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# Unpacking the Employee-Misconduct Defense

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## ARTICLES

### UNPACKING THE EMPLOYEE-MISCONDUCT DEFENSE

Sachin S. Pandya\*

#### ABSTRACT

When a worker sues an employer, the employer sometimes learns thereafter that the worker had committed some misconduct at the time of hire or while on the job. In those cases, most American work laws provide the employer with a defense that precludes employer liability, or at least limits remedies, if the employer shows that, had it known of the worker's misconduct at the time of its allegedly wrongful act, it would have fired the worker because of that misconduct. This Article evaluates the prevailing arguments for and against the employee-misconduct defense as it appears in the National Labor Relations Act, federal and state employment discrimination and retaliation statutes, state contract and tort law, as well as state workers' compensation statutes. It finds that virtually all of these arguments (both for and against) are incomplete, incoherent, or rely on unverified empirical premises. This finding implies that, though pervasive, virtually no sound reason currently exists for adopting the defense or (apart from *stare decisis*) continuing to apply it.

#### INTRODUCTION

A worker sues an employer for an illegal firing or refusal to hire. The employer discovers *after* its alleged illegal act that, when hired or while on the job, the worker had committed some kind of misconduct. He had lied on his résumé about his prior education or criminal record. She had stolen

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office supplies or company trade secrets. He had smoked marijuana or taken some other illicit drug. Cases like these raise this question: what if the employer had discovered this worker misconduct *before* the employer's allegedly illegal act, such as an illegal firing? If so, would that employer have fired the worker solely because of that worker's misconduct, and could it have done so lawfully?

Under many American work laws, employers who prove this counterfactual enjoy an affirmative defense. This defense defeats employer liability in the worker's suit, or at least precludes certain remedies: reinstatement and front pay, as well as any back pay otherwise owed for the time after the employer in fact discovered the employee's misconduct. This defense *pervades* American work law. It appears in the National Labor Relations Act, most federal and state employment discrimination statutes, some state contract and tort law, and many state workers' compensation statutes. Legal commentary has largely focused on such a defense in federal employment discrimination law.<sup>1</sup>

This Article examines the set of prevailing arguments for and against the current forms of this employee-misconduct defense. It finds that these arguments, both for *and* against, are remarkably incomplete, incoherent, or rely on unverified empirical premises. This finding is startling and perhaps counterintuitive. Usually, difficult value tradeoffs underlie debates about work law rules. In contrast, the employee-misconduct defense lacks what every legal rule needs for legitimacy: a coherent justification.

This Article thus challenges the legitimacy of every (actual or potential) work law claim outcome (including settlement) that the defense has or will adversely affect. It shows that virtually no sound reason currently exists for adopting the defense, because the defense, in its current forms, contravenes the restorative (make-whole) purposes of the work laws into which it has been read. And where it has already been adopted, this Article implies that there is virtually no sound reason for continuing to

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1. E.g., Robert Brookins, *Policy Is the Lodestar When Two Wrongs Collide: After-Acquired Evidence Under the Age Discrimination in Employment Act*, 72 N.D. L. REV. 197 (1996); William R. Corbett, *The "Fall" of Summers, The Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from McKennon and Hicks*, 30 GA. L. REV. 305, 369-71 (1996); Melissa Hart, *Retaliatory Litigation Tactics: The Chilling Effects of "After-Acquired Evidence"*, 40 ARIZ. ST. L.J. 401 (2008); Kenneth A. Sprang, *After-Acquired Evidence: Tonic for an Employer's Cognitive Dissonance*, 60 MO. L. REV. 89 (1995); Jenny B. Wahl, *Protecting the Wolf in Sheep's Clothing: Perverse Consequences of the McKennon Rule*, 32 AKRON L. REV. 577 (1999); Rebecca Hanner White & Robert D. Brussack, *The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation*, 35 B.C. L. REV. 49 (1993). For a broader but outdated survey, see Mitchell H. Rubinstein, *The Use of Pre-discharge Misconduct Discovered After an Employees' Termination as a Defense in Employment Litigation*, 24 SUFFOLK U. L. REV. 1 (1990).

apply the employee-misconduct defense, except for the thin reed of *stare decisis*.

The Article proceeds as follows. Part I shows how the defense has been adopted into American work law. The rest of the Article evaluates prevailing justifications for and against the defense. Part II shows how the defense poorly compensates, and sometimes overcompensates, the employer for losses suffered because of employee misconduct. Part III shows that little evidence supports the premises of deterrence rationales for the defense.

Part IV focuses on the defense variant that only precludes particular remedies: reinstatement, front pay, and full back pay. There, the Article presents an alternative yet abandoned version of the defense that also precludes those remedies, but only if the employer shows that, absent its wrongful act, it still would have *discovered* the employee's misconduct when it did *and* would have fired him or her solely because of that misconduct. The current defense does not require a would-have-discovered showing. Thus, the current defense contravenes the restorative (make-whole) purposes of the laws under which it arises.

Part V shows how some justifications for the defense largely turn on errors about how a court's legal authority to order reinstatement, front pay, and back pay interacts with an employer's legal authority to fire an employee for misconduct.

Part VI discusses rationales for an employee-misconduct defense to liability based on certain contract law principles—material breach and fraudulent inducement—as well as the doctrine of unclean hands. These rationales are incomplete, because they do not justify those features of the defense that depart from what each state's material-breach, fraudulent-inducement, or unclean-hands doctrines generally require.

Part VII considers two justifications for the defense as it appears in state workers' compensation statutes: fighting fraud and the equal opportunity goals of state second-injury funds.

Part VIII examines the main objection to an employee-misconduct defense, that is, that it uniquely reduces attorney selection of, or the settlement price for, otherwise meritorious cases. The Conclusion summarizes and points to the limits of this Article.

## I. THE DEFENSE ACROSS AMERICAN WORK LAW

This Part describes the employee-misconduct defense as it appears in the National Labor Relations Act, federal and state employment discrimination statutes, state contract and tort law, and state workers' compensation statutes.

### A. *National Labor Relations Act*

The National Labor Relations Board (NLRB) has adopted the employee-misconduct defense when deciding appropriate relief for unfair labor practices under the National Labor Relations Act (NLRA). Section 10(c) of the NLRA, as codified, authorizes the Board “to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter,” except for orders of reinstatement or back pay to employees “suspended or discharged for cause.”<sup>2</sup>

Since at least *John Cuneo, Inc.* (1990),<sup>3</sup> the NLRB has endorsed an employee-misconduct defense that limits back pay and precludes reinstatement.<sup>4</sup> In *John Cuneo*, the employee, fired in violation of the NLRA, made false statements on his employment application. The administrative law judge found that, had it known of this misconduct, the employer would never have hired him. The NLRB concluded that this finding justified ending the back pay period on “the date [the employer] acquired knowledge of [the employee’s] misconduct.”<sup>5</sup> This approach, the Board wrote, balanced the Board’s duty to remedy the NLRA violation “against the public interest in not condoning [the employee’s] falsification of his employment application.”<sup>6</sup> In contrast, granting reinstatement and full back pay would be “an undue windfall” to the employee, while rejecting any back pay liability “would provide an undue windfall for the [employer].”<sup>7</sup>

### B. *Employment Discrimination and Retaliation Statutes*

Since the U.S. Supreme Court decided *McKennon v. Nashville Banner Publishing Co.* (1995),<sup>8</sup> most courts have read employment discrimination statutes, as well as some retaliation statutes, to limit the remedies available

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2. 29 U.S.C. § 160(c) (2006).

3. 298 N.L.R.B. 856 (1990). For antecedents, see Rubinstein, *supra* note 1, at 6–12.

4. First Transit, Inc., 350 N.L.R.B. 825, 829 (2007); Frontier Tel. of Rochester, Inc., 344 N.L.R.B. 1270, 1277 (2005); *In re Aldworth Co., Inc.*, 338 N.L.R.B. 137, 147 (2002); Marshall Durbin Poultry Co., 310 N.L.R.B. 68, 70 (1993), *aff’d in relevant part*, 39 F.3d 1312 (5th Cir. 1994); *see also* Mohave Elec. Coop., Inc. v. N.L.R.B., 206 F.3d 1183 (D.C. Cir. 2000); N.L.R.B. v. Smucker Co., 130 F. App’x 596, 601 (3d Cir. 2005). *But see* Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137 (2002) (stating that any NLRA back pay award to undocumented workers contravenes goals of Immigration Reform and Control Act of 1986).

5. *John Cuneo, Inc.*, 298 N.L.R.B. at 856.

6. *Id.*

7. *Id.*

8. 513 U.S. 352 (1995).

to the plaintiff-employee if the employer-defendant can show that, had the employer known of the employee's misconduct at the time of the employer's adverse act, it would have fired the employee because of that misconduct.

*McKennon* concerned a worker's suit against her former employer for firing her because of her age in violation of the Age Discrimination in Employment Act (ADEA).<sup>9</sup> Section 7(b) of the ADEA, as codified, authorizes courts to "grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter."<sup>10</sup> During a deposition in this suit, the plaintiff testified that she had taken and copied confidential company documents. On appeal, the Court presumed that the employer had fired the plaintiff only because of her age, and that her misconduct—copying the confidential documents—was "so grave that [her] immediate discharge would have followed its disclosure in any event."<sup>11</sup>

The Court then asserted that whereas such a would-have-fired showing was not a defense to ADEA liability, section 7(b) of the ADEA did require taking "due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing."<sup>12</sup> Accordingly, the employer could use evidence of employee misconduct as a defense to certain remedies: "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."<sup>13</sup> Given this requisite showing "here, and as a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy."<sup>14</sup> Moreover, the Court barred back pay otherwise due after the date the employer discovered the information about the employee misconduct. The trial judge could then further adjust the back pay award by "taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party."<sup>15</sup>

Since the U.S. Supreme Court decided *McKennon*, most courts have followed *McKennon*'s approach for other federal anti-discrimination statutes<sup>16</sup> and some state employment discrimination statutes.<sup>17</sup> Courts

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9. *Id.* at 354–55.

10. 29 U.S.C. § 626(b) (2006).

11. *McKennon*, 513 U.S. at 356.

12. *Id.* at 361.

13. *Id.* at 362–63.

14. *Id.* at 361–62.

15. *Id.* at 362.

16. *E.g.*, Crapp v. City of Miami Beach, 242 F.3d 1017, 1021 (11th Cir. 2001) (Title

have also followed the *McKennon* approach for claims against employers under statutes that prohibit employers from retaliating against workers for filing or supporting the filing of claims under employment discrimination statutes<sup>18</sup> or workers' compensation statutes.<sup>19</sup> Like *McKennon*, the underlying statutes in all of these cases have no express provision authorizing this defense. Yet, courts recognize the defense nonetheless, largely by assuming that *McKennon* applies, expressly relying on the reasoning in *McKennon*, and sometimes emphasizing the similarities in purpose or text between the statutes discussed in *McKennon* and the statute at issue.

Although the *McKennon* Court expressly refused to rely on an unclean hands defense to preclude ADEA liability,<sup>20</sup> some California courts have recognized unclean hands as a defense to statutory discrimination liability in certain kinds of cases. In *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995),<sup>21</sup> one of the plaintiffs brought a claim for wrongful discharge under the California Fair Employment and Housing Act, but had not revealed a prior felony conviction on his job application. The employer's contract with a federal government agency required it to periodically certify that none of its employees had a felony conviction. Departing from *McKennon*, a California appellate court relied on the doctrine of unclean hands to conclude that "the equities compel" no employer liability for the wrongful

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VII); *Miller v. AT&T Corp.*, 250 F.3d 820, 837 (4th Cir. 2001) (Family and Medical Leave Act); *Wallace v. Dunn Constr. Co.*, 62 F.3d 374, 378 (11th Cir. 1995) (Title VII and the Equal Pay Act); *Hunter v. Ark Rests. Corp.*, 3 F. Supp. 2d 9, 15 (D.D.C. 1998) (42 U.S.C. § 1981); E.E.O.C. Enforcement Guidance, No. 915.002, 1995 WL 1789069, at \*1 n.1 (Dec. 14, 1995) ("The principles applied by the McKennon Court are applicable to charges brought under Title VII . . . and the Americans with Disabilities Act of 1990 . . . .") (citations omitted).

17. *E.g.*, *Brown Distrib. Co. v. Marcell*, 890 So. 2d 1227, 1231–32 (Fla. Dist. Ct. App. 2005); *Toyota Motor Mfg. U.S.A., Inc. v. Epperson*, 945 S.W.2d 413, 416 (Ky. 1996); *Smith v. Charter Twp. of Union*, 575 N.W.2d 290, 293 (Mich. Ct. App. 1997); *Wright v. Rest. Concept Mgmt.*, 532 N.W.2d 889, 893 (Mich. Ct. App. 1995); *Meads v. Best Oil Co.*, 725 N.W.2d 538, 545–46 (Minn. Ct. App. 2006); *Cicchetti v. Morris Cnty. Sheriff's Office*, 947 A.2d 626, 642–43 (N.J. 2008); *McCarthy v. Pall Corp.*, 625 N.Y.S.2d 296, 296 (N.Y. App. Div. 1995); *Johnson v. Bd. of Trs. of Durham Technical Cmty. Coll.*, 577 S.E.2d 670, 675–76 (N.C. Ct. App. 2003); *Norwood v. Litwin Eng'rs & Constructors*, 962 S.W.2d 220, 223 (Tex. App. 1998); *Janson v. N. Valley Hosp.*, 971 P.2d 67, 71 (Wash. Ct. App. 1999); *Barlow v. Hester Indus.*, 479 S.E.2d 628, 643 (W. Va. 1996).

18. *E.g.*, *Walters v. U.S. Gypsum Co.*, 537 N.W.2d 708, 711 (Iowa 1995); *see also* *Baber v. Greenville Cnty.*, 488 S.E.2d 314, 320–21 (S.C. 1997) (state whistleblower act); *Appeal of N.H. Dep't of Emp't Sec.*, 672 A.2d 697, 703–04 (N.H. 1996) (same).

19. *Trico Techs. Corp. v. Montiel*, 949 S.W.2d 308, 312 (Tex. 1997); *Beaulieu of Am., Inc. v. Kilgore*, 680 So. 2d 288, 295 (Ala. Civ. App. 1996); *see also* *Mosley v. Truckstops Corp. of Am.*, 891 P.2d 577, 582–84 (Okla. 1994).

20. *McKennon*, 513 U.S. at 360.

21. 35 Cal. App. 4th 620 (Cal. Ct. App. 1995).

termination “where an employee who is disqualified from employment by government-imposed requirements nevertheless obtains a job by misrepresenting the pertinent qualifications.”<sup>22</sup>

### C. *State Contract and Tort Law*

Some state courts have justified an employee-misconduct defense to contract liability by relying upon two principles under state contract law: the material failure of a contract party to perform a contractual duty<sup>23</sup> and, for cases where the worker makes false statements on a résumé or job application, the fraudulent-inducement defense.<sup>24</sup> A few other state courts have also adopted an employee-misconduct defense to contract liability for wrongful discharge, albeit on more opaque grounds.<sup>25</sup> Moreover, in states recognizing a common law tort claim for wrongful discharge in violation of public policy, a few courts have recognized the employee-misconduct defense, most following *McKennon* and precluding reinstatement, front pay, and full back pay.<sup>26</sup>

### D. *Workers' Compensation Law*

In workers' compensation law, legislatures and courts have adopted employer defenses based on false statements by an employee at the time of hire that concerned a prior medical condition.

First, some state workers' compensation statutes preclude benefits for injury if, at the time of “entering into employment,” the employee had misrepresented that he had been disabled, laid off, or compensated because

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22. *Id.* at 638; *see also* *Murillo v. Rite Stuff Foods, Inc.*, 65 Cal. App. 4th 833, 845 (Cal. Ct. App. 1998) (discussing discrimination claim in *Camp*).

23. *O'Day v. McDonnell Douglas Helicopter Co.*, 959 P.2d 792, 795–96 (Ariz. 1998); *accord* *Loftis v. Key Energy Servs., Inc.*, No. 07-2871, 2008 WL 2609918, at \*3 (E.D. Pa. June 26, 2008) (Pennsylvania law); *Dobinsky v. Crompton & Knowles Colors Inc.*, No. 3:02CV1291, 2004 WL 2303686, at \*4–7 (M.D. Pa. Mar. 30, 2004) (same); *Teter v. Republic Parking Sys., Inc.*, 181 S.W.3d 330, 340 (Tenn. 2005); *see also* *McDill v. Environamics Corp.*, 757 A.2d 162, 166 (N.H. 2000) (quoting *O'Day*).

24. *Crawford Rehab. Servs., Inc. v. Weissman*, 938 P.2d 540, 547–48 (Colo. 1997); *see McDill*, 757 A.2d at 166 (following *Crawford*); *see also* *Crawford*, 938 P.2d at 548 (referring to unclean hands doctrine to reject promissory estoppel claim).

25. *Lewis v. Fisher Serv. Co.*, 495 S.E.2d 440, 444–45 (S.C. 1998); *Gassmann v. Evangelical Lutheran Good Samaritan Soc., Inc.*, 933 P.2d 743, 746–47 (Kan. 1997); *Schuessler v. Benchmark Mktg. & Consulting, Inc.*, 500 N.W.2d 529, 541 (Neb. 1993).

26. *O'Day*, 959 P.2d at 798; *Silver v. CPC-Sherwood Manor, Inc.*, 151 P.3d 127, 131 (Okla. 2006); *Riddle v. Wal-Mart Stores, Inc.*, 998 P.2d 114, 120 (Kan. Ct. App. 2000) (tort of retaliatory discharge); *Teter*, 181 S.W.3d at 340 n.2; *McDill*, 757 A.2d at 166. *But cf. Camp*, 35 Cal. App. 4th at 638 (barring employer liability under unclean hands doctrine for tort claims of wrongful discharge under California law).



of an “occupational disease” (such as silicosis or asbestosis) that caused the condition for which the worker now seeks benefits.<sup>27</sup> Workers’ compensation coverage for occupational diseases stems largely from legislative lobbying starting in the 1930s to remove from civil courts tort suits against employers for silicosis exposure.<sup>28</sup>

Second, some states have adopted by statute<sup>29</sup> or court decision<sup>30</sup> a general defense to workers’ compensation liability for false statements on a job application. This false-statement defense resembles the following formulation in contemporaneous editions of the Larson workers’ compensation treatise:

The following factors must be present before a false statement at the time of hiring will bar benefits: (1) The employee must have knowingly and wilfully made a false representation as to his or her physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the

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27. ARIZ. REV. STAT. ANN. § 23-901.04(B) (2012); ARK. CODE ANN. § 11-9-601(b) (West 2012); DEL. CODE ANN. tit. 19, § 2301(20)(b) (2012); FLA. STAT. ANN. § 440.151(b) (West 2012); GA. CODE ANN. § 34-9-291 (2011); IDAHO CODE ANN. § 72-441 (2012); IOWA CODE § 85A.7(1) (2012); KY. REV. STAT. ANN. § 342.316(7) (West 2012); ME. REV. STAT. ANN. tit. 39-A, § 604 (2011); MD. CODE ANN., LAB & EMPL. § 9-502(e) (West 2012); *see* MICH. COMP. LAWS ANN. § 418.431 (West 2012) (“previously suffered from”); NEV. REV. STAT. ANN. § 617.460(3) (LexisNexis 2012) (“Nothing in this chapter entitles an employee . . . to compensation . . . for disability or death because of silicosis or a disease related to asbestos in the event of the failure or omission on the part of the employee truthfully to state, when seeking employment, the place, duration and nature of previous employment in answer to an inquiry made by the employer.”); N.C. GEN. STAT. § 97-52 (2012) (“disabled or laid off because of asbestosis or silicosis”); R.I. GEN. LAWS § 28-34-7 (2012) (“previously had”); S.C. CODE ANN. § 42-11-80 (2011) (“previously suffered from”); *cf.* ALA. CODE § 25-5-115 (2012) (“wilfully and falsely represented himself in writing to such employer as not having previously been compensated in damages, or under this article, because of occupational disease”).

