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An Ad Hoc Rationalization of Employer Wrongdoing: The Dangers of the After-Acquired Evidence Defense

Joseph Spadola*

This piece offers an across-the-board policy and doctrinal critique of the "after-acquired evidence" (AAE) defense. This defense allows employers to escape liability for workplace wrongs by uncovering previously unknown evidence of past employee misconduct. Such a defense violates the basic aspirations of our legal system, which include treating each litigant equally despite his or her past or character. The defense also poses a number of policy dangers, such as promoting invasive discovery, discouraging employee claims, creating unfair prejudice at trial, and disparately impacting underprivileged minorities. The defense has been justified on a number of contractual, equitable, and economic grounds, none of which withstands scrutiny. Past AAE scholarship has focused almost exclusively on federal discrimination law, with the important exception of one recent article by Professor Sachin Pandya. Building on Pandya's article, this Comment articulates arguments against the AAE defense that apply to all employee claims.

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INTRODUCTION

The after-acquired evidence defense (AAE defense) presents a loophole through which employers can evade liability for employee rights violations. The defense allows an employer to justify an adverse employment action on the basis of evidence discovered ex post that the employee committed résumé fraud or on-the-job misconduct. Thus, if an employer fires an employee because of his age and later discovers that the employee stole sensitive documents from his supervisor's desk, the employer has a potential defense to the employee's age discrimination claim.[1] Following the seminal Supreme Court case *McKennon v. Nashville Banner Publishing Co.*, the AAE defense completely bars contract claims and is a partial defense to statutory claims rooted in public policy (limiting back pay to the date on which the misconduct or résumé fraud was discovered).[2] The Court rationalized this distinction on the basis that statutory claims, unlike private contract claims, have a broad deterrence goal that goes beyond compensating individual employees, such that it would contravene public policy to let employers completely off the hook for their wrongdoing.[3]

1. *See* O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466, 1470 (D. Ariz. 1992).
2. 513 U.S. 352, 360–62 (1995).
3. *Id.* at 358.

To benefit from the AAE defense, an employer must show (1) that it did not know of the employee's misconduct during the employee's time of employment and (2) that the misconduct was sufficiently severe to justify termination on its own.[4]

The application of the AAE defense is best illustrated with an example drawn from an actual case:[5] Employee, a female manager-trainee, is hired to work at Restaurant.[6] Immediately upon commencement of Employee's training, training managers and other staff subject her to sexual harassment.[7] Employee complains to two supervisors and is laughed at, told to "deal with it," and questioned about her sexual orientation.[8] Employee endures the harassment and later brings it up with another supervisor, who refers the matter to Human Resources.[9] Several months after hire, Employee attends a holiday party, where a manager slaps her buttocks and tells her she "looks good," drops her name tag between her breasts, and continues to make sexually suggestive comments all night.[10] Employee complains to her supervisor the next day.[11] Within three days, Employee is fired, on the pretext that she is not a "good fit."[12] Employee brings sexual harassment and retaliation claims against Restaurant.[13] During depositions, Restaurant discovers that Employee lied on her job application, claiming (1) that she had a two-year degree when in fact she had not completed her requisite classes, (2) that she had left her previous job in search of a better opportunity when in fact she had been fired, and (3) that her previous salary was higher than it in fact was.[14] The court finds that Restaurant did not know of Employee's résumé fraud and that if Restaurant had known of the résumé fraud, it would have fired Employee.[15] Employee's back pay is thus limited to the date of the depositions during which the résumé fraud was discovered.[16]

This Comment argues that, even in its watered-down post-*McKennon* form, the AAE defense is questionable as a matter of legal doctrine and bad as a matter of policy and therefore should be eliminated. The doctrinal justifications for the AAE defense (master-servant law, contractual theories of fraud in the inducement and material breach, the equitable doctrine of unclean hands, and mixed-motives discrimination law) are not convincing. Similarly,

4. *Id.* at 362–63.
5. EEOC v. Rose Casual Dining, L.P., No. Civ.A. 02-7485, 2004 WL 614806 (E.D. Pa. Mar. 5, 2004).
6. *Id.* at *1.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at *6.
13. *Id.* at *2.
14. *Id.* at *10.
15. *Id.*
16. *Id.*

the policy justifications for the defense (that it promotes employee honesty and productivity and diminishes employer reliance on stereotypes) are based on dubious assumptions about employee incentives—namely, that workers actually know the AAE defense exists and are therefore less likely to commit misconduct. With one important recent exception upon which this Comment draws heavily,[17] all existing scholarship on the AAE defense focuses on federal discrimination statutes.[18] However, the arguments posited above apply with equal force to other claims, and this Comment seeks to articulate those arguments outside the federal discrimination context.

