GRANT (or CVSG)

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PRELIMINARY MEMORANDUM

May 20, 1994 Conference
List 1, Sheet 2 (Page 2)

No. 93-1543-CFX

Christine McKENNON — Cert to CA6 (Kenney, Ryan, Brown [sr])

v.

NASHVILLE BANNER PUBLISHING CO. — Federal/Civil — Timely

1. *Summary*: Petr presents the same question as *Milligan-Jensen* v. *Michigan Technological University*, 92–1214 (which was granted and then dismissed when the parties settled) — does evidence of employee misconduct acquired in the course of litigation bar recovery by the employee for discriminatory discharge? There is a circuit split, and though resp attempts to argue that petr would lose under any standard, this seems incorrect. The Court has already decided that the issue is certworthy. GRANT, or CVSG w/v/t GRANT.

2. *Facts and Decisions Below*: Petr had worked for resp for 39 years, mostly as a secretary, when she was terminated in 1990 at the age of 62. About a year prior to her termination, petr's supervisor had begun to ask about her retirement plans, and had otherwise pressured her to retire. When resp fired nine people, to effect a staff reduction, petr and resp's other oldest secretary were among the nine. Two days before the termination, a 26 year old was hired as a secretary. Petr sued, alleging that she had been discharged because of her age, in violation of the Age Discrimination in Employment Act (ADEA), 29 U. S. C. §621, et seq., and the Tennessee Human Rights Act, Tenn. Code Ann. §4–21–101, et seq.

When resp deposed petr, it developed that several months before her termination, petr had taken certain documents available to her because of her job and copied them, bringing the copies home to show to her husband. The documents included proprietary information about resp's finances and personal information about a manager's employment-severance agreement. They were confidential. Upon hearing that petr had taken these documents four senior management swore out affidavits stating that they would have fired her for misconduct had they known of the incident.

The dct (Higgins, M.D. Tenn.) granted summary judgment for resp. (797 F. Supp. 604: Petr contends that her copying and removal of the documents were justified because she felt her job was being unfairly threatened. She argues that this question should be left to the jury. This contention is not material to resolution of this case. Rather, the ct finds that what is material is the undisputed fact that petr's

copying and removal of confidential documents constituted misconduct, and was in violation of her obligations as a confidential secretary to resp's Comptroller.

Resp argues that it is entitled to summary judgment on the basis of the after-acquired evidence doctrine. This doctrine was first set out in *Summers* v. *State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (CA10 1988), and was adopted by CA6 in *Johnson* v. *Honeywell Info. Sys., Inc.*, 955 F.2d 409 (1992). In *Summers*, plaintiff alleged he'd been wrongfully discharged due to his age and religious beliefs. In preparing for trial, deft employer discovered that plaintiff had falsified over 150 records while he was a claims representative. CA10 held that this after-acquired evidence, while not relevant to determining why plaintiff was discharged, *was* relevant in deciding what relief was available to plaintiff. In *Johnson*, the plaintiff made false statements on her resume when she applied for the job. The job description specified that candidates needed a college degree, and it turned out that plaintiff did not have one. CA6 held that this evidence was material to the plaintiff's claim of "injury." (In a case much like this one, the surreptitious copying of a personnel file, was held misconduct that justified summary judgment in a age-discrimination case. *O'Day* v. *McDonnell Douglas Helicopter Co.*, 784 F.Supp. 1466 (D.Ariz. 1992).)

In order to rely on the after-acquired evidence doctrine, resp must prove that had it known of petr's misconduct, it would have discharged her. The after-acquired evidence must establish valid and legitimate reasons for the termination of employment. These criteria are met in this case — petr's misconduct provides adequate and just cause for her dismissal as a matter of law, and petr has brought

forth no evidence tending to prove that resp would have continued her employment had it learned of her misconduct prior to her termination.