28. DAVID ROSNER & GERALD MARKOWITZ, *DEADLY DUST: SILICOSIS AND THE POLITICS OF OCCUPATIONAL DISEASE IN TWENTIETH-CENTURY AMERICA* 78–86 (1991).

29. ALA. CODE § 25-5-51 (2012); ALASKA STAT. § 23.30.022 (2012); KY. REV. STAT. ANN. § 342.165(2) (West 2012); LA. REV. STAT. ANN. § 23:1208.1 (2012); MASS. GEN. LAWS ANN. ch. 152, § 27A (West 2012); N.M. STAT. ANN. § 52-1-28.3 (West 2012); S.D. CODIFIED LAWS § 62-4-46 (2012).

30. *Shippers Transp. of Ga. v. Stepp*, 578 S.W.2d 232, 233–34 (Ark. 1979); *Air Mod Corp. v. Newton*, 215 A.2d 434, 439 (Del. 1965); *Martin Co. v. Carpenter*, 132 So. 2d 400, 406 (Fla. 1961); *Ga. Elec. Co. v. Rycroft*, 378 S.E.2d 111, 114 (Ga. 1989); *Clarion Mfg. Corp. of Am. v. Justice*, 971 S.W.2d 288, 290–91 (Ky. 1998); *Jewison v. Frerichs Constr.*, 434 N.W.2d 259, 261 (Minn. 1989); *Cooper v. McDevitt & St. Co.*, 196 S.E.2d 833, 835 (S.C. 1973); *Fed. Copper & Aluminum Co. v. Dickey*, 493 S.W.2d 463, 465 (Tenn. 1973); *Falls Church Const. Co. v. Laidler*, 493 S.E.2d 521, 523 (Va. 1997).

injury.<sup>31</sup>

Other courts have refused to recognize this defense by judicial decision, emphasizing the lack of express statutory authority.<sup>32</sup> A few of these courts have also commented that such a rule runs contrary to the general aim of workers' compensation statutes: to remove employee fault as a determinant of recovery for workplace injuries.<sup>33</sup>

Such false-statement defenses are not categorically preempted by Title I of the Americans with Disabilities Act (ADA). The ADA provides: "Nothing in this [Act] alters the standards for determining eligibility for benefits under State worker's compensation laws . . . ."<sup>34</sup> A court or agency could plausibly treat a false-statement defense under state workers' compensation law as a "standard for determining" benefit eligibility under this provision, though none has yet done so. Moreover, the ADA and a state-law false-statement defense do not necessarily conflict. If the employer makes an ADA-prohibited employer inquiry into applicant disability,<sup>35</sup> a job applicant need not respond with a *false* statement.<sup>36</sup>

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31. 3 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 66.04 (2011) (footnotes omitted).

32. See *Still v. Norfolk & W. Ry.*, 368 U.S. 35 (1961) (Federal Employers Liability Act); *Newport News Shipbuilding & Dry Dock Co. v. Hall*, 674 F.2d 248 (4th Cir. 1982) (Longshoremen's and Harbor Workers' Compensation Act); *Marriott Corp. v. Indus. Comm'n of Ariz.*, 708 P.2d 1307, 1310–13 (Ariz. 1985); *Teixeira v. Kauikeolani Children's Hosp.*, 652 P.2d 635, 636 (Haw. Ct. App. 1982); *Fontenot v. Cagle Chevrolet, Inc.*, 417 So. 2d 1338, 1343–44 (La. Ct. App. 1982); *Dressler v. Grand Rapids Die Casting Corp.*, 262 N.W.2d 629, 634 (Mich. 1978); *Estate of Freeman v. J.L. Rothrock, Inc.*, 676 S.E.2d 46 (N.C. 2009); *Goldstine v. Jensen Pre-Cast*, 729 P.2d 1355, 1356–57 (Nev. 1986); *Harris v. Syracuse Univ.*, 168 A.D.2d 791 (N.Y. App. Div. 1990); *H.J. Jeffries Truck Line v. Grisham*, 397 P.2d 637, 643 (Okla. 1964); *Stovall v. Sally Salmon Seafood*, 757 P.2d 410, 417–18 (Or. 1988); *Blue Bell Printing v. Workmen's Comp. Appeal Bd.*, 539 A.2d 933, 935–36 (Pa. Commw. Ct. 1988).

33. See *Marriott Corp.*, 708 P.2d at 1312; *Stovall*, 757 P.2d at 418; *Fontenot*, 417 So. 2d at 1343.

34. 42 U.S.C. § 12201(e) (Supp. II 2009); see also 29 C.F.R. § 1630.1(c)(3) (2011) (same for ADA Title I regulations).

35. See 42 U.S.C. § 12112(d)(2), (3) (2006); 29 C.F.R. §§ 1630.13(a), 1630.14(a)-(b) (2011); 29 C.F.R. Pt. 1630, App. (2011) (interpretative guidance to Title I of ADA for 29 C.F.R. § 1630.14(b)).

36. *Caldwell v. Aarlin/Holcombe Armature Co.*, 481 S.E.2d 196, 198 (Ga. 1997). In some states, the defense may not cover misrepresentations made in response to ADA-prohibited employer inquiries. See, e.g., ALASKA STAT. § 23.30.022 (2012) (only misrepresentations made "after a conditional offer of employment"); cf. *Huisenga v. Opus Corp.*, 494 N.W.2d 469, 474 (Minn. 1992) (noting that given provisions in the Minnesota Human Rights Act, defense does not apply if worker responded to employer questions "regarding disabilities" unless employer shows that such "inquiries were job-related or necessary to protect the safety of third-parties indispensable to the employer's business") (footnote omitted).

## II. COMPENSATION RATIONALES

This Part identifies the problems with compensation rationales for the employee-misconduct defense. For any such compensation rationale, the defense must offset the employer's liability in the worker's suit to an extent proportionate to the losses suffered by the employer because of that worker's misconduct. Thus, such compensation rationales face three problems. First, in most cases, the defense poorly approximates the monetary value of misconduct losses.<sup>37</sup> Second, in some cases, the defense enables overcompensation. In those cases, employers who prevail on the defense are not thereby precluded from also recovering, in a counterclaim or separate lawsuit against the worker, for losses caused by the *same* employee misconduct that supports the defense. Third, the defense cannot be justified as compensation for a kind of hard-to-measure misconduct-loss: foregone worker productivity.

### A. *Poor Measure of Misconduct-Losses*

In many cases, the value of an employee-misconduct defense ( $d$ ) will poorly approximate misconduct-related losses, because the value of what the worker would have received but for the defense has nothing to do with how much harm the worker's misconduct caused ( $m$ ).

To illustrate, suppose that a worker, paid \$50/day, steals a box of widgets worth \$1000 from the employer's supply room ( $m = \$1000$ ); the worker is unlawfully discharged for some other reason; and thereafter the employer finds proof of the worker's theft. If the defense precludes employer liability for the discharge, then for the defense to cover the employer's cost of replacing the widgets ( $d = m = \$1000$ ), the monetary value of the remedies the worker would have otherwise received from the employer must equal \$1000. A dollar more, and the defense overcompensates ( $d > \$1000$ ). A dollar less, and the defense undercompensates ( $d < \$1000$ ). This poor approximation occurs, because the value of the remedies that the worker would have received but for the defense has nothing to do with *how much* harm the worker's theft caused the employer.

Similarly, suppose the defense does not defeat liability, but only precludes back pay after the date the employer discovered the worker's

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37. For similar arguments against an employee-misconduct defense to ADEA liability, see Brief of Petitioner at 29, *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995) (No. 93-1543), 1994 WL 385636 at \*29; Reply Brief of Petitioner at 13-16, *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995) (No. 93-1543), 1994 WL 563409 at \*13-16.

theft. For the defense to cover the employer's cost of replacing the widgets ( $d = m = \$1000$ ), exactly twenty days (assuming \$50/day wages and a seven-day work week) must have elapsed from when the employer discovered the misconduct to the date of final judgment in the employee's suit. A day more, and the defense overcompensates ( $d > \$1000$ ). A day less, and the defense does not compensate enough ( $d < \$1000$ ). This poor approximation occurs, because the defense's back pay restriction turns on *when* the employer discovered the theft, which does not necessarily determine how much harm the theft caused.

### B. Overcompensation

The employee-misconduct defense can overcompensate the employer in cases where the value of the defense ( $d$ ) exceeds the net expected value of the legal remedies available to employers under existing law for losses caused by that *same* employee misconduct.

Under existing law, employers already have many grounds for recovering losses caused by employee misconduct and can pursue that recovery not only by a separate lawsuit, but also often by counterclaim in the worker's suit. For a worker who lies, the employer has the torts of fraud or deceit. When a worker steals or damages employer's property, the employer has the tort law of conversion and trespass of chattels, as well as state civil theft statutes<sup>38</sup>, for misappropriation of trade secrets, state law variants of the Uniform Trade Secrets Act,<sup>39</sup> and for claims of misuse of, or damage to, computer systems, the Computer Fraud and Abuse Act.<sup>40</sup> When workers engage in conduct like luring away customers or co-workers for a separate business venture while employed, some states' agency laws authorize claims of breach of an employee's duty of loyalty.<sup>41</sup>

Most importantly, employers can anticipate damages recovery for employee-misconduct losses when they write employment contracts. Such contracts include not only express terms prohibiting specific kinds of misconduct, but also, for example, a morals clause.<sup>42</sup> Even absent any such

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38. See, e.g., CONN. GEN. STAT. ANN. § 52-564 (West 2011); FLA. STAT. ANN. § 772.11 (West 2011); TEX. CIVIL PRAC. & REM. CODE ANN. §§ 134.001–134.005 (Vernon 2011).

39. BRIAN M. MALSBERGER, TRADE SECRETS: A STATE-BY-STATE SURVEY (Robert A. Blackstone et al. eds., 3rd ed. 2006).

40. 18 U.S.C. § 1030(a)(5) (Supp. II 2009).

41. BRIAN M. MALSBERGER, EMPLOYEE DUTY OF LOYALTY: A STATE-BY-STATE SURVEY (Stacey A. Campbell et al. eds., 4th ed. 2009 & Supp. 2010); Charles A. Sullivan, *Mastering the Faithless Servant?: Reconciling Employment Law, Contract Law, and Fiduciary Duty*, 2011 WIS. L. REV. 777.

42. Marka B. Fleming et al., *Morals Clauses for Educators in Secondary and Postsecondary Schools: Legal Applications and Constitutional Concerns*, 2009 B.Y.U.

express terms, in some states, there is an implied covenant of good faith and fair dealing in employment contracts, which imposes on both parties the duty to act consistent with the parties' reasonable expectations.<sup>43</sup> Under any of these contract terms, an employer can pursue a contract damages action based on a worker's misconduct, including misconduct discovered after that worker's quit or firing.

Because of these legal remedies that employers already have to recover for worker misconduct,<sup>44</sup> in some circumstances, the value of the defense ( $d$ ) will be such as to overcompensate the employer. To see this, let  $pm - c$  equal the net expected value of the employer's counterclaim or separate lawsuit against an employee for his misconduct. Here,  $p$  is the probability of winning the counterclaim or separate action,<sup>45</sup>  $m$  is the average value of legal remedies collectible for those losses, and  $c$  is the additional cost of pursuing the counterclaim or separate lawsuit beyond the costs to defend against the plaintiff's claim. If the employer prevails on the defense and the value of that defense exceeds the cost of pursuing the counterclaim or separate lawsuit ( $d > c$ ), then the defense overcompensates the employer for losses suffered because of the employee's misconduct, because the employer who pursues the counterclaim or separate lawsuit can recover  $d + (pm - c)$  for that same employee misconduct.<sup>46</sup>

This overcompensation result is possible, because the defense does not preclude it and because the defense is not subject to the usual common law rule barring multiple recoveries for the same injury.<sup>47</sup> The defense falls

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EDUC. & L.J. 67 (2009); Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347 (2009).

43. See, e.g., *Luedtke v. Nabors Ak. Drilling, Inc.*, 834 P.2d 1220, 1223–24 (Alaska 1992); *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1040 (Ariz. 1985); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 696 (1988); *Magnan v. Anaconda Indus., Inc.*, 479 A.2d 781, 789 (Conn. 1984); *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 101 (Del. 1992); *Jenkins v. Boise Cascade Corp.*, 108 P.3d 380, 389–90 (Idaho 2005); *Metcalf v. Intermountain Gas Co.*, 778 P.2d 744, 749 (Idaho 1989); *Bourgeois v. Horizon Healthcare Corp.*, 872 P.2d 852, 856–57 (N.M. 1994).

44. For unionized firms, the employer must determine whether these and other state law claims are sufficiently independent of the collective bargaining agreement to avoid preemption under NLRA section 301.

45. Success on the defense does not affect  $p$ , except to the extent that the findings of fact for the defense have a preclusive effect on the employer's separate lawsuit by operation of collateral estoppel doctrine.

46. If  $d \leq c$ , then the defense arguably does not overcompensate, but only subsidizes the employer for the expected cost of bringing the counterclaim or separate lawsuit. There is, however, little basis for a litigation-cost subsidy *rationale* for the defense, because there is little reason to assume that, in *most* cases,  $d \leq c$ . Even if so, there may be far better ways to provide such a subsidy, such as allowing the employer to claim  $c$  as a tax credit.

47. E.g., *Medina v. Dist. of Columbia*, 643 F.3d 323, 326–27 (D.C. Cir. 2011);

outside this rule, because the defense defeats liability or restricts remedies in the worker's suit. It does not amount (formally) to a *recovery* of employer's losses caused by the worker's misconduct, in part because the value of  $d$  depends on the types of relief the worker seeks in his suit. If, for example, the defense only precluded reinstatement and full back pay, but the worker had sought only a declaratory judgment, then  $d$  would be zero.

In at least three circumstances, this overcompensation problem does not exist. First, in cases where  $pm \leq c$ , the rational employer expects no net gain from filing a counterclaim or separate suit, and thus will not file. Therefore, even if success on the merits was certain ( $p = 1$ ), a rational employer will not sue if the worker is judgment-proof. The worker, however, will *not* be judgment-proof at least to the extent of worker assets acquired from the worker's own suit against the employer. (If that recovery is zero because the worker cannot prove employer liability, then the defense is unnecessary.)

Second, if the employer has liability insurance, the insurer, not the employer, pockets the value of the defense. The defense, if successful, just reduces what the insurer must pay to indemnify the policyholder (here, the employer) for any money judgment against it arising from a claim that the policy covers (in addition to litigation defense costs). In contrast, if the employer pleads a counterclaim to recover misconduct-related losses, the insurer has no right to the proceeds of that counterclaim as an offset to its indemnification payment. Moreover, in the standard liability insurance policy for employment-law liability, no provision expressly obligates the insurer to cover, as part of litigation defense costs, the costs of pursuing an employer counterclaim against the worker.<sup>48</sup> Many courts have read other kinds of liability insurance policies not to cover legal expenses associated with pursuing counterclaims as part of the insurer's duty to defend under the policy,<sup>49</sup> albeit with some exceptions.<sup>50</sup>

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Tavaglione v. Billings, 847 P.2d 574, 614 (Cal. 1993); Chapman Lumber, Inc. v. Tager, 952 A.2d 1, 29–30 (Conn. 2008); Saichek v. Lupa, 787 N.E.2d 827, 835 (Ill. 2003); Gagnard v. Baldrige, 612 So. 2d 732, 736 (La. 1993); Elyousef v. O'Reilly & Ferrario, LLC, 245 P.3d 547, 549 (Nev. 2010); Austin v. Stokes-Craven Holding Corp., 691 S.E.2d 135, 153 (S.C. 2010); Nizan v. Wells Fargo Bank Minn. Nat. Ass'n, 650 S.E.2d 497, 502 (Va. 2007).

48. *E.g.*, Insurance Services Office, Employment-Related Practices Liability Coverage Form (EP 00 01 11 09).

49. *E.g.*, Spada v. Unigard Ins. Co., 80 F. App'x 27, 29 (9th Cir. 2003) (Oregon law); Parameter Driven Software, Inc. v. Mass. Bay Ins. Co., 856 F. Supp. 314, 320 (E.D. Mich. 1993), *aff'd*, 25 F.3d 332 (6th Cir. 1994) (Michigan law); James 3 Corp. v. Truck Ins. Exch., 111 Cal. Rptr. 2d 181, 188–90 (Cal. Ct. App. 2001); Int'l Ins. Co. v. Rollprint Packaging Products, Inc., 728 N.E.2d 680, 694 (Ill. App. Ct. 2000); St. Paul Fire & Marine Ins. Co. v. Nat'l Computer Sys., Inc., 490 N.W.2d 626, 632 (Minn. Ct. App. 1992); Duke Univ. v. St. Paul Mercury Ins. Co., 384 S.E.2d 36, 46 (N.C. Ct. App. 1989); Red Head Brass, Inc. v. Buckeye Union Ins. Co., 735 N.E.2d 48, 56–57 (Ohio Ct. App. 1999); Towne Realty, Inc. v.

Third, if the employee misconduct supports an employer's legal claim that counts as a compulsory counterclaim,<sup>51</sup> and if the employer fails to plead that claim as a counterclaim in the worker's suit, the employer forfeits the value of that claim ( $pm - c$ ). Applying a compulsory counterclaim rule, some courts have barred claims by employers and employees for failure to plead them as counterclaims in a prior suit with the same parties. In some of those cases, the claim is compulsory because both employer and worker assert contract claims based on the same employment contract.<sup>52</sup> In other employment cases, the claim and counterclaim have different sources of law, but the underlying issues of fact are similar enough to declare a "logical relationship" between them sufficient to trigger a compulsory counterclaim rule.<sup>53</sup> Accordingly, if a compulsory counterclaim rule applies, this overcompensation problem does not exist.

### C. Compensation for Foregone Worker Productivity

The employee-misconduct defense substitutes poorly for lost worker productivity due to misconduct.<sup>54</sup> Suppose that, in some cases, the

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Zurich Ins. Co., 548 N.W.2d 64, 68–69 (Wis. 1996); *Shoshone First Bank v. Pacific Emp'rs Ins. Co.*, 2 P.3d 510, 516–17 (Wyo. 2000).

50. Some courts have read a liability insurance policy to cover the cost of pursuing a defendant's counterclaim if such counterclaim is pursued to preclude or limit the defendant's liability under the plaintiff's claim, e.g., *Int'l Ins. Co.*, 728 N.E.2d at 694 (citing counterclaim "for contribution" as example); see *Smart Style Indus., Inc. v. Pa. Gen. Ins. Co.*, 930 F. Supp. 159, 164–65 (S.D.N.Y. 1996) ("preemptive" declaratory judgment action), or if pursuing it is "inextricably intertwined" with the defense against the plaintiff's claim, see, e.g., *Post v. St. Paul Travelers Ins. Co.*, 752 F.Supp.2d 499, 514–16 (E.D. Pa. 2010); *Ultra Coachbuilders, Inc. v. Gen. Sec. Ins. Co.*, 229 F. Supp.2d 284, 289 (S.D.N.Y. 2002); *Bennett v. St. Paul Fire & Marine Ins. Co.*, ME CIV. No. 04-CV-212-GN, 2006 WL 1313059, at \*4 (D. Me. May 12, 2006).

51. E.g., FED. R. CIV. P. 13(a)(1)(A). Over forty states have a compulsory-counterclaim rule that is similar in scope, but varies as to the types of claims expressly exempted. E.g., TENN. CODE R. CIV. P. 13.01 (2012) ("other than a tort claim"); see Todd David Peterson, *The Misguided Law of Compulsory Counterclaims in Default Cases*, 50 ARIZ. L. REV. 1107, 1118–19 n. 57–59 (2008) (collecting citations).

