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Wallace v. Dunn Construction Co.: Defining the Role of After-Acquired Evidence in Federal Employment Discrimination Suits

Hugh Lawson III

Wallace v. Dunn Construction Co.: Defining the Role of After-Acquired Evidence in Federal Employment Discrimination Suits

I. INTRODUCTION

In *Wallace v. Dunn Construction Co.*[1] the Eleventh Circuit Court of Appeals faced an issue of first impression in the circuit: the role of after-acquired evidence in actions arising under federal employment discrimination statutes,[2] namely Title VII of the Civil Rights Act of 1964[3] and the Equal Pay Act.[4] The court held that after-acquired evidence cases in which an employer discovers evidence constituting a permissible reason for discharging an employee *after* that employee has already been discharged for an impermissible reason are distinguishable from mixed-motive cases in which an employer discharges an employee for several reasons, some permissible and some impermissible, but all known to the employer at the time of discharge.[5] The court further held that different rules apply in each situation,[6] and that the presence of after-acquired evidence may decrease the amount of attorney fees awarded to a prevailing employee.[7] In so holding, the court devised a solution to the after-acquired evidence problem too complicated to be feasible.

II. FACTUAL STATEMENT

Plaintiff Joyce Annette Neil brought suit against her former employer, Dunn Construction Company ("Dunn"). Her complaint alleged four causes of action: (1) inadequate compensation under the Equal Pay Act,[8]

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1. 968 F.2d 1174 (11th Cir. 1992).
2. *Id.* at 1178.
3. 42 U.S.C. §§ 2000e to 2000e-15 (1988). *Wallace* was decided in the district court before the new Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), went into effect.
4. 29 U.S.C. §§ 206, 215 (1988 & Supp. II 1990).
5. 968 F.2d at 1181.
6. *Id.* at 1180.
7. *Id.* at 1183.
8. 29 U.S.C. § 206(d) (1) (1988) provides:
   No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, be-

(2) retaliatory discharge under the same Act,[9] (3) sexual harassment under Title VII,[10] and (4) retaliatory discharge under Title VII,[11] alleging that her discharge was due to her objection to sexual harassment.[12] Neil also alleged tort claims under Alabama law for invasion of privacy and assault and battery.[13]

During discovery, Neil admitted at a deposition that she had pleaded guilty to possession of cocaine and marijuana prior to submitting her employment application to Dunn.[14] This after-acquired evidence established that Neil had lied on her application for employment with Dunn because on the application she checked the "no" box after the question, "Have

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tween employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 215(a)(2) (1988) provides in pertinent part that "it shall be unlawful for any person . . . to violate the provisions of section 206 . . . of this title . . . ." *Id.* § 215(a)(2).

9. 29 U.S.C. § 215(a)(3) (1988) makes it unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." *Id.* § 215(a)(3).

10. 42 U.S.C. § 2000e-2(a)(1) (1988) provides:

(a) It shall be an unlawful employment practice for an employer-(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a)(1).

11. 42 U.S.C. § 2000e-3(a) (1988) provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Id. § 2000e-3(a).

12. 968 F.2d at 1176.

13. *Id.*

14. *Id.*

you ever been convicted of a crime?"[15] After discovering this evidence, Dunn moved for partial summary judgment, contending that the after-acquired evidence of Neil's drug convictions and application fraud provided a legitimate cause for terminating Neil regardless of whether Dunn had any unlawful motive.[16] The district court denied Dunn's motion and also rejected Dunn's after-acquired evidence theory as a matter of law. Dunn appealed. The court of appeals reversed and remanded the case.[17]

III. Details of the Eleventh Circuit's Opinion

A. *The Majority Opinion*

In moving for partial summary judgment based on the after-acquired evidence, Dunn relied on the Tenth Circuit case of *Summers v. State Farm Mutual Automobile Insurance Co.*[18] The defendant insurance company in *Summers* discharged plaintiff Summers for alleged falsification of company records, untimely and poor quality of reporting, problems with settlement negotiations and customer relations, and poor attitude.[19] Summers, a fifty-six-year-old Mormon, subsequently filed suit in federal district court, alleging that his discharge was due to his age and religion.[20]