The AAE defense is dangerous for several reasons:

1) it invites employers to engage in invasive discovery practices that discourage employee claims and to present otherwise inadmissible evidence in court that unduly prejudices employees;
2) it undercuts the law's effort to generate awareness of important social issues and lets employers off the hook for socially harmful behavior;
3) it reinforces the notion that certain plaintiffs are less morally deserving than others of the court's intervention; and

17. Sachin S. Pandya, *Unpacking the Employee-Misconduct Defense*, 14 U. PA. J. BUS. L. 867 (2012). Pandya addresses the AAE defense in all contexts, including "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." *Id.* at 867. Pandya's article purports to rebut "the prevailing arguments for and against" the AAE defense (which he idiosyncratically calls the "employee-misconduct defense"). *Id.* However, the vast majority of Pandya's critiques (many of which are incorporated into this Comment) target arguments *for* the AAE defense. Pandya critiques only one argument *against* the AAE defense—namely, that the defense lowers case payoffs. Pandya claims this by itself is insufficient to justify eliminating the defense. *Id.* at 914. As will become apparent, I am more sympathetic to this argument than Pandya. The argument, as I understand it, is not simply that the AAE defense lowers case payoffs, but rather that it lowers them drastically below whatever countervailing value the AAE defense promotes. Admittedly, because of the measurement problems Pandya identifies, there is no statistical data proving this. *Id.* at 915. However, the anecdotal evidence that practitioners and scholars have amassed—coupled with the normative arguments that Pandya himself develops—make it morally clear that the defense does more harm than good. Pandya acknowledges this as he concludes, "[V]irtually no sound reason currently exists for adopting the defense or (apart from *stare decisis*) continuing to apply it." *Id.* at 867.

18. For a list of after-acquired evidence scholarship focusing almost exclusively on federal discrimination law, see *id.* at 868 n.1 (citing 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); Mitchell H. Rubinstein, *The Use of Predischarge Misconduct Discovered After an Employees' Termination as a Defense in Employment Litigation*, 24 SUFFOLK U. L. REV. 1 (1990); 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)).

4) it greatly disadvantages those employees who are most likely to need remedial action for harm suffered in the workplace, by subjecting them to a level of scrutiny not faced in the ordinary course of employment by other employees.

While the use of the AAE defense is generally problematic, there are situations in which its use seems intuitively correct—particularly in cases of egregious employee misconduct, such as sexual harassment. Still, just as wrongfully acquired evidence is excluded in criminal law, the AAE defense should be eliminated even in those cases in which its use seems intuitively correct. In the criminal context, our judicial system proscribes the use of improperly acquired evidence in recognition of broader concerns about procedural fairness and human dignity. Similarly, it is contrary to the fundamental principles of our legal system to let employers justify bad actions by presenting evidence of employee misconduct that would have gone undiscovered absent the employee's claim.

Thus, while scholars and courts have proposed a number of middle-ground solutions designed to mitigate the dangers presented by the AAE defense,[19] this Comment advocates complete elimination of the defense as the only way to fully address the doctrinal and policy concerns articulated above. The Comment proceeds as follows: Part I gives an overview of how the AAE defense is applied in different jurisdictions and to different types of claims. Part II describes the origin of the AAE defense and critically examines its doctrinal justifications. Part III discusses the various policy concerns of the AAE defense and the relative effectiveness of middle-ground solutions in addressing these concerns.

19. *See* Bryan Schwartz & Baldwin Lee, *The Unclean Hands and After-Acquired Evidence Defenses*, 26 CAL. LAB. & EMP. L. REV., no. 5, Sept. 2012, at 5 ("[V]arious middle-ground measures exist to safeguard the legitimate interests of both employers and employees, including requiring or permitting: (1) employer proof of the defenses by clear and convincing evidence; (2) more vigorous judicial oversight of discovery; (3) bifurcation of the proceedings to dispense with them quickly and separately; (4) sanctions and shifting attorneys' fees for frivolous assertion of the defenses; (5) retaliation counterclaims based on retaliatory assertion of the defenses; (6) restriction of the defenses to the most egregious employee misconduct; and (7) limiting the after-acquired evidence defense to evidence discovered in the ordinary course of business.") (footnotes omitted). As a summer associate with Mr. Schwartz's firm, I contributed to the research and drafting of the above-cited article and have drawn on that research in drafting this Comment.