52. E.g., *Visual Factor, Inc. v. Sinclair*, 441 P.2d 643, 645 (Colo. 1968); *Brinkmann v. Common School Dist. No. 27 of Gasconade Cnty.*, 238 S.W.2d 1, 6 (Mo. Ct. App. 1951); CHARLES ALLEN WRIGHT ET AL., 6 FEDERAL PRACTICE AND PROCEDURE § 1410 (3d ed. & Supp. 2011).

53. E.g., *Soni v. Boston Med. Ctr. Corp.*, 683 F. Supp. 2d 74, 93 (D. Mass. 2009); *Klein v. London Star Ltd.*, 26 F. Supp. 2d 689, 697 (S.D.N.Y. 1998); *Automated Datatron, Inc. v. Woodcock*, 659 F.2d 1168, 1171 (D.C. Cir. 1981); *Align Tech., Inc. v. Bao Tran*, 102 Cal. Rptr. 3d 343 (Cal. Ct. App. 2009); *Medlin v. Carpenter*, 329 S.E.2d 159, 164 (Ga. Ct. App. 1985); *Commint Tech. Serv., Inc. v. Quickel*, 314 S.W.3d 646, 653 (Tex. App. 2010). For courts adopting the logical-relationship test, see WRIGHT ET AL., *supra* note 52, § 1410 n. 10.

54. For examples of damages for hard-to-measure losses in the Fair Labor Standards

worker's misconduct reliably predicts that worker's below-average productivity after the misconduct occurred. Suppose further that had the employer known of the worker's misconduct when it occurred, the employer would have fired him for that reason and replaced him with someone of at least average productivity. If so, the argument goes, by concealing his misconduct, the worker caused the employer to suffer a loss: Had the worker immediately revealed his misconduct and been fired for that reason, the employer would have suffered no subsequent loss of productivity from that time until the worker exited the employment relationship. However, because this loss is hard to measure, the employer cannot recover for it in a separate suit or counterclaim against the worker. Thus, the value of the defense (*d*) arguably stands in for the otherwise hard-to-measure loss from foregone worker productivity caused by the worker's misconduct.

This argument faces two hurdles. First, in industries where piece rates prevail, wages are a function of the individual worker's output, and thus any particular worker's productivity can be directly measured. Thus, we can directly see if the worker who, for example, lied on his job application actually had below-average productivity relative to other workers performing the same tasks. In those cases, then, the defense is unnecessary. Second, if the worker's pay depends on time worked (e.g., hourly, weekly), and thus worker productivity is hard to measure, it remains unclear why the defense, in any form, should be deemed to cover the loss attributable to foregone worker productivity. Any sum said to cover that loss is arbitrary, without knowing by how much that loss exceeds zero.

### III. DETERRENCE RATIONALES

This Part shows that any deterrence rationale for the defense turns on how much the defense reduces worker misconduct, how well it does so, and at what cost, compared to other policy options. Unlike the employer's right to fire for misconduct or right to sue to recover misconduct-related losses, an employer cannot assert the defense unless the worker sues. Thus, any deterrence rationale for the defense must presume: (1) that workers who sue their employers are also more likely to commit employee misconduct than workers who do not; or (2) that workers considering misconduct actually worry about how such misconduct might affect their legal rights if they were later subject to a wrongful act by their employer.

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Act (FLSA), see 29 U.S.C. § 216(b) (2006) and *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707–08 (1945).



There is currently little evidence to support either premise in the limited empirical literature on employee misconduct.<sup>55</sup>

Indeed, employee misconduct is itself hard to measure if it is not self-reported or cheap to detect. For example, for résumé fraud, there is some research based on survey self-reports of law students and law schools concerning résumé discrepancies<sup>56</sup> as well as researcher attempts to verify the listed publications of medical residency and fellowship applicants.<sup>57</sup> In contrast, most press reports about résumé fraud tend to be based on findings by background check firms of increases in discrepancies found in the résumés or job applications that they have been asked to verify. Such estimates suffer from selection bias, because employers do not randomly choose résumés for background checks.

Yet, even assuming good measures of employee misconduct, a deterrence rationale is hard to support. Consider, for example, one sophisticated deterrence rationale. Following a textbook labor market signaling model, Wahl (1999) argued that by limiting remedies instead of precluding liability, *McKennon* reduced the reliability of self-reported worker information (e.g., post-secondary education, criminal record) as signals of worker productivity.<sup>58</sup> This in turn, she worried, might make an employer more likely to turn to race, sex, or other characteristics as signals of productivity, contrary to the goals of employment discrimination laws.<sup>59</sup>

This argument rests on two premises. First, the cost of obtaining the relevant signal includes the expected cost of sending a false signal, itself some function of the odds and adverse consequences of detection. Second, by not making defense a bar to liability, *McKennon* and its progeny lowered the worker's cost of sending false signals to prospective employers.

This argument has two problems. First, even if it precludes liability, an employee-misconduct defense may only negligibly affect the incidence of résumé fraud, as compared to other potential influences. Such influences include the average cost of pre-employment screening practices,

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55. E.g., Steven H. Appelbaum et al., *Employee Theft: From Behavioural Causation and Prevention to Managerial Detection and Remedies*, 9 J. AM. ACAD. BUS. 175 (2006); Jill Poulston, *Rationales for Employee Theft in Hospitality: Excuses, Excuses*, 15 J. HOSPITALITY & TOURISM MGMT. 49 (2008); Mark N. Wexler, *Successful Resume Fraud: Conjectures on the Origins of Amoralty in the Workplace*, 12 J. OF HUMAN VALUES 137 (2006).

56. E.g., Nancy Millich, *Ethical Integrity in the Legal Profession: Survey Results Regarding Law Students' Veracity on Resumes and Recommendations for Enhancing Legal Ethics Outside the Classroom*, 24 ARIZ. ST. L.J. 1181, 1186–89 (1992).

57. Michael N. Wiggins, *A Meta-Analysis of Studies of Publication Misrepresentation by Applicants to Residency and Fellowship Programs*, 85 ACAD. MED. 1470 (2010).

58. Wahl, *supra* note 1, at 596–98.

59. *Id.* at 598–601.

such as background checks, buying a job applicant's consumer credit report, or hiring through social network ties. Other influences include factors that increase a job's value, such as prolonged unemployment, household debt, or family size. Even putting these aside, the effect of an employee-misconduct defense still may be negligible, given that employers *still* have multiple avenues of legal recourse to recover for résumé fraud or other employee misconduct.

Second, even if the defense non-negligibly reduces résumé fraud, there may be better ways to do so. Instead of the defense, policymakers could offer subsidies for pre-employment screening, such as a tax credit for background checks. They could require that all firms in certain industries perform background checks for certain items, such as felony convictions. Or they could let employers pass the cost of background checks onto workers by debiting some or all of that cost from worker wages owed in the worker's first pay period.

#### IV. RESTORATIVE PURPOSE

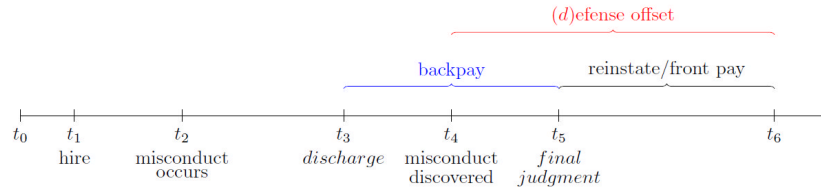
This Part considers the version of the defense (depicted in Figure 1) that precludes reinstatement, front pay, and any back pay owed after the employer discovered the employee's misconduct. Courts have read the authority to order back pay, front pay, and reinstatement under various work-law statutes<sup>60</sup> to require that, in any particular case, those remedies serve the restorative ("remedial" or make-whole) purposes of those laws,<sup>61</sup> that is, to restore the worker to the condition he or she would have occupied if, all else being equal, the employer's wrongful act had never occurred. Similarly, under state law governing tort damages, damages for any past and future pay lost because of a tort generally counts as money awarded to restore the injured party to the condition he would have occupied absent that tort.<sup>62</sup>

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60. *See, e.g.*, 29 U.S.C. § 626(b) (2006) (ADEA); 42 U.S.C. § 2000e-5(g) (2006) (Title VII); 42 U.S.C. § 12117(a) (2006) (ADA).

61. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (Title VII); Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 197 (1941) (NLRA); Republic Steel Corp. v. N.L.R.B., 311 U.S. 7, 12 (1940) (NLRA).

62. 1 JEROME H. NATES ET AL., DAMAGES IN TORT ACTIONS § 3.01[1] (2011) (collecting cases).



**Figure 1: Timeline of Effect of Employee-Misconduct Defense (Remedies)**

This Part presents an alternative employee-misconduct defense that may limit back pay, reinstatement, and front pay in some cases in a way that *serves* those remedies' restorative purposes. This alternative requires that the employer prove that, had the employer not committed its wrongful act, it still would have *discovered* the worker misconduct when it did (Figure 1:  $t_4$ ) and would have fired that worker for that misconduct. Before *McKennon*, some federal courts of appeal had endorsed this approach to deciding back pay relief in Title VII and ADEA cases, albeit not for reinstatement or front pay.<sup>63</sup> *McKennon* rejected this approach in favor of a defense that does not turn on when, if ever, the employer would have discovered that misconduct but for the employer's wrongful act. Because of this feature, the *McKennon* approach contravenes the restorative (make-whole) aims of these remedies.

#### A. *The Restorative-Purpose Rationale: Back Pay*

The employee-misconduct defense contravenes back pay's restorative aims. For a back pay award to restore, the size of the award must only equal the pay that the employer's wrongful act *caused* the worker to lose. This requires estimating the plaintiff-worker's *what-if* pay, i.e., the pay she would have received if, all else being equal, the employer had not committed its wrongful act. The employee-misconduct defense, however, precludes back pay for the time after the employer discovered the misconduct *as a matter of law*. The defense thereby forces judges and juries to assume that the employer's wrongful act did not substantially affect the odds of misconduct discovery in cases where evidence suggests

63. *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1240 (3d. Cir. 1994), *vacated*, 514 U.S. 1034 (1995); *Wallace v. Dunn Const. Co.*, 968 F.2d 1174, 1182 (11th Cir. 1992), *vacated in relevant part*, 62 F.3d 374, 380 (11th Cir. 1995) (en banc); see Brief of Petitioner, *McKennon*, 1994 WL 385636, at \*35–36 (same).

that this assumption is implausible or false. Therefore, in those cases, our estimate of plaintiff's what-if pay is invalid and biased downward. Indeed, even if this assumption is *usually* warranted, at best it supports a rebuttable presumption, not an evidence-invariant one.

This analysis turns on how we estimate a worker's what-if pay. We estimate her what-if pay by calculating the average actual pay of comparator-workers. Comparator-workers are workers that share all the plaintiff's pay-relevant characteristics (including that the employer treated them the same as the plaintiff in all pay-relevant respects), except that they did not suffer from the employer's wrongful act. Here are three illustrations. Each assumes we know the plaintiff's what-if wage *rate* and focuses on the plaintiff's what-if time worked.

First, sometime after the plaintiff's firing, the employer shuts down the plant and fires all the remaining workers there. Here, for any set of comparator-workers, we can calculate the actual average number of workdays after the date of the plaintiff's firing. That number, however, cannot exceed the total number of workdays between that firing and the plant shutdown. For that reason, that latter number is the estimated maximum number of plaintiff's what-if workdays past the firing.<sup>64</sup>

Second, after a wrongful firing, a worker injures his back. Had he not been fired, the back injury would have caused him to miss a certain number of paid workdays before he would have been physically able to do the job again. The plaintiff's back pay award, therefore, must be reduced to account for the plaintiff's what-if number of workdays missed while injured. To estimate this what-if number, one could, in theory, assemble a set of comparator-workers and calculate the average number of workdays that they actually missed. This will be hard to do if back injuries are rare. Moreover, there are many hard-to-see differences between how the plaintiff's body suffers and heals from the injury as compared to the bodies of possible comparators. Instead, there are other approaches, such as substituting a doctor's professional judgment as to when the effects of the back injury disappeared from the work-relevant features of the plaintiff's actual body.

Third, an employer imposes drug tests upon all its workers at regular intervals. The plaintiff-worker secretly smoked marijuana at work on Monday morning. He is wrongfully fired that day, before his scheduled drug test on that Friday along with all the other workers. Here, the number of the plaintiff's what-if workdays past Monday is estimated by the average number of workdays past Monday for a set of comparator-workers. To be

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64. Bales v. N.L.R.B., 914 F.2d 92, 94–95 (6th Cir. 1990); N.L.R.B. v. Master Slack &/or Master Trousers Corp., 773 F.2d 77, 83–85 (6th Cir. 1985); Hill v. Spiegel, Inc., 708 F.2d 233, 238 (6th Cir. 1983) (ADEA).

comparators, these other workers must share all the plaintiff's pay-relevant characteristics, except for the wrongful firing, but including that they also smoked marijuana on Monday and were also scheduled for an employer drug test on Friday. If, on average, those comparator-workers actually failed the Friday drug test, and those who failed were fired that same day, then we infer that the plaintiff has no what-if workdays beyond Friday.

Again, in practice, comparator-workers will be hard to find if, for example, none of plaintiff's now-former co-employees had smoked marijuana at work that Monday. Here, too, there are acceptable substitutes, such as judging how consistently company drug tests were performed at their scheduled times in the recent past, the incidence of false negatives in those tests, how often in the past this employer has reacted to a positive test result by firing the worker immediately, and the average time between positive drug test and firing.

In these three examples, an event (plant shutdown, back injury, positive drug test) affects the odds that a plaintiff's comparator-workers occupy a pay-relevant state or experience a pay-relevant change, which in turn affects their average actual pay. From their average actual pay, we infer plaintiff's what-if pay. The plant shutdown affected the odds that those workers would stop receiving pay thereafter, though that pay change was not certain to occur in every case.<sup>65</sup> The back injury affected the odds that, in any particular workday thereafter, the average comparator-worker could put his body to its job-required uses. The positive drug test affected the odds that the average comparator-worker who had smoked marijuana would be fired.

In each example, we assumed that the odds of these events (plant shutdown, injury, positive drug test) are the same in both a world where the employer's wrongful act occurred and in a world where it did not, all else being equal. This is critical. If the employer's wrongful act *did* affect the odds of the event, then that act thereby influenced the average actual pay of our comparator-workers. If so, their average actual pay cannot be a valid estimate of the plaintiff's what-if pay, because that is, by definition, what the plaintiff would have been paid had the employer's wrongful act never happened.

In some cases, it is an error to assume that the employer's wrongful act and the subsequent pay-changing event are independent of each other. For example, in a wrongful denial of a promotion to a new job, if the new job has a far lower injury rate, then the employer's wrongful act may have

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65. *E.g.*, *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1110 (8th Cir. 1982) (remanding for jury to decide in ADEA suit that back pay period did not stop when plant shut down because employer would have retained plaintiff to work at one of its other plants).

increased the odds of a physical injury, and thus the number of missed workdays.<sup>66</sup> Or, in cases where the discharged employee's lawsuit motivated an investigation in which the employer discovered the employee's pre-discharge misconduct, there may be good reason to believe that, absent the employer's wrongful discharge, there would have been no lawsuit, and thus a far lower chance that the employer would have discovered the misconduct.

Instead of so assuming in cases where that assumption is implausible, judges and legislatures need only require the employer raising the defense to *prove* that, absent the employer's wrongful act, the employer would still have discovered the misconduct when it did and would have fired the employee for that misconduct at that time. The *McKennon* Court, however, rejected this approach. It reasoned that the restorative aim of compensation is

difficult to apply with precision where there is after-acquired evidence of wrongdoing that would have led to termination on legitimate grounds had the employer known about it. Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and *even if the information might have gone undiscovered absent the suit.*<sup>67</sup>

The Court, however, never explained *what* was "difficult" or *why* the employer should not have to prove that it would have discovered the misconduct "even if" the illegal firing and subsequent lawsuit had not occurred.

In defending the version of the defense later adopted in *McKennon*, White and Brussack (1993) rejected as "wrong" a lower court approach to Title VII back pay that also required that, but for its wrongful act, the employer still would have discovered the misconduct.<sup>68</sup> They reasoned that anyone thinking about filing an employment discrimination lawsuit "must weigh the risk that the defendant will uncover, in preparing for trial, information about the plaintiff that triggers a discharge policy. There is nothing inherently illegitimate about an employer's acquisition of such

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66. *E.g.*, *Wells v. N.C. Bd. of Alcoholic Control*, 714 F.2d 340, 342 (4th Cir. 1983) (holding that back pay award for employer refusal to promote in violation of Title VII includes period after plaintiff suffered back injury, because "[h]ad he not been wrongfully denied that promotion to relatively light work, it may reasonably be inferred that he would not have suffered an injury to his back or that any back problem would have been less severe.").

67. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362 (1995) (emphasis added).

68. White & Brussack, *supra* note 1, at 84.

information through pretrial discovery or through its own pretrial investigation.”<sup>69</sup>

This reasoning is opaque as well. That there is such a risk of misconduct-discovery does not explain why, in such cases, section 706(g) of Title VII *ought* to be read to limit back pay in the way *McKennon* read section 7(b) of the ADEA. Perhaps they meant that a court should always act *as if* a worker who sues her employer has assumed the risk that her lawsuit will cause the employer to discover her pre-termination misconduct<sup>70</sup> in a permissible way. However, “assumed-the-risk” is just another legal conclusion in need of a reason that matters more than back pay’s restorative purposes. That reason is not self-evident.

On the other hand, if an employer shows that it would still have discovered the misconduct when it did and would have fired the employee for that misconduct at that time, *full* back pay contravenes the restorative purpose of back pay awards. To the contrary, Corbett (1996) argued that full back pay in such cases would nonetheless “be more consistent with the broader goal of eradicating discrimination in the workplace” and that “any approach that cuts off backpay before judgment . . . interfere[s] with the deterrence objective of the statutes” by encouraging employers to “creat[e] opportunities for employees to make misrepresentations on employment documents,” routinely search for them, and have “a low threshold for discharge.”<sup>71</sup>

The error here is that once courts read a line between restoration and punishment into work law remedies, a deterrence rationale alone cannot justify crossing that line in any particular class of cases. Back pay is a restorative (make-whole) remedy that may also deter. A deterrence rationale *alone* proves too much, because it also justifies double or treble back pay, or any award that makes the plaintiff better off than she would have been absent the employer’s wrongful act. In this respect, a restoration (make-whole) purpose of a statute *restricts* what might be otherwise

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69. *Id.*

70. Christine Neylon O’Brien, *The Law of After-Acquired Evidence in Employment Discrimination Cases: Clarification of the Employer’s Burden, Remedial Guidance, and the Enigma of Post-Termination Misconduct*, 65 UMKC L. REV. 159, 163 (1996) (adopting this reading).

71. Corbett, *supra* note 1, at 370–71 (footnote omitted). Corbett also argued that full back pay compensates a discrimination plaintiff for “psychological injury” under statutes, such as the ADEA, that authorize back pay but *not* emotional-suffering damages. *Id.* at 369–70 & n. 335. (Title VII is not such a statute. *See* 42 U.S.C. § 1981a(b)(2) – (3) (2006)). This presumes that, by not authorizing damages for emotional harm, such statutes contravene their restorative purposes to an extent partially corrected by an *otherwise* over-compensatory award of full back pay. This argument, however, proves too much, because it applies to *any* limitation on, or offset against, back pay awarded under such statutes.

implied from that same statute's deterrence purpose.<sup>72</sup>

Accordingly, suppose Corbett can prove that “in most cases, the employer would not have discovered the after-acquired evidence absent its illegal acts and the ensuing litigation.”<sup>73</sup> Even if so, such proof does not necessarily imply that courts *ought* to deny the employer the opportunity to prove in any *particular* case that it would have discovered the misconduct in any event.