Summers' employment with State Farm proceeded without incident from 1963 to 1980. However, in 1980, State Farm discovered that Summers had forged the signature of a representative of Monsanto Chemical Company to document a claim made by a Monsanto employee. Summers received a warning that further falsifications could result in his dismissal. Later, in 1981, State Farm discovered that Summers had falsified certain medical and pharmacy bills that a State Farm insured had supposedly received, but in fact had not. Again State Farm warned Summers that such conduct would result in his discharge if it happened again. As a result of the 1981 discovery, State Farm randomly examined other files Summers had handled in the past, and concluded that seven or eight of those files were "suspicious." Again, State Farm did not fire Summers, but rather placed him on probationary status for two weeks without pay. When State Farm did actually discharge Summers over a year later, it conceded that the discharge did not occur because of Summers' falsification of records, but because of his poor attitude and inability to deal with his co-workers and the public.[21]

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15. *Id.* at 1176 n.2.
16. *Id.* at 1177.
17. *Id.*
18. 864 F.2d 700 (10th Cir. 1988).
19. *Id.* at 701.
20. *Id.* at 701-02.
21. *Id.* at 702-03.

Nearly four years after Summers' termination, State Farm, during trial preparation, discovered over 150 instances in which Summers had falsified records, eighteen of which occurred after Summers had returned to work following his two-week probationary status.[22] Upon learning of the additional falsifications, Summers' counsel filed a motion *in limine* to prevent State Farm from offering them as evidence.[23] The Tenth Circuit affirmed the district court and held that after-acquired evidence could not be a cause for termination since it was not within the knowledge of the employer at the time of discharge, but that such evidence is relevant to the amount of relief, if any, due to a prevailing plaintiff.[24] The court further held that Summers was not entitled to any relief because if State Farm had known of the additional falsifications at the time of discharge, it would have fired Summers without any unlawful motives.[25] The court in *Summers* based its decision principally on the Supreme Court case of *Mt. Healthy City School District Board of Education v. Doyle*.[26]

In *Mt. Healthy* a school board refused to rehire a teacher, citing two reasons for its refusal: (1) the teacher conveyed the contents of an internal memorandum concerning teacher dress codes to a local radio station, and (2) the teacher used obscene gestures toward students.[27] The Supreme Court held that the teacher had the burden of showing that an unlawful motive was a "substantial factor" in the school board's decision not to rehire him.[28] The court further held that the teacher had met this burden by showing that the conveyance of the memorandum to the radio station constituted protected conduct under the First Amendment.[29] However, the court went on to state that because an impermissible motive played a substantial part in an employment decision does not warrant relief to the employee; if the employer can show that it would have reached the same decision absent any unlawful motive, then the employee could obtain no relief.[30] The court reasoned that "[t]he constitutional

22. *Id.* at 703.
23. *Id.* at 704.
24. *Id.*
25. *Id.* at 708.
26. 429 U.S. 274 (1977).
27. *Id.* at 282-83.
28. *Id.* at 287.
29. *Id.*
30. *Id.* In *Wallace* the Eleventh Circuit asserted that the case of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), confirms *Mt. Healthy*'s approach for deciding mixed-motive cases, and makes that approach applicable to Title VII cases. 968 F.2d 1174, 1180 (1992). However, it should be noted that under the new section 107 of the Civil Rights Act of 1991, (adding Title VII § 703(m), 42 U.S.C.A. § 2000e-2(m) (Supp. 1992), "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." This new section codifies *Price*

principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the [protected] conduct."[31] Thus, if the school board would have dismissed the teacher solely for the obscene gesture incident even if the radio station incident had never occurred, the fact that the radio station incident was a substantial factor in the decision not to rehire would still not entitle the teacher to any relief.[32]

In *Wallace* the Eleventh Circuit rejected that portion of the *Summers* holding that provides an employer with an affirmative defense by allowing the employer to avoid all liability for a discharge based solely on impermissible motives if the employer can prove it would have discharged the employee without impermissible motives *if* it had known of the after-acquired evidence at the time of the discharge.[33] The court in *Wallace* believed the Tenth Circuit erred in applying *Mt. Healthy* to the *Summers* facts because in doing so, the Tenth Circuit ignored the time lapse between the unlawfully motivated decision to discharge and the discovery of a lawful motive for a decision.[34] The court pointed out that *Mt. Healthy* is a mixed-motive case; that is, at the time of discharge, the employer proffered two reasons for discharge, one permissible, the other impermissible.[35] While *Summers* is technically a mixed-motive case, the court stated that the existence of after-acquired evidence in that case distinguishes it from *Mt. Healthy*.[36] Thus, the court in *Wallace* held that "the law governing after-acquired evidence should not ignore the time lapse between the unlawful act and the discovery of a legitimate motive and therefore should not replicate the law applicable to mixed motives."[37]