I.
OVERVIEW OF THE SCOPE OF THE AAE DEFENSE

The AAE defense exists in various contexts, and each has a distinct jurisprudence. Below is a synoptic overview of the current state of the law:[20]

Area of Law	Effect of AAE	Rationale
State and Federal Discrimination Law/ Wrongful Discharge in Violation of Public Policy	No reinstatement,[21] no front pay,[22] back pay[23] limited to date of discovery of misconduct (in most states).[24]	Two competing values: (1) upholding the broad purpose of discrimination statutes, and (2) recognizing the legitimate interests of employer. (*McKennon*)[25]
Breach of Contract	Total defense.[26]	Private contract claims do not promote a broad public purpose. Material breach and fraud in the inducement rationales.
Labor Law: The National Labor Relations Act (NLRA)	No reinstatement, no front pay, back pay limited to date of discovery of misconduct.	Balancing two countervailing values: (1) the public objectives of the NLRA and (2) the public policy of not condoning employee misconduct. (*John Cuneo, Inc.*)[27]

20. For a similar chart with a focus on California law, see *id.*

21. "Reinstatement" is a court order requiring the employer to rehire the plaintiff employee.

22. "Front pay" is a damages remedy that replaces the plaintiff's wages for the time period beginning with the court's judgment and ending when the plaintiff finds appropriate substitute work.

23. "Back pay" is a damages remedy that replaces the plaintiff's wages for the time period beginning with the adverse employment action and ending with the court's judgment (or when the plaintiff finds appropriate substitute work, if earlier).

24. While courts limit back pay and grant no reinstatement or front pay, they do not limit noneconomic damages such as damages for emotional distress. *See* EEOC v. Rose Casual Dining, L.P., No. CIV.A. 02-7485, 2004 WL 614806, at *9 (E.D. Pa. Mar. 5, 2004).

25. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361–62 (1995).

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

27. 298 N.L.R.B. 856, 856 (1990).

Workers' Compensation	Split. Total defense in some states; no defense in others.[28]	Statutory bar in some states. In remaining states, courts rely on factors like (1) the public policy of discouraging employee fraud, (2) preservation of employer access to second-injury funds, (3) lack of statutory authority to deny workers' compensation benefits, and (4) upholding the public purpose of workers' compensation laws.[29]

As noted, labor law, discrimination law, and wrongful-discharge law all follow a similar logic on the AAE defense. All three promote broad public policy goals[30] and—balancing those goals against the discouragement of employee fraud and misconduct—take the middle-ground solution of a partial defense that applies at the remedy stage only and allows for back pay up to the date the employer discovered the employee's misconduct. By contrast, in the workers' compensation context, the defense is either all-or-nothing, depending on the jurisdiction, both for idiosyncratic statutory and policy reasons, and because it would be hard to fashion a halfway remedy with workers' compensation benefits. Lastly, in the contract setting, the AAE defense is a complete bar to employee claims in all jurisdictions, both because of particular contractual doctrines (namely, fraud in the inducement and material breach) and because contract law does not involve the broad policy goals involved in, say, discrimination law. The historical background of each aforementioned domain is briefly discussed below.[31]

28. *See* Pandya, supra note 17, at 873–74 (listing twenty-three state workers' compensation statutes that bar benefits, nine court decisions denying benefits, and twelve court decisions granting full benefits).

29. *Id.* at 874–75, 910.

30. Unlike discrimination law, whose purpose is to protect individuals' civil rights and eliminate invidious discrimination in society, the avowed purpose of the NLRA is to promote industrial peace. For cases discussing this distinction, see Mitchell H. Rubinstein, *The Use of Predischarge Misconduct Discovered After an Employee's Termination as a Defense in Employment Litigation*, 24 SUFFOLK U. L. REV. 1, 12–13 (1990).