Similarly, a deterrence statutory purpose cannot alone or necessarily justify a more stringent standard of proof (e.g., clear and convincing) for the defense.<sup>74</sup> To the contrary, that purpose makes the defense consistent with the many other remedy restrictions that also undermine deterrence and advance a restorative purpose but are subject to a less stringent proof standard (e.g., preponderance of the evidence).<sup>75</sup>

### B. Reinstatement and Front Pay

The same basic argument extends to reinstatement and front pay. Their restorative purpose requires denying those remedies if, at a time on or before final judgment, the plaintiff would not have been working for that employer, even absent the employer's wrongful act.<sup>76</sup> Put differently, we are concerned here with plaintiff's what-if *employment status* before final judgment (Figure 1:  $t_3 < x \leq t_5$ ).

To illustrate, again suppose that, before final judgment, the employer shut down the plant and fired everyone. If so, then at the time of final

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72. Cf. *Republic Steel Corp. v. N.L.R.B.*, 311 U.S. 7, 12 (1940) (rejecting as “prov[ing] too much” a deterrent-effect argument for particular NLRB requirements as “sufficient” to sustain a Board order, because, if so, the NLRB “would be free to set up any system of penalties which it would deem adequate to that end”); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (inferring from Title VII's legislative history that “backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination”) (emphasis added).

73. Corbett, *supra* note 1, at 369 (footnote omitted).

74. *But see Sprang*, *supra* note 1, at 157–58. In contrast, the South Carolina Supreme Court adopted a clear-and-convincing standard for employee-misconduct defense to contract liability in order to discourage “less-than-principled employers (or their attorneys)” who otherwise, because of the defense, “may be tempted to ‘rummage the file’ in order to ‘discover’ any and all evidence that would permit them to escape liability.” *Lewis v. Fisher Serv. Co.*, 495 S.E.2d 440, 445 (S.C. 1998). The worry here appears to be the risk of employer retaliatory use of the defense. *See infra* Part VIII.B.

75. *E.g.*, *Fleming v. Cnty. of Kane*, 898 F.2d 553, 560 (7th Cir. 1990) (Title VII damages mitigation defense).

76. *See, e.g.*, *Geller v. Markham*, 635 F.2d 1027, 1036 (2d Cir. 1980) (affirming denial of permanent reinstatement based on the inference, from jury damages award for one year's salary, that plaintiff would not have been working for her employer past one year).



judgment, we can observe that the average comparator-worker no longer works for that employer. From this, we infer that plaintiff's what-if employment status would have also been the same at that time.

Similarly, suppose the employer shows that, absent its wrongful act, it would have discovered the plaintiff's misconduct and fired the plaintiff for that misconduct before final judgment (Figure 1:  $t_4 < x \leq t_5$ ). If so, then it has by definition shown that plaintiff's what-if employment status on or before final judgment is that he no longer worked for that employer, and therefore reinstatement should be denied.

The same analysis applies to front pay. A front pay award is supposed to equal the present value of future pay that the worker was reasonably certain to have received after final judgment, but for the employer's wrongful act. Some work laws authorize front pay in lieu of reinstatement in cases where reinstatement is warranted but impossible or impractical.<sup>77</sup> Yet, loss of future earnings (i.e., front pay) is also a standard item of damages under state tort law,<sup>78</sup> while reinstatement is disfavored if the damages remedy is deemed adequate.

Regardless of any legal presumption for or against reinstatement over front pay, once the employer can show that, absent its wrongful act, it would have discovered the plaintiff's misconduct and fired the plaintiff for that misconduct before final judgment (Figure 1:  $t_4 < x \leq t_5$ ), then it has by definition shown that plaintiff's what-if employment status on or before final judgment is that he no longer worked for that employer. For that reason, plaintiff's what-if front pay is zero. Alternatively, if the employer can show that, absent its wrongful act, it would have discovered the plaintiff's misconduct and fired the plaintiff for that misconduct at some point after final judgment (Figure 1:  $t_6$ ), then plaintiff's front pay period ends on that future date.<sup>79</sup>

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77. See, e.g., *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 853–54 (2001) (§ 706(g) of Title VII); *id.* at 849 (NLRA § 10(c)); *Gilliland v. Mo. Athletic Club*, 273 S.W.3d 516, 524 (Mo. 2009) (Missouri Human Rights Act); *Peters v. Rivers Edge Mining, Inc.*, 680 S.E.2d 791, 813 (W. Va. 2009) (finding that a state statute prohibited discrimination for seeking or receiving workers' compensation benefits).

78. E.g., *Cates v. Brown*, 645 S.W.2d 658, 660 (Ark. 1983); see generally 2 NATES ET AL., *supra* note 62, § 10.02.

79. The front pay period ends at the future date at which, had he could have been reinstated, the worker would have found comparable employment elsewhere, see *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 954 (7th Cir. 1998), or at the date of some other event, independent of the employer's wrongful act, that would have caused employment to cease, see, e.g., *Tyler v. Union Oil Co. of Cal.*, 304 F.3d 379, 402 (5th Cir. 2002) (closing of business unit); *Schick v. Ill. Dep't of Human Servs.*, 307 F.3d 605, 614 (7th Cir. 2002) (prison; Title VII); *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1158 (10th Cir. 1990) (physical disability; ADEA); *Floca v. Homcare Health Servs., Inc.*, 845 F.2d 108, 113 (5th Cir. 1988) (school; Title VII).

Here, too, we presume that the odds of the employment-status-relevant event (plant shutdown, misconduct-discovery) are the same in both a world where the employer's wrongful act occurred and in the counterfactual world where it did not, all else being equal. If absent the employer's wrongful act, the employer likely never would have discovered the misconduct, then it likely would not have fired the plaintiff for that misconduct. If, however, the employer's wrongful act influenced the odds that the employer discovered the employee's misconduct, then the employer's wrongful act would also influence the average comparator-worker's employment status at the time of final judgment, in turn making it an invalid basis for estimating plaintiff's what-if employment status.

The *McKennon* approach, however, precludes reinstatement and front pay only on a showing that, had it known of the misconduct at the time of discharge, the employer would have fired the employee for that misconduct at that time. Its reason: "It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds."<sup>80</sup>

This is terse. Based on the phrase "would have terminated . . . in any event and upon lawful grounds," we can read it at least to make this argument: once the employer shows that it would have fired the employee for misconduct at the time of discharge (Figure 1:  $t_3$ ) had it known of the misconduct at that time, that showing *necessarily* implies that, even absent the employer's wrongful act, the employer would and could by law have fired the employee when it actually learned of his misconduct (Figure 1:  $t_4 \leq x \leq t_5$ ). However, as discussed above, this simply does not hold in cases where, absent the employer's wrongful act, the employer likely would not have discovered the misconduct at all.

## V. THE AUTHORITY TO FIRE

This Part shows the errors committed by basing the employee-misconduct defense on the employer's legal authority to fire a worker. Courts and commentators have suggested that by precluding reinstatement, front pay, and full back pay, the defense expresses proper regard for employer discretion to fire or otherwise discipline employees for misconduct. For example, the *McKennon* Court emphasized that, in deciding ADEA remedies, "the employee's wrongdoing becomes relevant . . . to take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has

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80. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362 (1995).

arising from the employee's wrongdoing."<sup>81</sup> Similarly, in applying the *McKennon* approach to limit relief in wrongful discharge claims under state tort law, the New Hampshire Supreme Court wrote that it "properly balances the employee's entitlement to a remedy as a result of the employer's tortious conduct with an employer's interest in lawfully managing its business affairs."<sup>82</sup>

The problem is that courts use the idiom of balance, regard, or respect, instead of specifying how precisely barring remedies otherwise available to the worker under law X is justified by employer discretion to fire for misconduct afforded by some other law (law Y). Perhaps law Y imposes a duty that in every case justifies, precludes, or limits relief otherwise available under law X. This could also happen by operation of preemption doctrine or to harmonize the purposes of laws X and Y, where X and Y are two laws of equal priority (e.g., two federal statutes or two state common law precedents). For example, where a worker's misconduct pertains to job qualifications required by statute, some courts have treated the issue as one of harmonizing that statute with the statute authorizing the worker's suit.<sup>83</sup>

If not, perhaps the exercise of employer discretion afforded by law Y advances some public good that aligns with or trumps the restorative purposes of remedies otherwise due under law X in every such case. For example, remedial authority under the NLRA section 10(c), as codified, covers "such affirmative action . . . as will effectuate the purposes of this subchapter."<sup>84</sup> Similarly, remedial authority under section 706(g) of Title VII covers "such affirmative action as may be appropriate."<sup>85</sup> One could argue that employer discretion to fire workers afforded under, say, Missouri law advances a particular public good; that such advancement counts as a "purpose[]" of the NLRA or counts as "appropriate" under Title VII; and that this public good would not be as well advanced by awarding the remedies otherwise due under the NLRA or Title VII, respectively.

In contrast, just expressing regard or respect for such employer discretion is unhelpful. It is not an argument, but a placeholder for one. It

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81. *Id.* at 361.

82. *McDill v. Environamics Corp.*, 757 A.2d 162, 166 (N.H. 2000).

83. *See, e.g.*, *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002) (NLRA and federal immigration law); *Cedeno v. Montclair State Univ.*, 750 A.2d 73, 76 (N.J. 2000) (state employment discrimination statute and state statute barring plaintiff's employment because of his prior bribery conviction); *Crespo v. Evergo Corp.*, 841 A.2d 471 (N.J. App. Div. 2004) (state employment discrimination statute and federal immigration law). *But cf.* CAL. LAB. CODE § 1171.5(b) (West 2011) (making a person's immigration status, "[f]or purposes of enforcing state labor and employment laws . . . irrelevant to the issue of liability").

84. 29 U.S.C. § 160(c) (2006).

85. 42 U.S.C. § 2000e-5(g)(1) (2006).

does not identify the public good in question. It does not show how such employer discretion advances that public good. And it does not show how denying remedies otherwise due in such cases (here, under the NLRA or Title VII) promotes that public good to such an extent as to align with or trump the restorative aims of those remedies.

At best, courts and commentators have argued that it would be pointless to award reinstatement, front pay, or full back pay, because if the employee is reinstated either voluntarily or by court order, the employer would and could by law immediately fire that employee for having committed its pre-reinstatement misconduct. The rest of this Part identifies the errors or unsupported premises upon which these arguments rest.

#### A. *Prospective Firing after Reinstatement*

The *McKennon* opinion offered a reinstate-and-fire rationale for precluding reinstatement and front pay: “It would be both inequitable and pointless to order the reinstatement of someone the employer . . . will terminate, in any event and upon lawful grounds.”<sup>86</sup> This sentence seems to make this argument: once the employer shows that it would have fired the employee for misconduct at the time of discharge (Figure 1:  $t_3$ ) had it known of the misconduct at that time, that showing necessarily implies that if the court orders reinstatement, then, after final judgment (Figure 1:  $x > t_5$ ), the employer would and could by law immediately fire the newly-reinstated employee because of her past misconduct.

Here is the error: in cases where a court finds an employee suitable for reinstatement despite his misconduct, the reinstatement order is not pointless just because, under other laws, the employer may fire the reinstated employee for his pre-reinstatement misconduct. Usually, a court rejects arguments that a person’s act has not violated *this* law simply because that act did not also violate *that* law. The reinstatement order itself has the force of law by operation of the legal authority under which the court issued it, such as section 706(g) of Title VII, or NLRA section 10(c). If an employer’s action violates this order (*this* law), it does not matter whether some other law permits that action, such as state law governing employment contracts, unless that other law supplants or restricts the legal authority to order reinstatement in the particular case.

Rather, the question is this: if an employer immediately fires the reinstated employee for reasons that the court has already rejected as grounds for denying reinstatement, has the employer violated the

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86. *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 362 (1995); *accord O’Day v. McDonnell Douglas Helicopter Co.*, 959 P.2d 792, 797–98 (Ariz. 1998).

reinstatement order *itself*? To illustrate, suppose that, pursuant to section 706(g) of Title VII, a trial judge orders reinstatement, and in doing so writes an opinion that expressly rejects the employer's argument that the worker's pre-termination misconduct (discovered post-termination) suffices to deny reinstatement. To underscore this rejection, the trial judge includes as part of the reinstatement order a provision barring the employer from firing the reinstated employee solely because of his pre-termination misconduct. The judge does this to prevent the employer from using its authority to fire to accomplish in effect what it could not persuade the trial judge to do in the first place: deny reinstatement because of the pre-termination misconduct. This provision, no less than the rest of the order, has the force of law of section 706(g), and therefore supplants state law that otherwise permits the employer to immediately fire that reinstated employee for that misconduct.

If so, when a Title VII reinstatement order lacks such an express provision, can a judge read such a provision as *implied* when the order is issued under the same circumstances? For example, a judge might so read the order by pointing to other boilerplate language in the order, such as that the defendant obey the order consistent with the court opinion setting forth the reasons for granting reinstatement in that case. The point is that whether a judge reads the order in this way does not turn on the state law that *otherwise* authorizes the employer to fire its workers.

For the fire-after-reinstating rationale to nonetheless justify denying reinstatement as a matter of law, one must elide the differences between three separate inquiries: (1) whether the employer would have fired the employee at the time of discharge solely because of his misconduct, had it known of that misconduct; (2) if the court orders reinstatement, whether the employer would, if it could, immediately fire that reinstated employee solely because of his misconduct; and (3) whether the employee is objectively unsuitable to be reinstated because of his misconduct.

First, the fire-after-reinstating rationale assumes that, if the employer can show that it would have fired the employee at the time of discharge solely because of its misconduct, had it known of that misconduct, that showing *necessarily* proves that, if the court orders reinstatement, that employer would, if it could, immediately fire the employee after reinstatement because of that misconduct. The former refers to a counterfactual past (Figure 1:  $t_3$ ) while the latter refers to a potential future in which the judge had ordered reinstatement (Figure 1:  $x \geq t_5$ ). In the interim, however, conditions can change, such as changes in employer policy or management personnel, or a change in law, that makes it less likely that, because of the misconduct, the employer would fire the employee after reinstatement. In such cases, by precluding reinstatement

as a matter of law, the employee-misconduct defense requires judges to assume a future state of the world that is now less likely to occur.

Instead, a court can simply ask the employer to separately show that it would, if it could, immediately fire the reinstated employee because of his past misconduct. Actually proving this, however, may not be easy. By the time the worker has prevailed and the trial judge is considering whether to order reinstatement, there may be a rather large set of causes for why, at that time, the employer wants, if it can, to fire the employee if reinstated. The employer may be angry with the plaintiff-employee for committing the misconduct and worried that, if reinstated, the plaintiff will do it again, or something worse. The employer may be angry just because the plaintiff sued, let alone because she sued and won. Or the employer may want to fire, because the prevailing market wage for the employee's former job has dropped, whereas reinstatement would commit the employer to paying the plaintiff's former higher wage.

Second, even if an employer shows that it would, if it could, immediately fire the reinstated employee because of his past misconduct, that showing does not necessarily establish that the employee is objectively unsuitable to be reinstated. Reinstatement usually does not depend on what the employer wants. For example, if an employer opposes reinstatement because of expected workplace antagonism, such antagonism must go beyond the employer hostility that usually results when a worker has filed a lawsuit against it and prevailed, lest such hostility, precisely because it is so typical, bar reinstatement in virtually every case.<sup>87</sup> The emphasis is usually not on what an employer wants, but on what a court can infer from the nature of the employee's misconduct as to how that employee will behave if reinstated.

To illustrate, compare the NLRA's employee-misconduct defense (discussed above in Part I(A)) with how the NLRB decides reinstatement in cases of post-termination misconduct, i.e., where the worker commits the misconduct after the firing, not before, and then the employer learns of it. In such cases, the NLRB denies reinstatement only "in those flagrant cases in which the misconduct is violent or of such character as to render the employees unfit for further service."<sup>88</sup>

In cases of credible threats of physical violence against a supervisor or

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87. See, e.g., *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 862 (7th Cir. 2001) (Title VII); *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1138-39 (8th Cir. 1981) (Title VII); *Ottenberg's Bakers, Inc. v. D.C. Comm'n on Human Rights*, 917 A.2d 1094, 1106 (D.C. 2007) (D.C. Human Rights Act); *Sands v. Menard, Inc.*, 787 N.W.2d 384, 394 (Wis. 2010) (arbitration of Equal Pay Act and Title VII claims).

88. *JCO Food Corp. (C-Town)*, 281 N.L.R.B. 458, 458 (1986) (footnote and internal quotation marks omitted).

co-employee, let alone actual violence, this standard can be easily satisfied.<sup>89</sup> Not all post-termination disparaging statements about the employer, however, satisfy this test, because “it is wholly natural for an employee to react with some vehemence to an unlawful discharge.”<sup>90</sup> The premise is that reinstatement does not trigger any equivalent anger, making similar employer disparagement less likely after reinstatement. Even when the employee lies under oath in an NLRB proceeding against the employer, the NLRB does not categorically preclude reinstatement for that misconduct. Rather, in such cases, the NLRB considers, among other things, whether such false testimony shows that she is unfit for reinstatement.<sup>91</sup>

In all these cases, the employer opposes reinstatement because of past misconduct, a credible signal that if it could, it would fire the employee after reinstatement because of that misconduct. Yet, what the employer wants and would do, if it could, does not wholly determine whether, despite the misconduct, the employee should be awarded reinstatement.

The NLRB’s “unfit for further service” approach illustrates that, for the employee-misconduct defense that denies reinstatement, a fire-after-reinstating rationale depends on the reason for collapsing the distinction between what the employer would want and whether the employee is objectively suitable for reinstatement despite his past misconduct. That reason is not self-evident. Perhaps misconduct on-the-job implies less future loyalty or obedience to that employer than post-termination misconduct. In any particular case, this may be true. But it is not obvious that inferences of this sort are available in enough cases to warrant stripping the trial judge of discretion to so infer or not, given the evidence, when deciding whether to order reinstatement.

Put another way, stripping trial judges of such discretion might be justified given strong evidence that trial judges often commit a certain kind of error. That error is finding someone suitable for reinstatement despite his past misconduct, when (1) in fact that person was later confirmed to be unsuitable for reinstatement because of his post-reinstatement behavior, and (2) his past pre-reinstatement misconduct alone well predicted that type of post-reinstatement behavior.

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89. See, e.g., *Precision Window Mfg., Inc. v. N.L.R.B.*, 963 F.2d 1105 (8th Cir. 1992); *Alto-Shaam, Inc.*, 307 N.L.R.B. 1466, 1467 (1992); *Hillside Ave. Pharmacy, Inc.*, 265 N.L.R.B. 1613 (1982).

90. *Stephens Media, L.L.C.*, 356 N.L.R.B. No. 63, 2011 WL 549435, at \*2 (Feb. 14, 2011) (citation and internal quotation marks omitted), *enforced*, Nos. 11–1054, 11–1088, 2012 WL 1372162 (D.C. Cir. April 20, 2012).

91. See, e.g., *Owens Ill., Inc.*, 290 N.L.R.B. 1193, 1193–94 (1988). The NLRA does not require the NLRB to deny reinstatement in every such case. *ABF Freight Sys., Inc. v. N.L.R.B.*, 510 U.S. 317, 325 (1994).

To illustrate, suppose a trial judge finds an employee suitable for reinstatement despite his theft of office supplies, and rejects the employer's argument that the past theft alone indicates that, if reinstated, the employee will probably steal something from the employer again. After reinstatement, that employee steals an office computer. If so, one might conclude that the trial judge had erred in finding reinstatement suitability. If, however, the reinstated employee had, after reinstatement, sexually harassed a co-employee, then the judge did not err in finding reinstatement suitability, provided that an employee's theft poorly predicts subsequent sexual harassment by that employee. On the other hand, if employee theft is a strong predictor of *any kind* of subsequent serious rule-breaking behavior, including but not limited to sexual harassment, then the judge did err in finding reinstatement suitability.

