminatory circumstances.

C. Material After-Acquired Evidence Should Only Affect Prospective Relief

If the evidence is not material, the employee is entitled to reinstatement or, if reinstatement is impossible, the employee should receive frontpay. However, once the employer establishes materiality, the plaintiff should not receive prospective remedies because the interest of

117. 42 U.S.C.A. § 1981a(b) (West Supp. 1992); see *supra* notes 35–37 and accompanying text.

118. See, e.g., *Washington v. Lake County*, 969 F.2d 250 (7th Cir. 1992); *O'Driscoll v. Hercules, Inc.*, 745 F. Supp. 656 (D. Utah 1990).

the employer in making lawful decisions on non-discriminatory grounds prevails over the employee's right to any prospective relief. The law should not require an employer to retain an employee who would be subject to immediate termination on non-discriminatory grounds. Title VII does not propose to force an employer to retain an unqualified worker or to force employment in the face of bona fide disqualifications.¹¹⁹ As a result, regardless of the unlawful catalyst behind the discovery of the evidence, the employer's freedom to make decisions becomes a factor in forming an equitable remedy.

Discontinuing the plaintiff's remedies from the point the employer discovered the material evidence makes the plaintiff as whole as possible without trampling the employer's right to make lawful decisions. Once the employer discovers the evidence, granting prospective remedies in cases where the employer can prove the evidence is material would render the plaintiff more than whole. Even though the employer would conceivably never have discovered the evidence without the discrimination claim, prospective remedies would force employers to retain unqualified employees. Thus, reinstatement and frontpay are inappropriate. An injunction against future discrimination may also be unsuitable since the employee would no longer work as an employee of the defendant and the discrimination may have been personal to the victim.

V. CONCLUSION

Courts should not allow evidence regarding the unrelated conduct of plaintiffs to cloud their responsibility to take action against discriminating employers. Allowing after-acquired evidence to preclude a remedy to plaintiffs under Title VII not only undermines the make-whole purpose of the Act, it fails to deter employers from continuing their discriminatory practices. The court's use of such evidence erroneously applies the unclean hands doctrine because the culpable conduct and such evidence are unrelated and the public policy behind Title VII outweighs any inequities between individual employers and employees. Congress explicitly supported this policy in the 1991 amendments by ordering recovery for victims in mixed-motive cases.¹²⁰

In order to fully effectuate Title VII, the courts should defer to the EEOC guidelines and issue appropriate forms of equitable and com-

119. *Ostapowicz v. Johnson Bronze Co.*, 369 F. Supp. 522, 533 (W.D. Pa.), *aff'd in part and vacated in part*, 541 F.2d 394 (3d Cir. 1973), *cert. denied*, 429 U.S. 1041 (1977).

120. *See supra* notes 45-47 and accompanying text.

Title VII and After-Acquired Evidence

pensatory relief. In addition, if the discrimination was sufficiently malicious, the courts should award punitive damages to discourage future discriminatory conduct. To neglect to do so effectively victimizes the plaintiff twice: once, as an employee and again, as a plaintiff denied equitable relief.