Petr attempts to distinguish *Johnson* on the grounds that a nexus exists between her claim of age discrimination and her misconduct. But this is irrelevant. Even if the misconduct is related to a discrimination claim, if a plaintiff has engaged in misconduct severe enough to warrant termination upon discovery by her employer, that plaintiff has no grounds that justify recovery for her termination. Petr's does not claim that her misconduct falls under the ADEA's "opposition clause" ("It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.").

CA6 affirmed (Brown +2): Resp's summary judgment motion assumed, for the purposes of the motion, that petr had been a victim of age discrimination. The case proceeds on this assumption. Resp seeks to avoid liability, nonetheless, on the bases of petr's conceded misconduct, which it found out about during discovery. Petr attempts to distinguish her case from our earlier after-acquired evidence cases, *Honeywell* and *Milligan-Jensen* v. *Michigan Technological Univ.*, 975 F.2d 302 (CA6 1992), cert. granted, 113 S.Ct. 2991, cert dismissed [under Rule 46], 114 S.Ct. 22 (1993); she argues that the doctrine should not apply where the misconduct is not resume fraud, or where a nexus exists between the misconduct and the discrimination claim. **(FN4**: As we understand petr's "nexus" argument, it is that her misconduct

cannot be the basis for a denial of her ADEA claim because she took the records to give her a basis to contest her expected discriminatory discharge.)

In *Johnson* and in *Milligan-Jensen*, we firmly endorsed the principle that after-acquired evidence is a complete bar to any recovery by the former employee where the employer can show it would have fired the employee on the basis of the evidence. See also *Paglio* v. *Chagrin Valley Hunt Club Corp.*, 966 F.2d 1453 (CA6 1992) (unpublished); *Dotson* v. *United States Postal Service*, 977 F.2d 976, 978, cert. denied, 113 S.Ct. 263 (1992) (No. 92–5347). The case from which we got the after-acquired evidence rule, *Summers* v. *State Farm Mut. Ins. Co.*, was not about resume fraud but workplace misconduct. We hold that both types of misconduct are subject to the after-acquired evidence rule.

We see no reason why any alleged "nexus" between misconduct and a discrimination claim should be relevant. **(FN7**: Of course, if the employee's "misconduct" falls into the category of protected activities set forth in the 'opposition clause' to the ADEA, 29 U. S. C. §623(d), the employer could not avoid liability based on the conduct. But copying and removing confidential documents is clearly not protected conduct.)

3. *Contentions*: Petr: This case presents precisely the same issue on which the Ct granted cert in *Milligan-Jensen* v. *Michigan Technological Univ.* Cert was dismissed in that case solely because the parties reached a settlement. **(FN6**: The instant case presents facts that are arguably more compelling than *Milligan-Jensen*. First, here the employee's misconduct was caused by the discrimination and petr's

efforts to protect herself from it. Second, *Milligan-Jensen* involved application fraud. The employer argued that the employee was not qualified for the job and would never have been hired under neutral and objective criteria. Here, a qualified employee had worked for nearly 40 years, and was uniformly evaluated as an excellent secretary. Yet the employer was allowed by CA6 to avoid liability by essentially a discretionary, post-litigation decision to terminate.)

The question presented in *Milligan* remains a recurrent and vitally important one, about which the circuits are irreconcilably in conflict. CA6 and CA10 have held that after-acquired evidence can absolve an employer of any liability for discriminatory practices. *Summers* (CA10); *Milligan-Jensen* (CA6). CA11, on the other hand, has held that an employer is liable under the same circumstances. *Wallace* v. *Dunn Construction Co.*, 968 F.2d 1174 (1992). In *Wallace* expressly rejected the CA10 *Summers* rule, and held that an employer can escape a finding of liability only by showing that it relied on the nondiscriminatory reason at the time of the employment decision. The evidence could, however, limit the remedy — reinstatement may be precluded, and back pay available only up till the date that the employer demonstrates that the new evidence would have been discovered in the absence of the litigation. CA7 has taken an intermediate position; there, newly discovered evidence that shows that the employee had made misrepresentations on his or her employment application will not defeat liability unless the misrepresentation is related to a critical job element. In addition, an award of back pay is cut off as of the date the evidence is *actually* discovered. *Kristufek* v.