If trial judges commit this error in most cases, then stripping them of the discretion to reinstate an employee despite his past misconduct has a benefit: it avoids the social cost of the predicted post-reinstatement behavior. This benefit might be worth the social cost of removing such discretion, i.e., denying reinstatement where that employee is in fact suitable for reinstatement despite past misconduct.

Yet, even given a single metric for measuring those costs and benefits, the research literature on post-reinstatement outcomes currently provides little basis to estimate how often such errors would occur in the reinstatement decisions that trial judges would make but for the employee-misconduct defense. Most studies in this literature look at samples of labor arbitration awards in cases where the employee was discharged *for* misconduct but the arbitrator substitutes some less severe discipline for the dismissal. The researchers inquire into, among other things, which employees agreed to be reinstated (a source of selection bias), how long after reinstatement the reinstated employee worked, whether that employee was discharged for cause, and whether the employer was satisfied with that employee's post-reinstatement job performance.<sup>92</sup> Without better research on how prone trial judges are to erroneously finding reinstatement suitability despite past misconduct, it is hard to show that the costs of such error exceed the benefits of giving trial judges the discretion to decide reinstatement suitability despite misconduct in the particular case.

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92: For reviews of this literature, see Bernard Walker & Robert T. Hamilton, *Employer-Employee Grievances: A Review*, 13 INT'L J. MGMT. REV. 40, 50–51 (2011); David Lewin, *Unionism and Employment Conflict Resolution: Rethinking Collective Voice And Its Consequences*, 26 J. LAB. RES. 209, 225–26 (2005); and Kelly Williams & Daphne Gottlieb Taras, *Reinstatement in Arbitration: The Grievors' Perspective*, 55 INDUS. REL. 227, 228–31 (2000).



*B. The Voluntarily-Reinstate-and-Fire Rationale for Reducing Back Pay*

This section rejects a reinstate-and-fire rationale for why the employee-misconduct defense should limit back pay. White and Brussack argued that the defense's back pay limitation simply replicated what employers could otherwise secure by strategic use of rules governing how voluntary reinstatement offers affect Title VII back pay calculation: "There is nothing to prevent an employer in an after-acquired evidence case from unilaterally rehiring a discharged plaintiff upon its discovery of the after-acquired evidence, thus ending the backpay period, and then immediately discharging the plaintiff on the basis of the after-acquired evidence."<sup>93</sup>

Here is the error: an employer's voluntary reinstatement offer does *not* necessarily end the back pay period. If the employee accepts the offer, then back pay stops accruing under Title VII and other laws.<sup>94</sup> If the employee rejects the offer, then the back pay period stops at the date of rejection only if certain conditions are satisfied. In *Ford Motor Co. v. E.E.O.C.* (1982), the U.S. Supreme Court read section 706(g) of Title VII to mean that "absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential backpay [Title VII] liability,"<sup>95</sup> provided that the offered job is "substantially equivalent to the one he was denied" and the rejection of the offer is unreasonable.<sup>96</sup> Courts have adopted or endorsed the *Ford Motor* rule under various federal and state laws to determine how rejection of a voluntary reinstatement offer should affect a plaintiff's back pay award.<sup>97</sup> Similarly, under NLRA section 10(c), rejection of a reinstatement offer tolls the back pay period, provided that the offer is specific, unequivocal, unconditional, and offers full reinstatement to the employee's former or a substantially equivalent

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93. White & Brussack, *supra* note 1, at 85.

94. 42 U.S.C. § 2000e-5(g) (2006) (Title VII); *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 198–200 (1941) (NLRA).

95. *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 241 (1982).

96. *Id.* at 232.

97. See, e.g., *Albert v. Smith's Food & Drug Ctrs., Inc.*, 356 F.3d 1242, 1253–54 (10th Cir. 2004) (ADA); *Ottenberg's Bakers, Inc. v. D.C. Comm'n on Human Rights*, 917 A.2d 1094, 1107 (D.C. 2007) (D.C. Human Rights Act); *Fair v. Red Lion Inn*, 943 P.2d 431, 440 (Colo. 1997) (contract claim under Colorado law); *Champion Int'l Corp. v. Wideman*, 733 So. 2d 559, 561 (Fla. Dist. Ct. App. 1999) (Florida Civil Rights Act); *Brady v. Nestor*, 496 N.E.2d 148, 151 (Mass. 1986) (Mass. Gen. Laws ch. 151B); *Morris v. Clawson Tank Co.*, 587 N.W.2d 253, 265 (Mich. 1998) (Michigan's Persons with Disabilities Civil Rights Act); *Martinell v. Montana Power Co.*, 886 P.2d 421, 440 (Mont. 1994) (Montana Human Rights Act); *Dobson v. E. Associated Coal Corp.*, 422 S.E.2d 494, 502 (W. Va. 1992) (West Virginia Human Rights Act).

position.<sup>98</sup> Thus, where the *Ford Motor* rule or its equivalent applies but its conditions are not satisfied, the plaintiff-employee can reject a voluntary reinstatement offer without ending the back pay period.

In a voluntarily-reinstate-and-fire case, the *Ford Motor* rule is unlikely to be satisfied. That rule at least requires that the job offered be “substantially equivalent” to the position denied, as opposed to one that required the employee to “go into another line of work, accept a demotion, or take a demeaning position.”<sup>99</sup> A court is unlikely to find this condition satisfied for a position about which the employer knows at the time of the offer that, when the worker accepts, the employer will immediately fire her. Such a position carries zero promotional opportunities, which matters if the position denied had at least some prospects for promotion. Its compensation terms, even if the same on paper, are not equivalent in practice, given the expected negligible duration of employment. And it is easy to label such an offered position as objectively “demeaning” to the worker, and particularly so if the worker does not know at the time of offer that, if she accepts, the employer intends to immediately fire her.

### C. *Front Pay*

A reinstate-and-fire rationale for precluding front pay simply makes no sense if the underlying law does not require judges to prefer reinstatement over front pay as a remedy, for example, under state tort law. Some state courts, however, have adopted *McKennon*'s bar against front pay into their tort law,<sup>100</sup> even though the appellate courts in such states have not declared a tort-remedies rule preferring reinstatement in lieu of damages for loss of future earnings (front pay).

Under laws preferring reinstatement over front pay as a presumptive remedy, the reinstate-and-fire rationale cannot be an independent reason for denying front pay unless it applies in cases where the employee is suited for reinstatement despite his past misconduct. However, in those cases, if the employer proves that if it could, it would immediately fire the employee after reinstatement, such a showing actually *justifies* awarding front pay instead. One ground for granting front pay in lieu of reinstatement is that the degree of continuing employer hostility, or mutual hostility due to the

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98. *In re* *Midwestern Pers. Servs.*, 346 N.L.R.B. 624, 624 (2006), *enforced*, 508 F.3d 418 (7th Cir. 2007); *Mashuda Corp. v. N.L.R.B.*, 135 F. App'x 574, 581 (4th Cir. 2005); *Halle Enters., Inc. v. N.L.R.B.*, 247 F.3d 268, 271 (D.C. Cir. 2001); *N.L.R.B. v. Seligman & Assoc.*, 808 F.2d 1155, 1163 (6th Cir. 1986); *Standard Aggregate Corp.*, 213 N.L.R.B. 154, 154 (1974).

99. *Ford Motor Co.*, 458 U.S. at 231–32.

100. *See supra* note 26 (citing cases).

lawsuit, has rendered a productive and amicable working relationship impossible or impractical.<sup>101</sup> In those cases, the employer's would-have-fired showing helps prove that there is enough hostility to preclude a productive and amicable working relationship after reinstatement.<sup>102</sup>

## VI. CONTRACT PRINCIPLES AND UNCLEAN HANDS

This Part considers three justifications for an employee-misconduct defense to liability. The first two claim fidelity to two distinct contract principles in order to justify the employee-misconduct defense as a defense to *contract* liability: (1) material breach by one party permits the counterparty to cancel its remaining contractual duties; and (2) if a party's misrepresentation induces the counterparty to assent to a contract, such contract is voidable by the counterparty. Either principle affords a party the right on those grounds to cancel or rescind the contract, respectively. This section also considers justifications based on the unclean hands doctrine, traditionally an equitable defense to remedies generally.

Each of these three rationales rests on a traditional common law defense that requires judges or juries to do something other than predict what the employer would have done at the time of its wrongful act had it known of the employee's misconduct. If case outcomes are the same nevertheless, then it is unclear why courts should adopt a specially designated employee-misconduct defense at all, as opposed to letting employers plead these traditional common law defenses in their existing doctrinal form. If, however, the prevailing would-have-fired variant of the defense leads to different case outcomes, then what needs justifying are those features of the employee-misconduct defense that *differ* from what each state's material-breach, fraudulent-inducement, or unclean-hands doctrines generally require.

### A. *Material Nonperformance*

Every state's contract law assumes that every contract contains "a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured

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101. See, e.g., *Abuan v. Level 3 Commc'ns, Inc.*, 353 F.3d 1158, 1176 (10th Cir. 2003) (Title VII and ADEA); *Salitros v. Chrysler Corp.*, 306 F.3d 562, 572 (8th Cir. 2002) (ADA); *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 729 (2d Cir. 1984) (ADEA); *Sands v. Menard, Inc.*, 787 N.W.2d 384, 394–96 (Wis. 2010) (arbitral order).

102. This reasoning does not apply in cases of post-termination misconduct in which the employee strategically committed the misconduct *in order* to make reinstatement untenable and thus obtain front pay, because the plaintiff could thereby escape the intended effect of any rule preferring reinstatement over front pay as a remedy.

material failure by the other party to render any such performance due at an earlier time.”<sup>103</sup> If such “material” nonperformance occurs, the non-breaching party may elect to seek, instead of contract damages, the discharge of all its remaining contractual duties. For this rule, it does not matter if the non-breaching party was unaware of the other party’s material non-performance.<sup>104</sup>

State contract law, however, varies in how a court must decide whether material breach has occurred. Some state courts provide that a breach is material only if it is severe enough to defeat the “primary,” “essential,” or “root” purpose of the parties in making the contract.<sup>105</sup> Other state courts<sup>106</sup> have adopted or relied on the Restatement (Second) of Contracts § 241, which identifies five “significant” types of non-dispositive circumstances or factors to consider.<sup>107</sup>

Both these approaches diverge from the prevailing employee-misconduct defense, which focuses *solely* on predicting whether the employer would have fired the employee for misconduct had it known of the misconduct at the time of discharge.<sup>108</sup> In contrast, in deciding the

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103. RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981). For cases recognizing this rule, see 14 RICHARD A. LORD, WILLISTON ON CONTRACTS § 43:5 (4th ed. 2000).

104. RESTATEMENT (SECOND) OF CONTRACTS § 237, cmt. c, illus. 8 (1981). Courts have applied the material breach rule to excuse an employee’s duties under a non-compete clause of an employment contract where the employer had earlier breached that contract by firing that employee. *E.g.*, *Rao v. Rao*, 718 F.2d 219, 223 (7th Cir. 1983); *Ward v. Am. Mut. Liab. Ins. Co.*, 443 N.E.2d 1342, 1343 (Mass. App. Ct. 1983); *McKnight v. Midwest Eye Inst. of Kansas City, Inc.*, 799 S.W.2d 909, 915–17 (Mo. Ct. App. 1990); *see Schuermann v. Am. KA-RO Corp.*, 367 S.E.2d 159 (S.C. 1988) (demonstrating that termination for cause permits employer to abandon non-competition clause under which employer had, in exchange for that clause, agreed to pay seventy-five percent of the monthly salary for two years).

105. *E.g.*, *Coors v. Sec. Life of Denver Ins. Co.*, 112 P.3d 59, 64 (Colo. 2005); *Independence Lead Mines v. Hecla Mining Co.*, 137 P.3d 409, 415 (Idaho 2006); *Ferrara v. Walters*, 919 So.2d 876, 886 (Miss. 2005); *R.C. Hobbs Enters., v. J.G.L. Distrib. Inc.*, 104 P.3d 503, 508 (Mont. 2004); *Horton v. Horton*, 487 S.E.2d 200, 204 (Va. 1997).

106. *E.g.*, *Seherr-Thoss v. Seherr-Thoss*, 141 P.3d 705, 713 (Wyo. 2006); *Mustang Pipeline Co., Inc. v. Driver Pipeline Co.*, 134 S.W.3d 195, 199 (Tex. 2004).

107. RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981). In employment contract cases, some state courts have referred to or relied on some or all of the Restatement factors, with varying precision. *See, e.g.*, *Nat’l Propane Corp. v. Miller*, 18 P.3d 782, 787 (Colo. Ct. App. 2000); *Shah v. Cover-It, Inc.*, 859 A.2d 959, 963–64 (Conn. App. Ct. 2004); *Circle Sec. Agency, Inc. v. Ross*, 437 N.E.2d 667, 673–74 (Ill. App. Ct. 1982); *Stokes v. Enmark Collaborative*, 634 S.W.2d 571, 573 (Mo. Ct. App. 1982); *Kersh v. Montgomery Developmental Ctr.*, 519 N.E.2d 665, 668 (Ohio Ct. App. 1987); *Grant v. Laughlin Emtl., Inc.*, No. 01-07-00227-CV, 2009 WL 7936382009, at \*10 (Tex. App. Mar. 26, 2009); *see also Virendra S. Bisla, M.D., Ltd. v. Parvaiz*, 884 N.E.2d 790, 795 (Ill. App. Ct. 2008) (prescribing factors that overlap with Restatement factors).

108. *O’Day v. McDonnell Douglas Helicopter Co.*, 959 P.2d 792, 795–96 (Ariz. 1998); *McDill v. Environamics Corp.*, 757 A.2d 162, 166 (N.H. 2000); *Teter v. Republic Parking*

material breach question, state courts do not ask the finder of fact to proceed exclusively from the employer's point of view. Given this difference, in at least some cases, applying a material breach rule may lead to different case outcomes than the employee-misconduct defense's would-have-fired approach. If so, it is not clear what justifies departing from the applicable material breach rule for employment contracts, while continuing to apply that rule for other kinds of contracts. If not, then it is unclear why employers should not have to raise and satisfy the material breach rule in its existing doctrinal form in order to defeat workers' contract claims.

*B. Inducement by Misrepresentation*

An employee-misconduct defense to contract liability can also be derived from the state contract law rule that permits rescission where one party's misrepresentations induced the other to assent to the contract. The Restatement formulation, roughly mirroring state contract law,<sup>109</sup> provides: "If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient."<sup>110</sup> Once voidable, the induced party can choose either to rescind its contractual duties, or ratify the contract nonetheless, thereby extinguishing its option to rescind.<sup>111</sup> In suits by employers, courts have sometimes granted rescission of employment contracts based on employee misrepresentations at the time of hire.<sup>112</sup> And in workers' contract claims against employers, some courts have also recognized a rescission defense to contract liability under employment contracts based on worker misrepresentations at the time of hire.<sup>113</sup>

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Sys., Inc., 181 S.W.3d 330, 340 (Tenn. 2005).

109. *E.g.*, CAL. CIV. CODE § 1689(b)(1) (West 2011); GA. CODE ANN. § 13-4-60 (West 2011); MONT. CODE ANN. § 28-2-1711(1) (2011); N.D. CENT. CODE ANN. § 9-09-02(1) (2012); OKLA. STAT. ANN. tit. 15, § 233(1) (West 2011); S.D. CODIFIED LAWS § 53-11-2(1) (2011); *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1094 (Alaska 2008); *Exotics Hawaii-Kona, Inc. v. E.I. Du Pont De Nemours & Co.*, 172 P.3d 1021, 1032 (Haw. 2007); *J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009, 1018 (Nev. 2004); *ABM Farms, Inc. v. Woods*, 692 N.E.2d 574, 578 (Ohio 1998); *Miller v. Celebration Mining Co.*, 29 P.3d 1231, 1235 (Utah 2001); *Sarvis v. Vt. State Colls.*, 772 A.2d 494, 498–99 (Vt. 2001).

110. RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1981). To be material, the misrepresentation must have "substantially contribute[d] to his decision to manifest his assent." *Id.* § 167.

111. *Id.* § 7.

112. *E.g.*, *Jewish Ctr. of Sussex Cnty. v. Whale*, 432 A.2d 521 (N.J. 1981).

113. *See, e.g.*, *Hampton v. Sandy Cowen Agency, Inc.*, 739 P.2d 1331, 1331–32 (Ariz. Ct. App. 1987); *Fuller v. DePaul Univ.*, 12 N.E.2d 213, 215–16 (Ill. App. Ct. 1938); *see*

Rescission, however, requires restitution, that is, substantially restoring both parties to the positions they would have occupied had the transaction not occurred. In employment contracts, an employer receives, and the worker provides, the benefit of the worker's services, which usually cannot be easily given or taken back so as to restore both employer and worker to their pre-agreement positions. Accordingly, in some states, rescission of employment contracts entails an inquiry into the reasonable value of those services (often the market wage), payment of which accomplishes the necessary restitution. For example, some state courts have declared that if an employer discharges a worker in breach of a fixed-duration employment contract before the worker has fully performed, the discharged worker can elect to rescind the contract and sue in *quantum meruit* to recover the reasonable value of services rendered to the employer.<sup>114</sup>

In contract cases where the employer relies on résumé fraud as a defense to liability, why should the defense's would-have-fired approach supplant existing state contract law authorizing contract rescission based on misrepresentations at the time of hire? A would-have-fired showing can help prove that the worker's misrepresentation "induced" the employer to hire the worker, or that a (non-fraudulent) misrepresentation is "material," but that showing *itself* need not be required. And while proving justifiable reliance sometimes requires that the recipient of the misrepresentation had tried to verify that misrepresentation, that duty to investigate usually does not apply to statements of fact where the fact in question is within the peculiar knowledge of the person making the representation.<sup>115</sup> This applies to résumé fraud, because the job applicant's criminal record, past work experience, and educational degrees, are all usually items of

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*also* Morgan v. Am. Univ., 534 A.2d 323, 329–31 (D.C. 1987) (affirming jury finding that contract language did not abrogate employer right of rescission based on employee's omission, at time of hire and subsequent reappointments, that he was simultaneously working for another university).

114. City of Anniston v. Douglas, 34 So. 2d 467, 470 (Ala. 1948); Oliver v. Campbell, 273 P.2d 15 (Cal. 1954) (attorney-client); Burritt v. Media Mktg Servs., Inc., 420 S.E.2d 792, 795 (Ga. Ct. App. 1992); Milage v. Woodward, 78 N.E. 873 (N.Y. 1906); Wegman v. Dairylea Co-op., Inc., 50 A.D.2d 108 (N.Y. App. Div. 4th Dep't 1975). *But see* Great Harbour Cay Realty & Inv. Co. v. Carnes, 862 So. 2d 63, 68 (Fla. Dist. Ct. App. 2003) (affirming dismissal of employer's fraudulent-inducement counterclaim against former employee based on résumé fraud, because the employer could not show "rescission [sic] . . . being applied in an employment contract situation"); RESTATEMENT (SECOND) OF CONTRACTS § 373(2) (1981) ("The injured party has no right to restitution if he has performed all of his duties under the contract and no performance by the other party remains due other than payment of a definite sum of money for that performance.")

115. *E.g.*, Danann Realty Corp. v. Harris, 157 N.E.2d 597, 599 (N.Y. 1959); Porreco v. Porreco, 811 A.2d 566, 571 (Pa. 2002).

information within the job applicant's peculiar knowledge. In general, if case outcomes are unlikely to vary much under either approach, then adopting the employee-misconduct defense requires explaining why state contract law should treat employment contract claims differently from other contract claims against which the employer can argue fraudulent-inducement.