31. For a slightly more detailed overview, see Pandya, *supra* note 17, at 870–75.

A. Discrimination and Wrongful Discharge: The McKennon *Defense*

Discrimination law and wrongful-discharge law (for those states that recognize wrongful-discharge claims) reached the middle-ground solution of a partial defense in *McKennon*, an Age Discrimination in Employment Act (ADEA) case in which the Supreme Court resolved a split between the Tenth and Eleventh Circuits, effectively adopting the Eleventh Circuit's approach.[32] A partial defense allows an employee to recover some, but not all, of the damages to which she would otherwise be entitled. *McKennon* was eventually extended to other federal discrimination claims[33] as well as to state discrimination claims[34] and many state wrongful-discharge claims.[35] Although initially intended as a guide,[36] the *McKennon* rule has become rigid black-letter law.

In *McKennon*, Catherine McKennon worked as a secretary for Nashville Banner Publishing Company for over thirty years.[37] McKennon was discharged at age sixty-two as part of a general workforce reduction[38] and subsequently brought an age-discrimination claim against her employer under the ADEA.[39] During her deposition testimony, McKennon revealed that, prior to her termination, she had furtively photocopied and shown to her husband several confidential documents bearing upon the company's financial condition, in attempts to "learn information regarding [her] job security."[40] The employer moved for summary judgment and conceded, for purposes of the motion, that it had discharged McKennon because of her age.[41] The issue before the Supreme Court was whether, and to what extent, the AAE of McKennon's breach of confidentiality barred her ADEA claim.

The *McKennon* Court held that AAE does not act as a complete bar to relief under the ADEA, but that such evidence can limit a plaintiff's remedies, rendering reinstatement and front pay inappropriate. The Court based its holding on district courts' discretion to fashion equitable remedies under the

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

33. *See* Pandya, *supra* note 17, at 871 n.16.

34. *Id.* at 871 n.17 (citing nine states that extend *McKennon* to state discrimination claims).

35. *Id.* at 871–72 n.18 (citing three states that extend *McKennon* to wrongful-discharge claims).

36. 513 U.S. at 362 ("In determining the appropriate order for relief, the court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party. An absolute rule barring any recovery of backpay, however, would undermine the ADEA's objective of forcing employers to consider and examine their motivations, and of penalizing them for employment decisions that spring from age discrimination.").

37. *Id.* at 354.

38. *Id.*

39. *Id.*

40. McKennon v. Nashville Banner Publ'g Co., 797 F. Supp. 604, 606 (M.D. Tenn. 1992), *aff'd*, 9 F.3d 539 (6th Cir. 1993), *rev'd*, 513 U.S. 352 (1995).

41. *McKennon*, 513 U.S. at 355.

ADEA and other anti-discrimination statutes.[42] The *McKennon* rationale has four basic components:

1) The Court rejected the unclean-hands doctrine as a justification for barring relief on the ground that the equitable doctrine does not apply to statutory claims embodying important public policies.[43]
2) The Court rejected the Tenth Circuit's analogy to a mixed-motives framework (whereby an employer can be held liable for taking an adverse action against an employee for a combination of lawful and unlawful motives). The Court reasoned that in the AAE context, the employer is unaware of the employee's misconduct at the time of the adverse employment action; therefore, the employer cannot have been motivated, partially or completely, by the employee's misconduct in taking the adverse action.[44]
3) The Court rejected reinstatement and front pay as remedies. It reasoned that the employer, having knowledge of the employee's misconduct, could legitimately fire the employee upon reinstatement. As a result, reinstatement would be "inequitable and pointless."[45] Further, the Court held that front pay, the damages equivalent to reinstatement, would result in overcompensation to the employee.[46]
4) The Court limited back pay to the date of discovery of the misconduct. The Court reasoned that the employer would have lawfully discharged the employee on that date, such that it would contravene the "lawful prerogatives of the employer" to award the employee back wages beyond that date.[47] However, the Court disregarded the fact that information regarding the employee's misconduct "[was] acquired during the course of discovery in a suit against the employer and . . . [that] the information might have gone undiscovered absent the suit."[48] Hence, the back pay awarded does *not* place the employee in as good a position as if the discriminatory act had never occurred.