Hussmann Foodservice Co., 985 F.2d 364, 369–370 (CA7 1993). (fn 10: the issue is currently pending in CA4 in *Russell* v. *Microdyne Corp.* 830 F. Supp. 305 (ED Va 1993), appeal pending Nos. 93–1895 & 93–2078, and in CA9 in *O'Day* v. *McDonnell Douglas Helicopter Co.*, 784 F.Supp. 1466 (D.Ariz. 1992), appeal pending No. 92–15625. DCts in CA5 have adopted the no recovery rule of CA6 and CA10. DCts in CA2 and CA3 have rejected *Summers* and have followed *Wallace*. See, e.g., *Moodie* v. *Federal Reserve Bank of New York*, 831 F. Supp. 333 (SDNY 1993); *Massey* v. *Trump's Castle Hotel & Casino*, 828 F. Supp. 314 (DNJ 1993).)

As the US and the EEOC pointed out in their brief in support of the petn for cert in *Milligan-Jensen*, there has been a proliferation of cases in which employers offer after-acquired evidence to defend their discriminatory actions; the defense has "broadly destructive impact . . . on nondiscrimination goals." Brief for U.S. in Support of Petn No. 92–1214, p. 11. This impact is especially significant because of the way the defense works. Had resp discovered petr's allegedly wrongful conduct prior to her discharge, and fired her, her ADEA claim, with an allegation that the proffered justification was pretextual, would have gotten to a jury. In the typical "after-acquired evidence" case, however, the employer can avoid the jury and obtain summary judgment with self-serving affidavits supporting a post-litigation termination. This result subverts this Ct's decision in *Texas Dept. of Community Affairs* v. *Burdine*, 450248 (1982), which depends on plaintiffs having "a full and fair opportunity to demonstrate pretext." CA11 was right in *Wallace*. After-acquired evidence cannot absolve an employer of illegal discriminatory action, although it may

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affect the remedy. This rule would be consistent with *Price Waterhouse*, and with §107 of the Civil Rights Act of 1991, which provides that if a reason for an employment decision violates Title VII, then there is liability under the statute; only the remedy is affected by another, permissible, basis for the decision.

In addition, the importance of the issue is demonstrated by the Ct's recent decision in *ABF Freight System, Inc.* v. *NLRB*, 510 U. S. ___ (1994) (upholding NLRB's discretion to grant full relief for a violation of the NLRA, even if the employee lied in the course of the dispute proceeding).

Brief Amicus of the Amer. Assoc. of Retired Persons, et al.: The CA cases on point are most easily divided into two groups — CA6 and CA10 hold that after-acquired evidence can provide a "complete bar" to liability for discrimination. CA11 has held that after-acquired evidence is not a complete bar. Rather, the ct uses a two-step approach, where after-acquired evidence is used only to determine the scope of the remedy available. (**FN3**: at least three circuits have indirectly weighed in on this issue without much explanation. In *Smallwood* v. *United Air Lines*, 728 F.2d 614 (CA4), cert. denied, 469 U. S. 832 (1984), CA4 adopted a modified complete bar rule in cases where the misconduct would have prompted the employer to make the same employment decision as the one at issue. [I'm not sure what's "modified" about this rule]. In *Lloyd* v. *Georgia Gulf Corp.*, 961 F.2d 1190 (CA5 1992) (age discrimination under state law), CA5 affirmed the dct's refusal at trial to admit after-acquired evidence. This opinion implicitly places CA5 on the "no complete bar" side. Conflicting CA7 opinions exist on the issue as well. See *Washington* v. *Lake County,*

Ill., 969 F.2d 250, 255 (1992) (affirming summary judgment for employer in Title VII termination case where resume fraud was such that plaintiff would have been fired earlier had employer known the truth); *Smith* v. *General Scanning, Inc.* 876 F.2d 1315 (1989) (resume fraud does not preclude ADEA plaintiff from establishing *prima facie* case, but summary judgment for employer is proper on other grounds).)