### C. *Fraudulent Inducement as a Statutory Bar*

A fraudulent-inducement argument might preclude liability under work law *statutes* if those statutes require a contract between worker and employer that is or could have been valid and enforceable at common law at the time of the employer's wrongful act. For example, some courts have read the statutory term "employee" in a state's workers' compensation statute, often defined to include a "contract for hire, express or implied,"<sup>116</sup> to require a valid contract in existence between worker and employer, at the time of the worker's injury, for the statute to apply.<sup>117</sup> The South Carolina Supreme Court, for example, grounded its judicially-declared false-statement defense to workers' compensation liability by reasoning that an injured worker cannot be an "employee" at the time of injury under the state's workers' compensation statute if that worker had committed fraudulent inducement at the time of hire.<sup>118</sup>

Two hurdles face this kind of argument. First, fraudulent-inducement typically renders a contract voidable, not void. This leaves the contract enforceable at common law unless the defrauded party rescinds the contract and provides restitution.<sup>119</sup> Courts have addressed this hurdle in different ways.

For example, when a claimant argued, on that basis, that the employer had to affirmatively rescind the contract to avail itself of the false-statement defense under South Carolina's workers' compensation statute, the South

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116. MODERN WORKERS COMP. § 106:2 (2011) (compiling statutes).

117. *E.g.*, *Spikes v. State*, 458 A.2d 672, 674 (R.I. 1983).

118. S.C. CODE ANN. § 42-1-130 (2011); *Brayboy v. WorkForce*, 681 S.E.2d 567, 568–69 (S.C. 2009); *Cooper v. McDevitt & St. Co.*, 196 S.E.2d 833, 834 (S.C. 1973). Similarly, some courts have also declared that employers have a fraudulent-inducement ground for seeking rescission of an employee benefit plan under the Employment Retirement Income Security Act (ERISA). *See Ram Tech. Servs. v. Koresko*, No. 03-6163-AA, 2004 WL 1050888, at \*4–5 (D. Or. Apr. 15, 2004) (no "plan" under ERISA if contract setting forth the benefit plan is voidable for fraudulent-inducement under state law); *see also Nash v. Trs. of Bos. Univ.*, 946 F.2d 960, 964–67 (1st Cir. 1991) (ERISA incorporates fraudulent-inducement defense under federal common law); *Yeckel v. Abbott*, No. 03-04-00713-CV, 2009 WL 1563587 (Tex. App. June 4, 2009) (same).

119. *See, e.g.*, *Still v. Norfolk & W. Ry.*, 368 U.S. 35, 38–39, 40–41 (1961); *H.J. Jeffries Truck Line v. Grisham*, 397 P.2d 637, 642–43 (Okla. 1964).

Carolina Supreme Court disagreed:

To so hold would be to require an employer who learns of a misrepresentation subsequent to an injury to elect either termination, in which case it may be subject to a wrongful discharge suit, or retention of the employee, in which case it is liable for worker's compensation. We decline to put the employers of this state on the horns of such a dilemma.<sup>120</sup>

This reasoning is incomplete. *Every* firing entails some risk of a meritless wrongful-discharge suit, as reduced by available sanctions for filing a frivolous lawsuit<sup>121</sup> and managed by liability insurance or arbitration clauses, among other things. Perhaps in these cases there is an above-average risk of a non-frivolous yet meritless wrongful-discharge suit, because, once terminated, the injured worker might sue under South Carolina statutory law prohibiting discharge of an employee "because the employee has instituted . . . any proceeding" under the state's workers' compensation law.<sup>122</sup> On the other hand, if the injured worker is not an "employee" under the state's workers' compensation statute, then that statute's exclusive-remedy provisions—which restrict the rights and remedies of that "employee"<sup>123</sup>—do not bar the injured "employee" from filing a tort claim or some other cause of action (meritless or not) against the employer to recover for the worker's injury. Thus, it is unclear whether, by its own reasoning, the South Carolina Supreme Court in fact increased or decreased the risk of meritless wrongful-discharge suits.

For another example, when employment testers sued an employment agency under the Civil Rights Act of 1866 (42 U.S.C. § 1981), which affords "all persons" the "same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens,"<sup>124</sup> the D.C. Circuit concluded that, even if they could prove that the defendant had treated them differently because of their race, they had no cognizable injury under section 1981.<sup>125</sup> The court reasoned in part that, because they had misrepresented their intentions and presented fictitious credentials, at best that defendant had denied the plaintiff-testers the opportunity to enter into *voidable* contracts. This did not violate section 1981, because "the rule that

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120. *Small v. Oneita Indus.*, 459 S.E.2d 306, 307 (S.C. 1995); *see Ga. Elec. Co. v. Rycroft*, 378 S.E.2d 111, 115 (Ga. 1989) (declaring without explaining why "[i]t is not necessary for the employment to be void, as opposed to merely voidable").

121. *E.g.*, S.C. CODE ANN. § 15-36-10 (2011) (South Carolina Frivolous Civil Proceedings Sanctions Act).

122. *Id.* § 41-1-80.

123. *Id.* § 42-1-540.

124. 42 U.S.C. § 1981(a) (2006).

125. *Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg Corp.*, 28 F.3d 1268, 1271 (D.C. Cir. 1994) (emphasis in original).



contracts obtained through misrepresentations are merely *voidable* rather than void seems designed entirely to protect the *target* of the misrepresentations.”<sup>126</sup>

This reasoning is flawed. The fraudulent-inducement defense protects the defrauded party by giving it the *option* to rescind. Unless and until it exercises that option, a voidable contract is no less valid and enforceable, and thus no less a contract under which the misrepresenting party still has rights. Thus, denying a person the right to make a voidable contract because he is not white still denies that person rights that he would have had “under the . . . proposed contractual relationship.”<sup>127</sup> Indeed, if voidable contracts are never “contracts” under section 1981, then section 1981, intended to protect against race discrimination, never protects minors, the mentally ill, and others that can make *only* voidable contracts, as well as their counterparties.

Second, even if a worker’s misrepresentation has rendered the employment contract void, not just voidable, under contract principles,<sup>128</sup> the statutory terms “employee” or “employment” in many work law statutes do not make a valid contract a necessary condition to proving a claim. For example, employment discrimination statutes often do not define an employee by reference to a “contract” or similar language, though they do not expressly preclude the incorporation of common-law contract defenses either. Congress defined “employee” under Title VII as “an individual employed by an employer,”<sup>129</sup> but did not define “employed” or cognates, such as “employment,” even though section 703(a) of Title VII prohibits, among other things, employer actions taken with respect to an individual that affect that individual’s “terms, conditions, or privileges of employment,” or “status as an employee,” because of that individual’s race, color, religion, sex, or national origin.<sup>130</sup>

For definitions of “employee” like these in federal statutes, the U.S. Supreme Court has presumed that the statutory term “employee” describes

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126. *Id.*; accord *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1138–40 (9th Cir. 2000).

127. *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006).

128. RESTATEMENT (SECOND) OF CONTRACTS § 163 (1981); cf. *Honaker v. Duro Bag Mfg. Co.*, 851 S.W.2d 481, 483–84 (Ky. 1993) (showing that claimant violated condition precedent to contract when he sent imposter to required pre-employment physical exam, and therefore was barred from benefits under state workers’ compensation statute).

129. 42 U.S.C. § 2000e(f) (2006). For the same or similar definitions of “employee” in other employment discrimination statutes, see, as examples: 42 U.S.C. § 12111(4) (2006); ARIZ. REV. STAT. ANN. § 41-1461(5)(a) (2011); GA. CODE ANN. § 34-5-2(3) (West 2011); LA. REV. STAT. ANN. § 23:302(1) (2011); MONT. CODE ANN. § 49-2-101(10) (2011).

130. 42 U.S.C. § 2000e-2(a) (2006). To the extent section 703(a) declares unlawful employer discrimination against categories of people other than employees, such as job applicants, that section cannot plausibly require any contract to have ever existed between the aggrieved individual and the employer.

“the conventional master-servant relationship as understood by common-law agency doctrine,” absent indications of legislative intent to the contrary.<sup>131</sup> In turn, common-law agency doctrine provides that an agency relationship, including a master-servant relationship, may exist absent any valid contract,<sup>132</sup> but cannot exist without “manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.”<sup>133</sup> Thus, any worker misrepresentation at the time of hire does not necessarily defeat a claim under such a reading, even if it renders the contract void under common-law contract principles, unless the misrepresentation defeats the consent required for an agency relationship to exist.

#### D. *Unclean Hands*

To base an employee-misconduct defense to liability (contract or otherwise) on the unclean hands doctrine, one must overcome this problem: any such justification largely derives from contestable conclusions as to the purpose of that doctrine and the moral judgments that doctrine authorizes.

By the early twentieth-century, the unclean hands doctrine was said to bar equitable relief upon a showing that the plaintiff committed misconduct that is, “in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties and arising out of the transaction.”<sup>134</sup>

Contemporary versions of this doctrine similarly require at least some misconduct that is connected to the matter in litigation. Courts vary in the words used to describe the requisite misconduct severity (e.g., “unconscionable”) as well as the kind of connection to the matter in litigation. For example, some state courts require the plaintiff’s misconduct to be somehow connected to the transaction at issue in the litigation,<sup>135</sup> while other courts have adopted or favorably referred to the idea that the plaintiff must have engaged in the misconduct “in acquiring the right he now asserts.”<sup>136</sup>

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131. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992) (internal quotation marks omitted) (ERISA); *accord Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440, 444–45 (2003) (ADA).

132. See RESTATEMENT (SECOND) OF AGENCY § 225 cmt. a, 220 cmt. b, 1 cmt. b (1958).

133. *Id.* § 1.

134. JOHN NORTON POMEROY, 1 A TREATISE ON EQUITY JURISPRUDENCE 741 (4th ed. 1918).

135. *E.g.*, *Scruggs v. Wyatt*, 60 So.3d 758, 773 (Miss. 2011) (quoting *Bailey v. Bailey*, 724 So.2d 335, 337 (Miss. 1998)) (“willful misconduct in the transaction at issue”).

136. *E.g.*, *Adams v. Manown*, 615 A.2d 611, 617 (Md. 1992); *City of St. Joseph v. Lake Contrary Sewer Dist.*, 251 S.W.3d 362, 369 (Mo. Ct. App. 2008); *Mechem v. City of Santa*

In turn, multiple justifications have been offered for the unclean hands defense. One is that, though often styled as an affirmative defense,<sup>137</sup> the unclean-hands doctrine primarily aims not to protect a party to the litigation, but to preserve court integrity by refusing to let the coercive machinery of the court system be used to profit from immoral conduct.<sup>138</sup> Yet, the unclean hands doctrine may at the same time reduce court integrity (however defined) because, among other reasons, the doctrine also lets stand a wrong committed by the defendant for which a court would otherwise provide redress.<sup>139</sup>

Another justification is the norm of *tu quoque*. If a speaker (here, the plaintiff) blames or condemns another for wrongdoing (including, by bringing a lawsuit), the illocutionary force of that speech act (roughly, how strongly that speech act accomplishes the speaker's intention to blame without regard to the truth value of what is said) is deflated or diminished where the speaker has committed the same, similar, or related wrongdoing.<sup>140</sup> Still another justification is retribution: by denying redress to the plaintiff for defendant's wrongdoing, a court punishes the plaintiff *for* committing its own wrongdoing. That punishment is proportional, because the plaintiff's wrong must be the same, similar, or related to the defendant's wrongdoing.<sup>141</sup>

An unclean-hands rationale for the employee-misconduct defense, however, faces at least three hurdles. First, only some state courts have extended this doctrine, traditionally a bar to equitable relief, to remedies at law as well.<sup>142</sup> Thus, in states where the doctrine has not been so extended, it is unavailable to preclude an employer's liability in damages.

Second, an unclean-hands rationale derives from contestable conclusions about the nature and priority of the purposes behind the unclean-hands doctrine and the moral norms it is supposed to embody. Thus, the scope of the unclean-hands defense rises and falls depending on validity and scope of these moral norms. In worker suits involving employee misconduct, it is not self-evident that a court-integrity purpose of

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Fe, 634 P.2d 690, 692 (N.M. 1981); *Kingston Hill Acad. v. Chariho Reg'l Sch. Dist.*, 21 A.3d 264, 270 (R.I. 2011); *Adrian v. McKinnie*, 684 N.W.2d 91, 93 (S.D. 2004). For a similar formulation, see *Nakahara v. NS 1991 Am. Trust*, 718 A.2d 518, 523 (Del. Ch. 1998); *see also* *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245 (1933).

137. *E.g.*, *Kingston Hill Acad.*, 21 A.3d at 270.

138. *E.g.*, *Pappas v. Pappas*, 320 A.2d 809, 811 (Conn. 1973); T. Leigh Anenson, *Beyond Chafee: A Process-Based Theory of Unclean Hands*, 47 AM. BUS. L.J. 509 (2010).

139. Ori J. Herstein, *A Normative Theory of the Clean Hands Defense*, 17 LEGAL THEORY 171, 178–82 (2011).

140. *See id.* at 191–98.

141. *See id.* at 200–01.

142. T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 KY. L.J. 63 (2011).

the doctrine justifies a misconduct defense to employer liability. Employer avenues for recovery for misconduct-losses<sup>143</sup> can reduce or eliminate the extent of any “profit” from the misconduct, particularly given the low cost of asserting counterclaims in the worker’s suit. Moreover, the moral valence is unclear, for it is extremely unlikely that a worker commits misconduct with the *goal* of later becoming injured by, and suing based on, the employer’s wrongful act.

Third, any unclean-hands rationale is under-determinate as applied, given under-determinacy about whether the plaintiff’s wrongdoing is the same, similar to, or connected enough with the defendant’s wrongdoing. The plaintiff-worker’s wrongdoing will never be exactly the *same* as defendant-employer’s wrongdoing, because unlike employers, workers cannot fire, refuse to hire, or deny workers’ compensation benefits, wrongly or otherwise.

Moreover, the unclean hands doctrine does not say how to judge whether a plaintiff-worker’s wrongdoing is similar or connected *enough*. How is, for example, a worker’s theft of company trade secrets while on the job *similar* or *connected* enough to the employer’s discriminatory firing? The answer depends on some criteria external to the doctrine for selecting certain characteristics of each side’s wrongdoing as salient for comparison. Only then can one compare those characteristics for similarity.

For example, stealing company property can be characterized as categorically different, if what should count when comparing wrongs is how much each side’s wrong implicates the other’s property rights. Or each side’s wrongdoing can virtually always be counted as similar or connected enough, if what should matter is that a necessary condition for each wrong is the employment relationship between worker and employer. Whatever the merits of these competing characterizations, the unclean hands doctrine does not provide the grounds for choosing between them.<sup>144</sup>

Similarly, where the worker’s claim arises under a statute, the unclean hands doctrine may not apply where, by operation of the doctrine itself, a countervailing public policy advanced by the statute warrants relief for the plaintiff’s claim, his misconduct notwithstanding.<sup>145</sup> The problem is that,

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143. *See supra* Part II.A.

144. This conceptual problem is not unique to unclean hands, but has been claimed to plague generally certain kinds of “equality” arguments, including applications of the judicial norm to treat like cases alike. *See generally* PETER WESTEN, *SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF “EQUALITY” IN MORAL AND LEGAL DISCOURSE* (1990).

145. Where the worker’s claim arises under common law, there is no statutory interpretation issue, leaving only the question of whether, by operation of the unclean-hands doctrine itself, a countervailing public policy advanced by the common law on which the

again, any unclean-hands justification for the defense is derivative of the moral judgments it permits and the external criteria it adopts to compare the wrongdoing on both sides. Without those, we cannot begin to decide whether a countervailing public policy is countervailing enough. Yet, on these issues, courts rarely do more than announce their conclusions.<sup>146</sup>

Finally, suppose a court substitutes for the traditional unclean-hands elements by asking instead what the employer would have done, had it known of the misconduct. If this substitution mattered to the case's outcome, it would have to be independently justified apart from the unclean hands doctrine. If not, then there is no good reason to depart from the unclean-hands doctrine in its various forms.

## VII. WORKERS' COMPENSATION STATUTES

A false-statement defense to workers' compensation claims presents a special case. Workers' compensation benefits are primarily intended to cover the claimant's loss of wage-earning *capacity* due to that injury (not actual lost wages) as well as medical or hospital expenses caused by that injury.<sup>147</sup> The size of these types of losses would remain the same even if, absent the workers' compensation claim, the employer would still have discovered the employee's misconduct when it did and fired the employee for it, because the size of these losses are not a function of the time that elapses after the injury occurs. Courts discussing a false-statement defense to liability for workers' compensation claims have offered two main justifications: (1) a public policy against fraud and (2) preserving employer ability to receive reimbursement from the state's second-injury fund (SIF).<sup>148</sup>

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plaintiff relies warrants relief for his or her claim.

146. *E.g.*, *Camp v. Jeffer, Mangels, Butler & Marmaro*, 35 Cal. App. 4th 620, 639 (Cal. Ct. App. 1995) (failing to explain why plaintiffs' misrepresentations about their prior felony convictions "relate directly" to their wrongful termination claims, or why barring those claims on unclean-hands grounds "adequately serve[s]" state "public policies," except by vaguely pointing to the misrepresentations' "nature," their "potential damage to [the employer]," and that plaintiffs "were disqualified from employment by means of government requirements.").

147. *See* 4 LARSON, *supra* note 31, § 80.02D (compiling cases).

148. On the fraud justification, see *Shippers Transp. of Ga. v. Stepp*, 578 S.W.2d 232, 234 (Ark. 1979); *Air Mod Corp. v. Newton*, 215 A.2d 434, 440 (Del. 1965); *Martin Co. v. Carpenter*, 132 So. 2d 400, 406 (Fla. 1961); *Ga. Elec. Co. v. Rycroft*, 378 S.E.2d 111, 114 (Ga. 1989); and *Fed. Copper & Aluminum Co. v. Dickey*, 493 S.W.2d 463, 464 (Tenn. 1973). On the SIF justification, see *Air Mod Corp.*, 215 A.2d at 440; *Martin Co.*, 132 So.2d at 406; *Rycroft*, 378 S.E.2d at 114; *Nabors Drilling USA v. Davis*, 857 So.2d 407, 414–15 (La. 2003); *Jewison v. Frerichs Constr.*, 434 N.W.2d 259, 261 (Minn. 1989); *Oesterreich v. Canton-Inwood Hosp.*, 511 N.W.2d 824, 827 (S.D. 1994); *Fed. Copper*, 493 S.W.2d at 464;

### A. *Fraud*

It is difficult to justify an anti-fraud rationale for a false-statement *defense* in particular. The employer can recover for a job applicant's fraud in a separate lawsuit alleging fraud, and such recovery is poorly approximated by the value of the injured worker's foregone workers' compensation benefits. And where a fraudulent-inducement contract defense is not incorporated by reference into the statute itself,<sup>149</sup> that principle, founded on making contracts consensual, does not obviously apply when the employer's wrongful act violates a statutory duty, because that duty does not require individual employer consent to apply.

A few courts have argued that since employers must bear the "risks" of an "infirm" employee, job applicant misrepresentations defeat an employer's ability to determine a worker's health before employment in order to avoid "possible liability for an accidental injury, causally related to an infirmity,"<sup>150</sup> or more generally, the "risks which are resultant from hiring an infirm employee."<sup>151</sup> Perhaps this means that a false-statement defense motivates job applicants to tell the truth, and that helps employers avoid hiring someone because of their prior injury in order to reduce their expected workers' compensation costs ("possible liability"). If so, then false-statement defenses seem aimed to help employers do what the ADA now prohibits. Title I of the ADA does not permit fear of increased workers' compensation costs as the motive for not hiring someone with an actual or perceived physical impairment.<sup>152</sup>

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and 1996 Alaska Op. Att'y Gen. 251, No. 661-95-0748, 1996 WL 1062199, at \*2 (Sept. 17, 1996). One court has offered equitable estoppel doctrine as a justification. *Lamay v. Roswell Indep. Sch. Dist.*, 882 P.2d 559, 564 (N.M. Ct. App. 1994). *But see Stovall v. Sally Salmon Seafood*, 757 P.2d 410, 418 (Or. 1988) (rejecting this argument).