In all, *McKennon* rejected two traditional grounds for allowing the AAE defense—the unclean-hands defense and the mixed-motives framework—but nonetheless upheld a limited AAE defense on a vague balancing of the "legitimate interests of either party."[49] As Professor Sachin Pandya points out, the doctrinal justifications for the *McKennon* rule regarding reinstatement, front

42. *Id.* at 357–58.
43. *Id.* at 360. For a discussion of the unclean-hands doctrine as a justification for the AAE defense, see infra Part II.D.
44. *McKennon*, 513 U.S. at 359–61.
45. *Id.* at 362.
46. *Id.* at 361–62.
47. *Id.*
48. *Id.* at 362.
49. *Id.*

pay, and back pay are weak. First, invariably eliminating front pay and reinstatement on grounds that the employer could fire the employee upon reinstatement is unconvincing since a court could order the employer not to fire the employee upon an objective finding that the employee is fit for employment despite the misconduct (a test often used by labor arbitrators).[50] Second, limiting back pay to the date the misconduct is discovered contravenes the compensatory purpose of workplace laws, since it is very unlikely in most cases that the misconduct would have been discovered at that time absent the employee's lawsuit, which itself is a product of the employer's unlawful act.[51]

While refusing to apply the unclean-hands defense and the mixed-motives framework, the Court seemed influenced by the values and principles underlying these doctrines, namely that (1) a plaintiff should not be rewarded for wrongdoing and (2) discrimination is not actionable so long as it does not leave a plaintiff worse off than she would have been without it (although as noted above, the partial *McKennon* defense leaves the plaintiff worse off). Perhaps recognizing that these values and principles do not quite square with the AAE context, the Court watered them down and created a partial defense that, unlike the mixed-motives framework and unclean-hands defense, allows the employee to recover some but not all of the damages to which she would otherwise be entitled. The partial defense is thus less a principled middle ground than it is a confused amalgam of principles that, as discussed further below, are either unsound or outweighed by countervailing policy concerns.

B. Labor Law

Labor law reached the middle-ground solution of a partial defense in *John Cuneo, Inc.*, a seminal 1990 National Labor Relations Board (NLRB) decision.[52] There, an employee who committed résumé fraud brought a claim under the NLRA after getting fired for engaging in a strike against unfair labor practices.[53] Emphasizing that the employer had a policy of not hiring applicants who made misrepresentations on their job applications, the Board found that, had the employer discovered the employee's misrepresentations, it would not

50. Pandya, *supra* note 17, at 889–91. One objection to this approach is that the "objectively fit for employment" standard is a for-cause standard, which would not apply in an at-will employment relationship. A proponent of *McKennon* might argue that to force an employer to rehire an employee whom it could legitimately fire (even if the employee is objectively fit for employment) would impede the employer's "lawful prerogative" to fire an at-will employee for any nondiscriminatory reason. This point is significantly weakened by the fact that the employer likely would not have discovered the employee's misconduct absent its own unlawful act. Thus, the "lawful prerogative" in question is to fire someone for something the employer did not know about.

51. *Id.* at 886–87.

52. *See* Rubinstein, *supra* note 30, at 6–7 (discussing NLRB treatment of the AAE defense since its first appearance in 1959: at times after-acquired evidence was a total defense, at times it was no defense, and at times it was a partial defense).

53. John Cuneo, Inc., 298 N.L.R.B. 856, 856–57 (1990).

have hired him.[54] The Board held that under those circumstances, full back pay and reinstatement would be an "undue windfall" for the employee but that, in view of the employer's unfair labor practice, no relief would be an undue windfall for the employer.[55]

Like in *McKennon*, the holding in *John Cuneo* was based not on explicit doctrinal or policy justifications but on a balancing of equities, where one partial windfall cancels out another. The AAE defense seems less problematic in the labor-law context, however, since NLRB hearings and most labor-arbitration proceedings do not involve discovery.[56] This difference greatly changes the stakes of the AAE defense, since it eliminates the potential for invasive and intimidating discovery practices on the part of employers.[57]

C. Workers' Compensation

Workers' compensation jurisprudence takes into account the unique trade-offs inherent in workers' compensation law, including protecting injured workers, dealing with issues like occupational disease (for which a worker's most recent employer bears all liability[58]), managing an efficient social insurance scheme independent of the courts,[59] and preserving employers' access to "second-injury funds," which pay workers' compensation benefits on behalf of employers who knowingly hire previously injured or disabled workers.[60]