Furthermore, the court in *Wallace* believed that the extension of *Mt. Healthy* to a fact pattern like that of *Summers* or *Wallace* would undermine the principal purpose of Title VII: the achievement of equal employment opportunity through incentives designed to encourage employer self-examination and elimination of discrimination.[38] The *Summers* holding would induce employers to rummage through an unlawfully dis-

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Waterhouse insofar as it rejects requiring the plaintiff to prove causation. It also modifies *Price Waterhouse* by providing that plaintiff's proof of an illegitimate motivating factor does not merely shift the burden to the defendant, but rather automatically establishes a violation. *See* MICHAEL GRANT ET AL, PROFESSOR'S UPDATE ON THE CIVIL RIGHTS ACT OF 1991, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 9-10 (1992).

31. 429 U.S. at 285-86.
32. *Id.* at 287.
33. 968 F.2d at 1180.
34. *Id.* at 1179.
35. *Id.* at 1179-80.
36. *Id.* at 1180.
37. *Id.* at 1181.
38. *Id.* at 1180.

charged employee's background in order to manufacture a "legitimate" reason for discharge.[39] Also, the *Summers* rule would result in "sandbagging" since it would encourage employers to hire a woman despite knowledge of a legitimate reason not to hire her, to destroy evidence of that knowledge, to pay her less because of her sex, to harass her sexually until she objects, to terminate her, and then to "discover" the legitimate reason during the course of the ensuing lawsuit.[40]

Although the court rejected a portion of *Summers*, it did agree with the abstract principle that after-acquired evidence is relevant to relief.[41] When after-acquired evidence becomes an issue in a Title VII case, the court should draw a boundary between the employer's right to make lawful employment decisions and Title VII's purpose of making discrimination victims whole.[42] Because this boundary will vary with the facts of each case, the court stated that courts should determine the effect of after-acquired evidence on Title VII relief on a case-by-case basis.[43]

In assessing the case before it, the court stated that, assuming the after-acquired evidence alone would have constituted a legitimate motive for terminating Neil, reinstatement or front pay for the Title VII discharge claim would be inappropriate remedies because such remedies would go beyond making Neil whole and would infringe on Dunn's freedom to discharge employees for lawful reasons.[44] The court went on to state that Neil's period of back pay for the allegedly retaliatory discharge should not terminate prematurely unless Dunn could prove it would have discovered the after-acquired evidence prior to what would have been the end of the back pay period had the unlawful acts never occurred.[45]

The court acknowledged that an alternative approach existed—ending the back pay period on the day Dunn actually learned of the after-acquired evidence. However, it rejected this approach as being contrary to *Mt. Healthy*'s requirement that the victim be placed in no worse position than if she had not engaged in protected conduct; that is, had Dunn not acted unlawfully, litigation would not have ensued, and Dunn would not have discovered Neil's narcotics conviction at the deposition.[46] Furthermore, the court believed that the alternative approach would result in a windfall to employers who, in the absence of their unlawful act and the litigation following it, would never have discovered any after-acquired ev-

39. *Id.*
40. *Id.* at 1180-81.
41. *Id.* at 1181.
42. *Id.*
43. *Id.*
44. *Id.* at 1182.
45. *Id.*
46. *Id.*

idence.[47] On the issue of the remedy of declaratory relief for the Title VII claims, the court held that because the after-acquired evidence could not have been discovered in time to alter the employment relationship, it could not preclude this remedy.[48]

Finally, with respect to the remedy of attorney fees, the court relied on the case of *Walker v. Anderson Electrical Connectors*,[49] and held that if Neil obtained at least " 'some of the benefit . . . sought in bringing suit' "[50] or a " 'material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute' "[51] despite the after-acquired evidence, she would have "prevailing party" status and would thus become entitled to an award of attorney fees.[52] However, the court warned that if in fact Neil did become entitled to a fee award, after-acquired evidence may decrease the amount of the award.[53]