In addition, courts disagree as to whether there is a difference between resume fraud and workplace misconduct. [Citing dct cases]. And when plaintiffs are deemed eligible for back pay, cts disagree as to the time period for which recovery is available. Some calculate back pay until the after-acquired evidence is acquired. *Kristufek* v. *Hussmann Foodservice Co.*, 985 F.2d 364, 371 (CA7 1993). Others allow back pay to accumulate until the date of judgment. *Wallace*, 968 F.2d, at 1182.

The Court should grant cert (as it did in *Milligan-Jensen*, and hold that after acquired evidence does not affect liability for discrimination, but merely the remedy.

Resp: This Ct should not grant cert because under the facts of this case, petr is not entitled to any relief in any circuit that has considered the question of after-acquired evidence. In each circuit that has examined this issue, the "after-acquired evidence rule" comes into play only where the employee's wrongdoing is of the magnitude that there would be just and proper cause for termination, and only where the evidence is undisputed that the employer would in fact have discharged the employee. CA6, CA10, and CA7 in *Washington* v. *Lake County, Ill*, have held that serious misconduct bars *any* remedy. CA11 and CA7 in *Kristufek* v. *Hussmann Foodservice Co.*, have held that backpay may be available to some extent.

But even under the CA11/*Kristufek* rule, petr would lose. In *Kristufek*, CA7 held that an employee can recover back pay only where the after-acquired evidence involved a non-critical, non-fundamental job requirement, and the employer did not adequately show that the employee *would* have been fired, not merely that the employee *might* have been fired. *Wallace*, in CA11, would also not help petr. Rather the ct there acknowledged that wrongdoing can limit the relief available. The examples, in *Wallace*, of situations in which backpay might be appropriate are not similar to this case.

This Ct's decision in *ABF* is not on point.

Further, petr's claim of a "nexus" between her misconduct and resp's alleged discrimination is irrelevant.

There is no evidence that the four affidavits produced by resp, each stating that petr would have been fired had resp discovered her misconduct before she was discharged, were pretextual.

§107 of the Civil Rights Act of 1991 is inapplicable both because this is an ADEA case, and because the termination occurred and the lawsuit was filed prior to the effective date of the Act.

Finally, the EEOC's litigating position in *Milligan-Jensen* is not relevant. The EEOC had issued instructions to its staff that CA10's rule, in *Summers*, was to be followed. See Policy Guidance on Recent Developments in Disparate Treatment Theory, N-915.063, EEOC Compl. Man (BNA) N: 2119 at 2132–33, and n. 17.

4. *Discussion*: As the SG argued (and the Court apparently accepted) in *Milligan-Jensen*, there is, in fact, a circuit split. I think that it is squarely presented. Certainly in CA11 and probably in CA7 (under that ct's most recent case, *Kristufek*) petr would be able to recover back pay. In CA7, the period of the award would be limited to the time between discharge and resp's actual discovery of the relevant misconduct. In CA11, the period would be greater — it would encompass the time between discharge and whenever resp *would have* discovered the misconduct, in the absence of litigation (presumably, this is never).

The issue, as the Court has already decided, seems important enough to merit plenary review. It seems unproblematic for such review to occur in the context of an ADEA claim, rather than a Title VII case. This case has proceeded on the assumption that the discharge was discriminatory, so that the after-acquired evidence question is cleanly presented. If the Court is concerned about possible vehicle problems, however, it might call for the Solicitor General's views. I gather that the EEOC filed an amicus brief before CA6, so the Commission shoud be well informed about this case.

5. *Recommendation*: GRANT, or CVSG with view to grant.

There is a response.

May 11, 1994 Margo Schlanger 9 F.3d 539

(RBG, Yale)

GRANT (or CVSG)

PO 5/14/94