149. *See supra* Part VI.C.

150. *Shippers Transp.*, 578 S.W.2d at 234.

151. *Martin Co.*, 132 So. 2d at 400, 406.

152. *See* 29 C.F.R. Pt. 1630, App. (2011) (interpretative guidance on Title I of the ADA) (discussion of 29 C.F.R. § 1630.2(l), providing that the "regarded as" definition is satisfied if the employer "made an employment decision because of a perception of disability based on 'myth, fear or stereotype,'" citing "workers' compensation costs" as an employer concern that is one among many "common attitudinal barriers that frequently result in employers excluding individuals with disabilities"); *Baker v. Windsor Republic Doors*, 414 F. App'x 764, 772 (6th Cir. 2011) ("Requiring an employee with a heart condition to waive workers' compensation benefits otherwise available to non-disabled employees . . . smacks of exactly the type of discrimination that the ADA seeks to prevent.").

### B. *Second Injury Fund*

In a few states, a false-statement defense to workers' compensation liability *can* be justified as preserving employer access to a state's second-injury fund (SIF). In some cases, a worker's work injury is attributable in whole or part to a prior injury suffered by that worker before coming to their current employer. For such cases, states adopted SIFs to pay all or some of the workers' compensation benefits for which the worker was otherwise eligible (or reimburse the employer's workers' compensation insurer for such payment). When the SIF pays, the insurer does not charge the employer the higher premiums it otherwise would because of that worker's injury.

The purpose of SIFs was to remove employer fear of increased workers' compensation premiums as a reason not to hire and retain disabled workers, and thereby increase their employment opportunities.<sup>153</sup> In some states, however, the SIF pays only if the employer knew of the worker's prior injury at the time of hire or at least before the second injury occurred.<sup>154</sup> In those states, if a worker makes false statements as to a prior medical condition at the time of hire, that worker could thereby preclude employers from obtaining SIF relief if that worker suffers a qualifying work injury. If the employer fears loss of SIF payments due to worker false statements about their prior medical conditions, the worry is that such fear reduces any SIF effect on employer hiring or retention of disabled workers.

This justification is limited. Many states have eliminated their SIFs or closed them to new claims. Of the sixteen states with a general false-statement defense, only four have SIFs that impose an employer knowledge requirement and that are currently open to new claims (Table 1). Similarly, of the sixteen states with a false-statement defense concerning occupational disease, only two have SIFs that impose an employer knowledge requirement and that remain open to new claims (Table 2).<sup>155</sup>

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153. E.g., *VECO Alaska, Inc. v. State, Dept. of Labor, Div. of Workers' Comp.*, 189 P.3d 983, 987 (Alaska 2008); *Shelby Mut. Ins. Co. v. Commonwealth*, 649 N.E.2d 732, 733 (Mass. 1995); see generally U.S. DEP'T OF LABOR, *SECOND INJURY FUNDS: STANDARDS AND PATTERNS IN STATE LEGISLATION* (1957) (Bulletin 190). It is not clear how much a state SIF *uniquely* increases disabled workers' employment opportunities, given the ADA and similar state statutes.

154. See, e.g., ALASKA STAT. § 23.30.205(c) (2012) (proof by "written records" that employer had "knowledge of the permanent physical impairment before the subsequent injury and that the employee was retained in employment after the employer acquired that knowledge").

155. On open SIFs, see U.S. CHAMBER OF COMMERCE, *2011 ANALYSIS OF WORKERS' COMPENSATION LAWS* 105-12 (2011) and S.C. CODE ANN. § 42-7-320(B) (2012); cf. LA. REV. STAT. ANN. § 23:1371.2 (2012) (closed to claims for accidents occurring after Dec. 31,

**Table 1: False-Statement Defense (General) and SIF**

State	Open SIF?	Employer Knowledge Required?
AL	No	-
AK	Yes	ALASKA STAT. § 23.30.205(c) (2012)
AR	No	-
DE	Yes	No
FL	No	-
GA	No	-
KY	No	-
LA	Yes	LA. REV. STAT. ANN. § 23:1378(A)(2) (2012)
MA	Yes	MASS. GEN. LAWS ANN. ch. 152, § 37 (West 2012)
MN	No	-
NE	No	-
NM	No	-
SC	No	-
SD	No	-
TN	Yes	TENN. CODE ANN. § 50-6-208(a)(2) (2012)
VA	Yes	No

**Table 2: False-Statement Defense (Occupational Disease) and SIF**

State	Open SIF?	Employer Knowledge Required?
AL	No	-
AZ	Yes	ARIZ. REV. STAT. ANN. § 23-1065(C)(2) (2012)
AR	No	-
DE	Yes	No
FL	No	-
GA	No	-
ID	Yes	No
IA	Yes	No
KY	No	-
ME	No	-
MD	Yes	No
MI	Yes	No
NC	Yes	No
NV	Yes	NEV. REV. STAT. ANN. § 616B.557(4) (LexisNexis 2012)
RI	No	-
SC	No	-

2014). For the state columns, *see supra* notes 27, 29, and 30.



## VIII. AGAINST THE DEFENSE: EFFECTS ON CASE SELECTION AND SETTLEMENT

This Part evaluates the main argument *against* the employee-misconduct defense: the defense reduces case payoffs, which in turn decreases expected attorney contingency fees, thus causing plaintiff-side attorneys to select fewer otherwise meritorious cases to litigate and to settle such cases for less money. In this view's best exemplar, Hart (2008) conducted phone interviews in early 2007 with twenty lawyers who worked in large cities and handled exclusively or primarily employment litigation.<sup>156</sup> From their responses to her (apparently open-ended) questions, she concluded that an employment-discrimination plaintiff "with misconduct in her record that might support the defense is unlikely to proceed very far in litigation," because plaintiffs' attorneys are less likely to select such cases and are more likely to settle them and for less.<sup>157</sup>

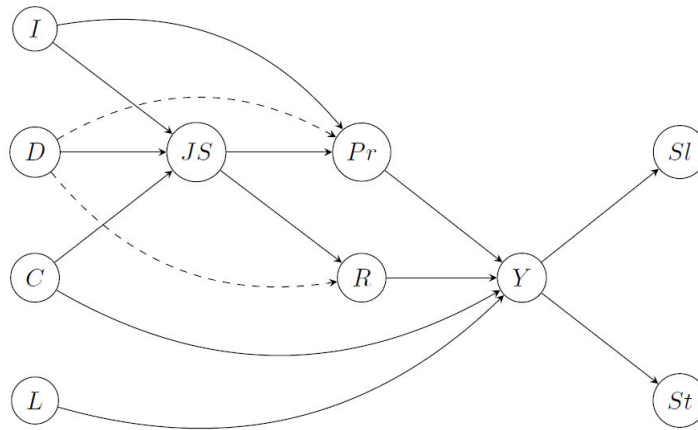
This argument is incomplete in two ways. First, however much the defense does reduce case selection or settlement price, it does not necessarily follow that the defense ought to be eliminated. For that argument, one must show that, all things considered, a world without the defense is better than a world with the defense with respect to some set of values that provide the relevant metrics for comparison. Put another way, any case *against* an employee-misconduct defense must show that the world is better without it even though, with respect to *some* value, the defense has *some* benefit. To be sure, because the defense implicates multiple values, the world without the defense may be better with respect to one value (e.g., human dignity), but not another value (e.g., full consent in forming contracts). Indeed, absent an agreed-upon ordinal ranking of values, we may not have a rational reason to conclude that a world with the defense is better, worse, or equally as good as a world without it.<sup>158</sup> At the very least, defense opponents assume away their argumentative burden by assuming that the defense has *zero* benefit.

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156. See Hart, *supra* note 1, at 430-34.

157. *Id.* at 434.

158. On a possible fourth relation of comparison, parity, see Ruth Chang, *The Possibility of Parity*, 112 ETHICS 659 (2002); and Martijn Boot, *Parity, Incomparability and Rationally Justified Choice*, 146 PHILOSOPHICAL STUDIES 75 (2009).



**Figure 2: Causal Graph of Effect of Employee-Misconduct Defense on Case Payoffs**

The rest of this Part discusses how hard it is to measure *how much* the defense reduces the selection or settlement price of otherwise meritorious claims, and thus how much to weigh such arguments against the defense. Such arguments imply a model (illustrated in Figure 2) of the paths by which the defense (D), by permitting employee-misconduct evidence into the case, affects plaintiff's actual or estimated net case payoffs (Y), and thus attorney case selection odds (Sl) and settlement price (St).

First, it affects case payoffs to an extent depending on how the defense by law affects probability of establishing defendant liability (Pr) or affects the remedies available to the plaintiff as a result (R), conditional on the probability of prevailing on the defense. Where the defense precludes liability ( $D \rightarrow Pr$ ), the plaintiff's expected case payoff is zero at best. Where the defense limits otherwise available remedies ( $D \rightarrow R$ ), the net case payoff drops accordingly.

Second, the defense, by introducing misconduct evidence, reduces jury or judge sympathy toward the plaintiff ( $D \rightarrow JS$ ), thereby reducing expected case payoffs, even if the employer cannot prevail on the defense as a matter of law. The premise here is that judges or juries decide liability or the size of damages awards based partly on their level of sympathy for the plaintiff, even though they are not supposed to act this way.

There are several problems here. One is that even under this model, the size of the defense's effect on case payoffs may be both non-negligible and quite small relative to other possible influences on case payoffs, such as attorney-fee shifting statutes or the ease of using aggregation devices such as the class action. Yet, even putting that aside, there are three *alternative* paths by which employee-misconduct evidence can affect net

case payoffs: (1) if admitted as impeachment evidence; (2) if admitted to support an employer counterclaim to recover misconduct-losses; and, (3) if introduced in a separate employer lawsuit to recover misconduct losses.

First, some employee-misconduct evidence can be admitted as impeachment evidence (I).<sup>159</sup> Impeachment evidence can reduce expected case payoffs by reducing judge or jury sympathy toward the plaintiff, and thus reducing the probability of proving defendant liability ( $I \rightarrow JS \rightarrow Pr \rightarrow Y$ ) or the expected value of otherwise available remedies ( $I \rightarrow JS \rightarrow R \rightarrow Y$ ). This can occur independently of how much impeachment evidence reduces case payoffs by reducing the credibility of plaintiff testimony, and thus the probability of proving defendant liability ( $I \rightarrow Pr \rightarrow Y$ ). Although limiting instructions can accompany impeachment evidence to remind jurors to consider such evidence only to judge credibility, not infer bad character, they may not work, as some mock jury studies suggest.<sup>160</sup> Similarly, with respect to motion practice or bench trials, some studies suggest that judges experience a similar level of difficulty in setting aside personal sympathy or antipathy for a party based on biasing evidence, even if that evidence is ruled inadmissible.<sup>161</sup>

Second, some employee-misconduct evidence can be admitted to prove an employer's counterclaim based on the employee's misconduct (C) in cases where such a counterclaim can be pleaded and litigated. To be sure, an employer counterclaim is unavailable in some cases, such as where the worker files suit in federal court and that court lacks an independent ground of jurisdiction to hear the employer's potential state-law counterclaim.<sup>162</sup> In cases where an employer counterclaim can and is brought, such evidence may reduce case payoffs by reducing judge or jury sympathy toward the plaintiff, and thus the probability of proving liability ( $C \rightarrow JS \rightarrow Pr \rightarrow Y$ ) or the expected value of available remedies ( $C \rightarrow$

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159. Hart, *supra* note 1, at 429, 448.

160. Sarah Tanford & Michele Cox, *The Effects of Impeachment Evidence and Limiting Instructions on Individual and Group Decision Making*, 12 LAW & HUM. BEHAV. 477 (1988); Jennifer S. Hunt & Thomas Lee Budesheim, *How Jurors Use and Misuse Character Evidence*, 89 J. APPLIED PSYCHOL. 347 (2004).

161. E.g., Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005); Stephen Landsman & Richard F. Rakos, *A Preliminary Inquiry Into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113 (1994).

162. Where a counterclaim is compulsory under Federal Rule of Civil Procedure 13(a), it necessarily falls within the federal court's supplemental jurisdiction under 28 U.S.C. § 1367(a). WRIGHT ET AL., *supra* note 53, § 1414. An employer counterclaim based on a non-NLRA violation is also unavailable in an NLRB proceeding, but case selection and settlement dynamics are substantially different for NLRB proceedings, because the NLRB General Counsel has the *exclusive* authority to pursue unfair labor practice charges before the NLRB.

$JS \rightarrow R \rightarrow Y$ ).

Moreover, and to an extent based on how likely the employer will prevail on a potential counterclaim, that counterclaim affects the plaintiff's net case payoff ( $C \rightarrow Y$ ), and that in turn *may* affect attorney case selection and settlement price depending on some function of the ways attorneys can write their fee agreements, the potential plaintiff's ability to pay, and the risk of violating attorney ethics rules that bar attorneys from charging "unreasonable" fees.<sup>163</sup> For example, plaintiffs' attorneys could write their contingency-fee agreements to compute fees as a fraction of what the plaintiff is actually paid, i.e., net recovery after offsetting any counterclaim award.<sup>164</sup> Or where the plaintiff has more of an ability to pay fees out of pocket, those attorneys might compute fees for the plaintiff's claim as a fraction of plaintiff's *gross* recovery but separately bill the plaintiff by the hour for defending against any counterclaim, with that hourly fee payable regardless of, or contingent upon, the defeat of the counterclaim.<sup>165</sup>

Third, some employee-misconduct evidence can be admitted to prove the employer's separate lawsuit based on the employee's misconduct (L). Here, because the misconduct evidence is introduced in an employer-initiated separate proceeding, it likely would not reduce judge or jury sympathy toward the plaintiff in the *plaintiff's* suit. Still, such evidence can still reduce expected net payoffs in the employee's suit, if the employer prevails in its suit and, under the plaintiff-attorney's fee agreement, the contingency fee is calculated as a percentage of worker's recovery *less* what the worker had to pay to satisfy the judgment against it in the employer's separate suit. If, however, for fee calculation purposes, the contingency-fee contract does not treat worker's net recovery as accounting for the judgment in the employer's separate suit, then this path ( $L \rightarrow Y$ ) should not affect net case outcomes.

Given these multiple paths by which employee-misconduct evidence can affect net case payoffs, as well as the set of potential other influences,

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163. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2002); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106(A) (1983) (same for "clearly excessive fee").

164. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35, cmt. d (2000) ("In the absence of prior agreement to the contrary, the amount of the client's recovery is computed net of any offset, such as a recovery by an opposing party on a counterclaim."). For cases endorsing this presumption, see *Camden Nat'l Bank v. Steamship Navigation Co.*, 991 A.2d 800, 803-04 (Me. 2010); *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92 (Tex. 2001); see also *In re William J. Murphy, P.C. v. State*, 157 A.D.2d 155, 158 (N.Y. App. Div. 1990).

165. *E.g.*, S.C. Ethics Advisory Op. 84-11, 1984 WL 272922 (DR 2-106(A) does not categorically prohibit fee contract with contingency fee for pursuing plaintiff's claim and hourly fee for defending counterclaim); *cf.* SC Adv. Op. 87-07, 1988 WL 582702 (explaining that under certain circumstances, state law permits contingency fee calculated by the hourly rate but capped at client's total recovery).

it matters by how much the defense *uniquely* affects case payoffs, i.e., by how much net case payoffs would be different absent the defense. This is not easy to measure. There is little cross-jurisdictional variation to exploit within the United States, because courts are virtually uniform in allowing impeachment evidence and (aside from the NLRB and workers' compensation hearing officers) the pleading of counterclaims, and because the employee-misconduct defense is already quite pervasive. In actually litigated cases, the trial record alone will be limited, because where the employee-misconduct evidence has been introduced along one path, neither the trial judge nor the parties are likely to have also litigated, for the record, whether and how such evidence would have been admitted or introduced on one or more alternative paths. Perhaps more promising is to ask attorneys to estimate case payoffs in hypothetical cases, and measure how much those estimates are influenced by case characteristics (manipulable by the researcher), such as fee-shifting statutes or potential damage size, as well as their beliefs about and past experience with actual cases involving employee-misconduct evidence.

Even then, estimating case payoffs is further complicated, because in cases where the employer has a non-frivolous argument for introducing employee-misconduct evidence by defense, counterclaim, or separate suit, the plaintiff has at least two counter-moves: (1) ask the trial judge to bifurcate the proceeding into liability and remedy phases; and, (2) bring a new claim, either during or after the plaintiff's original lawsuit, based on showing the employer's retaliatory motive for asserting the defense, counterclaim, or separate lawsuit.

#### A. *Bifurcation*

To reduce the effect of jury sympathy, a trial judge could bifurcate the proceeding, that is, order separate trials for liability issues and issues concerning the employer's misconduct-based defense or counterclaim.<sup>166</sup> For federal court, Federal Rule of Civil Procedure 42(b) provides: "For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims."<sup>167</sup> Some states afford similar discretion to state judges, while other states allow for much less.<sup>168</sup>

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166. *E.g.*, Sprang, *supra* note 1, at 151 (arguing for bifurcation such that, in the liability phase, "after-acquired evidence should be completely inadmissible for any purpose").

167. FED. R. CIV. P. 42(b). For criticism of any presumption against bifurcation, see Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705 (2000).

168. Compare, *e.g.*, CAL. CIV. PROC. CODE § 1048(b) (West 2012); IOWA R. CIV. P. 1.914; N.Y.C.P.L.R. 603 (McKinney 2012) with, *e.g.*, LA. CODE CIV. PROC. ANN. art. 1562

Mock jury studies have found some effect of bifurcation in personal injury cases on the size of damage awards.<sup>169</sup>

In cases where the employee-misconduct evidence only matters to remedies, there is a viable argument that the trial judge should order a separate trial on liability before having the jury decide the defense, if the misconduct evidence is not otherwise probative on issues of liability. Bifurcation here would avoid any prejudice. And bifurcation would advance judicial economy, because if the jury finds for the defendant on liability, there is no need to consider the employee-misconduct defense. For example, courts have endorsed bifurcation to handle evidence of a plaintiff's undocumented immigration status in cases where such status may affect entitlement to back pay, but not defendant liability.<sup>170</sup>

In contrast, bifurcation arguably advances neither judicial economy nor avoids prejudice in cases where the misconduct evidence is already admissible as impeachment evidence.<sup>171</sup> Bifurcation also may be harder to secure in cases where employee-misconduct evidence is probative of the defendant's counterclaim. In cases like these, granting a bifurcation motion stands in tension with the judicial-economy benefits of rules permitting counterclaims in lieu of making the defendant file a separate lawsuit.<sup>172</sup>

### *B. New Claims Based on Retaliatory Motive*

Under certain circumstances, the plaintiff-employee can pursue a new legal claim against the employer if the employer had a retaliatory motive for asserting the defense, counterclaim, or separate lawsuit against that plaintiff-employee. This section considers two examples: a retaliation claim under section 704 of Title VII and process torts under state common law. In turn, these claims face several hurdles, including those imposed by constitutional protections of the right to petition.

First, section 704(a) of Title VII declares it unlawful for an employer to “discriminate against any of his employees or applicants for

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(2011) (authorizing bifurcation of liability and damages if “all parties” consent).

169. *E.g.*, Christine Shea Adams & Martin Bourgeois, *Separating Compensatory and Punitive Damage Award Decisions by Trial Bifurcation*, 30 *LAW & HUM. BEHAV.* 11 (2006).

170. Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 *HOFSTRA LAB. & EMP. L. J.* 473, 529–30 (2005).

171. *E.g.*, *Adelman v. GMAC Mortg. Corp.*, 1998 WL 51131, at \*3 (E.D. Pa. Feb. 5, 1998); *see Vichare v. AMBAC Inc.*, 106 F.3d 457, 468 (2d Cir. 1996) (rejecting argument that, in Title VII case, trial court should not have let after-acquired-evidence of employee misconduct to impeach plaintiff credibility, because evidence might prejudice the jury).

172. *E.g.*, *Vichare*, 106 F.3d at 466–67.

employment . . . because he has opposed any practice” that Title VII made “an unlawful employment practice . . . , or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].”<sup>173</sup> This provision protects former employees as well,<sup>174</sup> and the phrase “discriminate against” in section 704(a) covers only those employer acts that are “materially adverse to a reasonable employee or job applicant,” regardless of whether such acts concern terms or conditions of employment.<sup>175</sup>

A few judges—mostly from one federal district court—have read section 704(a) of Title VII, or similar provisions in other statutes, not to cover an employer’s filing of counterclaims against the employee. They reason that a counterclaim cannot necessarily discourage plaintiffs from enforcing their legal rights, because a counterclaim is filed only after the plaintiff has secured attorneys and filed suit against the employer.<sup>176</sup> Based on the same reasoning, one judge refused to read section 704(a) to cover the employer’s assertion of an employee-misconduct defense to an employment-discrimination claim, and further emphasized that, unlike a counterclaim, raising a defense raises no fear that the plaintiff will end up having to pay a money judgment.<sup>177</sup> Other judges, however, have read retaliation provisions to cover employer counterclaims, presumably because counterclaims can discourage the reasonable person in the plaintiff’s position from pursuing his lawsuit further, and thus lower his

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173. 42 U.S.C. § 2000e-3(a) (2006).

174. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345–46 (1997).

175. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). For similar readings of parallel state statutes, see *Donovan v. Broward Cnty. Bd. of Comm’rs*, 974 So. 2d 458, 461 (Fla. Dist. Ct. App. 2008); *Hoffelt v. Ill. Dep’t of Human Rights*, 867 N.E.2d 14, 19–21 (Ill. App. Ct. 2006); *Roa v. Roa*, 985 A.2d 1225, 1236–37 (N.J. 2010); *Greer-Burger v. Temesi*, 879 N.E.2d 174, 180 n.2 (Ohio 2007); and *Allen v. McPhee*, 240 S.W.3d 803, 820 (Tenn. 2007).

176. *E.E.O.C. v. K & J Mgmt., Inc.*, No. 99 C 8116, 2000 WL 34248366, at \*4-5 (N.D. Ill. June 8, 2000) (Title VII); *accord* *Gross v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 599 F.Supp.2d 23, 34 (D.D.C. 2009) (ADEA); *Beltran v. Brentwood N. Healthcare Ctr.*, 426 F.Supp.2d 827, 834 (N.D. Ill. 2006) (FLSA); *Neuffer v. York Corrugated Container Corp.*, No. 03 C 1658, 2004 WL 1354442, at \*1–2 (N.D. Ill. Apr. 30, 2004) (ADA). Some of these courts also indicate that where the employer’s counterclaim is compulsory under Federal Rule of Civil Procedure 13(a), that counterclaim cannot fall within section 704(a) of Title VII or another similar statute if the employer filed it solely to avoid forfeiting that claim under Rule 13(a). See *Gross*, 599 F.Supp.2d at 34; *Beltran*, 426 F. Supp.2d at 834. While an employer might have both retaliatory and non-retaliatory motives for filing its compulsory counterclaim, it remains unsettled whether section 704(a) of Title VII authorizes mixed-motive liability. Compare *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010) (yes) with *Hayes v. Sebelius*, 762 F.Supp.2d 90, 113–14 (D.D.C. 2011) (no).

177. *Harmar v. United Airlines, Inc.*, No. 95 C 7665, 1996 WL 199734, at \*1 (N.D. Ill. Apr. 23, 1996).

settlement price.<sup>178</sup> To date, no court has ruled that an employer's assertion of the employee-misconduct defense can count as retaliation under section 704(a) or similar provisions.

Second, the tort of abuse of process under state common law arises based on injury caused by willful and improper use of judicial process primarily with an ulterior motive.<sup>179</sup> In a few states, the tort has been successfully claimed based on, among other things, extensive discovery procedures to expose a party to excessive legal expenses and fees,<sup>180</sup> or extensive motion practice generally.<sup>181</sup> In contrast, while some states permit the tort of malicious prosecution based on the filing of a counterclaim, only one state has expressly recognized a tort of malicious defense, whereas other state supreme courts have refused to recognize that tort, citing the fear of discouraging defendants and their attorneys from vigorously raising legitimate defenses.<sup>182</sup>

### C. *Constitutional Right to Petition*

These and other new retaliatory-motive claims are restricted by the First Amendment's protection of "the right of the people . . . to petition the government for a redress of grievances."<sup>183</sup> This Petition Clause has been declared or at least presumed to protect a person's right of access to courts for redress of wrongs, often by operation of the canon of reading statutes to avoid serious constitutional doubt.<sup>184</sup> For example, in *Bill Johnson's*

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178. *E.g.*, *Hill v. Lazarou Enter., Inc.*, No. 10-61479-CIV, 2011 WL 860526, at \*8 (S.D. Fla. Feb. 18, 2011) (Title VII), *adopted*, 2011 WL 860475 (S.D. Fla. Mar. 09, 2011); *Harper v. Realmark Corp.*, No. 4:04-CV00040-DFH-WGH, 2004 WL 1795392, at \*5 (S.D. Ind. July 29, 2004) (Title VII); *Rosania v. Taco Bell of Am., Inc.*, 303 F.Supp.2d 878, 882–88 (N.D. Ohio 2004) (retaliation provision of Family and Medical Leave Act); *Torres v. Gristede's Operating Corp.*, 628 F.Supp.2d 447, 473 (S.D.N.Y. 2008) (FLSA). For arguments in support, see Hart, *supra* note 1, at 444–50; Sprang, *supra* note 1, at 155–56.

179. Jeffrey J. Utermohle, *Look What They've Done To My Tort, Ma: The Unfortunate Demise Of "Abuse Of Process" in Maryland*, 32 U. BALT. L. REV. 1, 36–49 (2002) (appendices compiling cases by state).

180. *Nienstedt v. Wetzel*, 651 P.2d 876, 880–81 (Ariz. Ct. App. 1982); *accord Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 403 (Tenn. 2002).

181. *Crackel v. Allstate Ins. Co.*, 92 P.3d 882, 887, 892 (Ariz. Ct. App. 2004) (concluding that defendant employed "process" by in part asserting a contributory negligence defense). *But see One Thousand Fleet Ltd. v. Guerriero*, 694 A.2d 952, 960 (Md. 1997) (requiring seizure of person or property to result from abuse of process).

182. *Compare, e.g., Aranson v. Schroeder*, 671 A.2d 1023, 1028–29 (N.H. 1995) (recognizing tort of malicious defense) *with, e.g., Young v. Allstate Ins. Co.*, 198 P.3d 666 (Haw. 2008) (refusing to recognize tort of malicious defense); *Wilkinson v. Shoney's, Inc.*, 4 P.3d 1149, 1157–59 (Kan. 2000) (same).

183. U.S. CONST. amend I.

184. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2494 (2011) (citing cases).



*Restaurants, Inc. v. NLRB* (1983), the U.S. Supreme Court decided, in part because of the First Amendment's Petition Clause, that the NLRB lacked the statutory authority to enjoin an ongoing lawsuit as an unfair labor practice, even if brought and pursued with a retaliatory motive, unless that suit lacked a reasonable basis.<sup>185</sup>

More recently, in *BE & K Construction Co. v. NLRB* (2002), after an employer had completed its federal lawsuit against various unions, in which it had lost or withdrawn all its claims, the NLRB filed a complaint against the employer for violating NLRA section 8(a)(1) by filing and maintaining that lawsuit to retaliate against the unions for NLRA-protected activity. The U.S. Supreme Court, however, read NLRA section 8(a)(1) not to cover "all reasonably based but unsuccessful suits filed with a retaliatory purpose."<sup>186</sup> This reading avoided the "difficult constitutional question" of whether the Petition Clause permits the government to declare unlawful all reasonably-based unsuccessful lawsuits filed with a "retaliatory motive," including those motivated by a subjectively genuine and objectively reasonable belief that the conduct for which the employer sued is not legally protected.<sup>187</sup>

In addition, some state courts have declared or implied that petition clauses in state constitutions protect a right to court access.<sup>188</sup> An alternative (though as yet only theoretical) basis for such a right of access to courts may be so-called open-courts clauses that appear in thirty-seven state constitutions and, in various forms, declare that all courts shall be "open", that every person shall have "remedy" or "redress" for an "injury" under the law, or both.<sup>189</sup>

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Some courts have read the First Amendment's Petition Clause to protect pre-litigation conduct that is sufficiently related to actual or potential litigation, providing that actual or potential claim is not a sham. *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 942 (9th Cir. 2006) (reading RICO in light of Petition Clause to not permit "maintenance of a lawsuit for the sending of a prelitigation demand to settle legal claims that do not amount to a sham"); *Tichinin v. City of Morgan Hill*, 99 Cal. Rptr. 3d 661 (Cal. Ct. App. 2009) (pre-litigation investigation to support a potential claim).

185. *Bill Johnson's Rest., Inc. v. N.L.R.B.*, 461 U.S. 731, 744-46 (1983).

186. *BE & K Constr. Co. v. N.L.R.B.*, 536 U.S. 516, 536 (2002).

187. *Id.* at 537.

188. *E.g.*, *Baba v. Bd. of Supervisors*, 21 Cal. Rptr. 3d 428 (Cal. Ct. App. 2004) (CAL. CONST. art. 1, § 3); *Protect Our Mountain Env't, Inc. v. Dist. Court*, 677 P.2d 1361, 1365 n.5 (Colo. 1984) (COLO. CONST. art. 2, § 24); *see Richardson v. Carnegie Library Rest., Inc.*, 763 P.2d 1153, 1161 (N.M. 1988) ("[T]he right of access to the courts is one aspect of the right to petition for redress of grievances, and we have acknowledged that right as . . . also protected by [the Due Process Clauses of] both the United States and New Mexico Constitutions . . ."). *But see Hous. Auth. of King County v. Saylor*, 557 P.2d 321, 327 (Wash. 1976) (WASH. CONST. art. I, § 4, not apply to judicial process).

189. *See generally* JENNIFER FRIESEN, 1 STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES ch. 6 (4th ed. 2006 & Supp. 2010).

Because of the Petition Clause or its state constitutional equivalents, if the plaintiff-worker pursues a new retaliatory-motive claim against the defendant-employer for filing a defense, separate suit, or counterclaim based on that worker's misconduct, a court is likely to read the Petition Clause to require, for that new claim, that the plaintiff also show that the employer's suit, counterclaim or defense lacks an objectively reasonable basis.<sup>190</sup> This restriction arguably applies no differently for the employer's defense than its counterclaim or lawsuit, albeit if a court agrees that an affirmative defense is a "petition" that the court deny the relief requested in the plaintiff's lawsuit, and is thus protected by the Petition Clause.<sup>191</sup> A court may be less likely to conclude, however, that a defense counts as a "remedy" or "redress" for injury under an open-courts clause in a state constitution.

Either way, where the employer's suit, counterclaim or defense has been asserted but not yet resolved, there are two procedural vehicles for this argument. First, the defendant-employer can argue via a general pre-trial motion that, because of the Petition Clause, the plaintiff's retaliatory-motive claim must be dismissed, because the defendant's suit, counterclaim or defense has an objectively reasonable basis. In *Bill Johnson's*, the U.S. Supreme Court explained that in deciding whether a state court suit was objectively reasonable, if the state court plaintiff could present "evidence that shows his lawsuit raises genuine issues of material fact," the NLRB cannot enjoin that suit.<sup>192</sup> This implies that, in practice, where the defendant's suit, counterclaim, or defense can survive a *plaintiff's* motion for partial summary judgment, the Petition Clause requires the court to

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190. *E.g.*, *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1123 (10th Cir. 2007) (affirming summary judgment for defendant on plaintiff's Title VII and ADEA retaliation claims for filing counterclaims against her for unauthorized diversion and withdrawal of bank funds, "[m]ost importantly" because plaintiff "has not shown, nor does she even seem to argue, that [defendant's] counterclaims are devoid of merit") (citing *Bill Johnson's*); *Darveau v. Detecon, Inc.* 515 F.3d 334, 341 (4th Cir. 2008) (assuming that plaintiff bringing retaliation claim under FLSA "must allege facts demonstrating that he had an objectively reasonable belief that his employer violated the FLSA," and finding that plaintiff "met this burden"); *Beltran*, 426 F.Supp.2d at 834 n.5 ("[employer]'s counterclaim does not give rise to a [FLSA] retaliation claim because it was not baseless"); *Protect Our Mountain Environment*, 677 P.2d at 1369 (abuse of process tort claim).

191. *See Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005) ("[A]sking a court to deny one's opponent's petition is also a form of petition; thus, we may speak of a 'sham defense' as well as a 'sham lawsuit.'"); *see also Harmar v. United Airlines, Inc.*, No. 95 C 7665, 1996 WL 199734, at \*2 (N.D. Ill. Apr. 23, 1996) (assuming *arguendo* that the after-acquired evidence defense was not frivolous, "that would be another ground for dismissal since only baseless claims can support a retaliation claim. Even if motivated by retaliation, filing a lawsuit will not support a retaliation claim if the claims in the lawsuit are substantial") (citing *Bill Johnson's*).

192. *Bill Johnson's*, 461 U.S. at 746.

dismiss the plaintiff's retaliatory-motive claim as a matter of law, even if it is undisputed that the defendant had the requisite retaliatory motive.<sup>193</sup>

Second, the defendant can move to dismiss the plaintiff's retaliatory-motive claim pursuant to a state anti-SLAPP statute in the states that have one. Such a statute typically provides an expedited procedure for dismissing a claim, and recovering attorneys' fees and costs incurred by a party as a result of defending against that claim, where such claim is premised on a party's exercise of constitutionally-protected speech or petition rights and is aimed at intimidating or harassing that party. In some states, such protected activity includes the petitioning activity of filing a legal claim,<sup>194</sup> consistent with precedent reading the Petition Clause to protect a right of access to courts.

Assuming *arguendo* that all state anti-SLAPP statutes currently in force cover such activity, whereas most of them expressly cover counterclaims or have been so read,<sup>195</sup> no state anti-SLAPP statute to date appears to have been applied to assertions of affirmative defenses. And it is unclear whether those statutes will likely be read that way. For example, while some state anti-SLAPP statutes extend coverage to any "other

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193. Without mentioning the constitutional restriction, Hart concludes that it is "appropriate" for the plaintiff bringing a Title VII retaliation claim to prove both retaliatory motive and the absence of "some legitimate litigation goal" for, or "legitimate legal arguments" supporting, the *McKennon* employee-misconduct defense. Hart, *supra* note 1, at 450.

194. *E.g.*, *Hytel Group, Inc. v. Butler*, 938 N.E.2d 542 (Ill. App. Ct. 2010); *Charles v. Roads Corp.*, No. 981380E, 1998 WL 1247935, at \*3 (Mass. Super. Ct., Aug. 10, 1998).

195. *See* ARIZ. REV. STAT. ANN. § 12-751(3) (2012); ARK. CODE ANN. § 16-63-505 (2012) ("any claim"); CAL. CIV. PROC. CODE § 425.16(2)(h) (West 2012); DEL. CODE ANN. tit. 10, § 8136(a)(1) (2012); FLA. STAT. ANN. § 768.295(4) (West 2012); 735 ILL. COMP. STAT. ANN. 110/10 (West 2012); IND. CODE ANN. § 34-7-7-3(6) (West 2012); ME. REV. STAT. ANN. tit. 14, § 556 (2011); MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2012); MINN. STAT. ANN. § 554.01(3) (West 2012); MO. ANN. STAT. § 537.528(7) (West 2012) ("all causes of action"); NEB. REV. STAT. ANN. § 25-21,242(1) (West 2012); N.Y. CIV. RIGHTS LAW § 76-a(1)(a) (McKinney 2012); TEX. CIV. PRAC. & REM. CODE § 27.001(6) (Vernon 2012); UTAH CODE ANN. § 78B-6-1402(1) (2012); WASH. REV. CODE ANN. § 4.24.525(1)(a) (West 2012); *Hagemann v. City of Marietta*, 650 S.E.2d 363, 368 (Ga. Ct. App. 2007) (reading GA. CODE ANN. § 9-11-11.1(b)); *John v. Douglas Cnty. Sch. Dist.*, 219 P.3d 1276, 1284 (Nev. 2009) (reading NEV. REV. STAT. § 41.660); *Jimenez v. Vanderbilt Landscaping, L.L.C.*, 3-11-0276, 2011 WL 3027190 (M.D. Tenn. July 25, 2011) (assuming such a reading of TENN. CODE ANN. § 4-21-1003(a)); *see also* D.C. CODE § 16-5501(2) (2012). In the remaining state anti-SLAPP statutes, the texts do not expressly cover counterclaims, though they could arguably be read to do so. *See* MD. CODE ANN., CTS. & JUD. PROC. § 5-807(b) (LexisNexis 2012) (defining when a "lawsuit is a SLAAP suit"); N.M. STAT. ANN. § 38-2-9.1(A) (LexisNexis 2012) ("any action seeking money damages"); OR. REV. STAT. § 31.150(1) (2011) (authorizing "[a] defendant" to make a "special motion to strike"); VT. STAT. ANN. tit. 12, § 1041(1) (2012) (same).

judicial pleading or filing requesting relief,”<sup>196</sup> an assertion of an affirmative defense could plausibly fall within this phrase, and thus be protected by the anti-SLAPP statute, if the word “relief” is not read to refer *only* to legal remedies for a cognizable injury. If this reading is unlikely, then this reduces the defendant-employer’s payoffs for asserting a defense as opposed to a counterclaim or separate lawsuit, though by how much remains unclear.

### CONCLUSION

This Article has shown how virtually all the existing arguments by courts, agencies, and legal commentators for *and* against the employee-misconduct defense in American work law are incomplete, incoherent, or rely on unverified empirical premises. It has also identified, for certain circumstances, some more coherent reasons for alternative variants of such a defense. These include fealty to the restorative (make-whole) purposes of certain work-law remedies, and for workers’ compensation claims, the equal opportunity goals of second injury funds in a few of the states that still have them. In so concluding, this Article concludes that, in general, courts, agencies, and other legal institutions currently lack a sound reason for adopting the prevailing version of the employee-misconduct defense, albeit not because of the prevailing argument *against* the defense, but because of the substantially incoherent or incomplete nature of existing arguments *for* the defense.

This might imply that, for courts and agencies that have already adopted it, there is currently no sound reason for continuing to apply it, but for the norm of *stare decisis*. To be sure, that norm nominally burdens those who oppose the defense to persuade that, all things considered, we are better off in a world without the defense than in a world with it. And to the extent that arguments for and against the defense implicate multiple values, this Article is limited in part because it has assumed internal coherence as itself a relevant value. In contrast, judges and policymakers may rank that value lower than others in any particular set of circumstances. Nonetheless, if legal rules require coherent justifications to be legitimate, then this Article challenges the legitimacy of every actual or potential work law claim that the prevailing employee-misconduct defense has or will adversely affect.

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196. 735 ILL. COMP. STAT. ANN. 110/10 (West 2012); IND. CODE ANN. § 34-7-7-3(7) (West 2012); UTAH CODE ANN. § 78B-6-1402(1) (2012); WASH. REV. CODE ANN. § 4.24.525(1)(a) (West 2012).