The court explained that because the remedies available under Title VII and the Equal Pay Act are so similar, the same approach would apply to Equal Pay Act claims.[54] Although the court acknowledged that the remedy provisions of Title VII and the Equal Pay Act vary somewhat in that the Equal Pay Act provides for liquidated damages, the court dismissed this distinction as insignificant since the Equal Pay Act's liquidated damages provision is "wedded" to Title VII's "make whole" concept because the Equal Pay Act's liquidated damages provision awards prevailing plaintiffs double the amount of the "make whole" relief.[55] Finally, while *Wallace* was decided under Title VII as it existed at the time Neil instituted this suit, the court noted that its approach is fully consistent with the newly passed Civil Rights Act of 1991.[56]

B. The Dissent

In a lone dissent, Judge Godbold criticized the majority for failing to decide the case on standing grounds.[57] According to Judge Godbold, Neil was not a member of the class designed to be protected by Title VII and the Equal Pay Act because she obtained employment with Dunn by

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47. *Id.*
48. *Id.*
49. 944 F.2d 841 (11th Cir. 1991), *cert. denied*, 113 S. Ct. 1043 (1993).
50. 968 F.2d at 1183 (citing *Walker*, 944 F.2d at 846 (quoting Texas Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782 (1989))).
51. *Id.*
52. *Id.*
53. 968 F.2d at 1183.
54. *Id.*
55. *Id.*
56. *Id.* at 1183 n.17; Pub. L. No. 102-166, 105 Stat. 1071 (1991). *But see supra* note 30.
57. 968 F.2d at 1185 (Godbold, J., dissenting).

fraudulent means and thus was not a true employee.[58] Thus, Neil had no standing to bring her suit.[59]

IV. Analysis of the Opinion

As Judge Godbold's dissent pointed out, the drawback to the majority's approach is the complex body of law the court devised for determining relief under Title VII and the Equal Pay Act.[60] The majority could have avoided the necessity of devising such a confusing scheme had it held at the outset that Neil had no standing to bring her suit.[61] A charge may be filed under Title VII "by or on behalf of a person claiming to be aggrieved."[62] "The [c]ourts have generally used traditional notions of 'standing' in order to decide whether an individual is sufficiently 'aggrieved' to challenge a particular employment practice in a court suit brought by a private plaintiff."[63] Instead, the majority summarily rejected this relatively simple standing approach in a footnote in favor of its own more complicated approach.[64]

The main weakness in the majority's reasoning is that it failed to distinguish cases in which an employee lies on an employment application from cases in which an employee properly obtains employee status, but during the course of employment commits an improper act not discovered by the employer until the employee sues it for employment discrimination.[65] *Wallace* is a case of the former type; because Neil fraudulently obtained employment she would not otherwise have obtained, she had no standing to bring suit because she did not rise to employee status. As the dissent stated:

> There is no dispositive magic in the word "employee" or in having one's name on the payroll. Congress would not have intended that standing be conferred on an employee who had her name placed on the payroll by a collaborator, or, worse yet, having had her name fraudulently entered on

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58. *Id.* at 1187 (Godbold, J., dissenting).

59. *Id.* (Godbold, J., dissenting).

60. *Id.* at 1189 (Godbold, J., dissenting).

61. *Id.* (Godbold, J., dissenting).

62. 42 U.S.C. § 706(b) (1988).

63. Barbara L. Schlei and Paul Grossman, Employment Discrimination Law 987 (1983).

64. 968 F.2d at 1183 n.10. The court here asserted that Title VII and the Equal Pay Act themselves create standing for Neil, citing Warth v. Seldin, 422 U.S. 490 (1975). ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.") However, the court cited no authority indicating that Congress specifically intended to confer such statutory standing on Title VII or Equal Pay Act claims.

65. 968 F.2d at 1185 (Godbold, J., dissenting).

> a "padded" payroll, never reported for work but received paychecks that were split between her and her collaborator. These may be "far out" examples but not much farther out than the plaintiff who fraudulently misuses the employment process to get a job she would not otherwise have obtained and thereby creates significant risks to employer and public.[66]

V. CONCLUSION

Thus, the court in *Wallace*, in failing to distinguish fraud-in-application cases from on-the-job misconduct cases, resorted to a complex solution to the after-acquired evidence problem when a simpler solution was available. The majority would have been well-advised to have taken the advice of Judge Godbold: "We should grasp the nettle, decide the false application case that is before us, and place our decision squarely on standing grounds. Such a decision would help to bring understanding and order to a confused and disorderly field."[67]

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66. *Id.* at 1188 (Godbold, J., dissenting).
67. *Id.* at 1189 (Godbold, J., dissenting).