In the workers' compensation context, the AAE defense arises when an employee fails to disclose a preexisting injury or health condition and later exacerbates that injury or health condition on the job. The workers' compensation statutes of sixteen states specifically address this issue by precluding such workers from receiving benefits.[61] Some of these statutes, however, only apply to specific types of injuries, such as occupational diseases.[62] Further, in many of the states that do not explicitly restrict benefits,

54. *Id.* at 856. Interestingly, the employer introduced no evidence of not having hired or having fired other employees for résumé fraud to prove that it would not have hired the employee. *Id.* at 859. Instead, the employer introduced testimony from the president stating that it was "company policy" not to hire such employees, testimony from the vice president (who interviewed the employee) stating that he would not have hired the employee had he known of the misrepresentation, and evidence that the employer had fired other employees for making false statements. *Id.* at 859–60.

55. *Id.* at 856.

56. NLRB CASEHANDLING MANUAL PART ONE: UNFAIR LABOR PRACTICE PROCEEDINGS § 10292.4 (2012).

57. *See infra* Part III.A.

58. Marriott Corp. v. Indus. Comm'n, 708 P.2d 1307, 1311 (Ariz. 1985).

59. *See* Pandya, *supra* note 17, at 910.

60. Nabors Drilling USA v. Davis, 857 So. 2d 407, 413 (La. 2003).

61. *See* Pandya, *supra* note 17, at 874 n.27.

62. *Id.* (citing, e.g., ARIZ. REV. STAT. ANN. § 23-901.04(B) (2012)).

courts have fashioned their own restrictions.[63] Only a handful of state courts have rejected the AAE defense outright and have refused to deny workers' compensation benefits on health-status misrepresentation grounds alone.[64]

D. Breach of Contract

Under breach-of-contract jurisprudence, principles such as material breach and fraud in the inducement act as a complete bar to employee claims in the AAE context.[65] These doctrines are discussed at length in Part II.

II.
DOCTRINAL JUSTIFICATIONS FOR THE AAE DEFENSE

A. Master-Servant Law

The AAE defense first arose in the context of master-servant law. In that context, "where a sufficient cause exists for the discharge of a servant, although not the inducing motive to the discharge, or even known to the master, it will justify the discharge."[66] Thus, a master faced no liability in a situation in which he discharged a servant for an inadequate reason and later discovered that, during the servant's employment, the servant had committed an act justifying her discharge.

For example, in *Von Heyne v. Tompkins*, a paradigm master-servant case, the master discharged a servant whom he had hired under a written fixed-term contract to look after the master's farm.[67] Among the master's reasons for the discharge was that the servant had disobeyed various orders.[68] After the discharge, it came to light that the servant had committed fraud on one of the master's buyers, falsified the master's books, and misappropriated the master's money.[69] The court held that these actions, although unknown to the master at the time of discharge, sufficiently justified the discharge and relieved the

63. *Id.* at 874 n.30. Whether by statute or case law, most states require employers asserting the AAE defense to prove (1) that the employee made a false statement in writing regarding her health status, (2) that the employer relied on this statement in hiring her, and (3) that there was a causal connection between the false representation and the injury. *See* 3-66 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 66.04 (2011).

64. *See, e.g.*, Marriott Corp. v. Indus. Comm'n, 708 P.2d 1307, 1312 (Ariz. 1985) (rejecting the AAE defense on the following grounds: (1) there was no statutory authority restricting benefits except in the context of occupational disease; (2) to hold otherwise would be to resurrect "the disfavored idea that the employee must be free from fault in order to receive compensation"; (3) the employer can protect himself from liability by investigating the health status of job applicants more thoroughly; (4) the holding kept with "the long held view that the purpose of the workers' compensation system is to dispense with, as much as possible, the litigation between employer and employee and to place upon industry the burden of compensation").

65. RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. c, illus. 8 (1981).

66. Crescent Horseshoe & Iron Co. v. Eynon, 27 S.E. 935, 936 (Va. 1897).

67. 93 N.W. 901, 902 (Minn. 1903).

68. *Id.*

69. *Id.* at 904–05.

master of all liability.[70] Insofar as the servant was not seeking expectation damages under the contract, merely restitution for services already rendered, the *Von Heyne* holding was particularly harsh.[71] Nevertheless, the court reasoned that, because the servant had failed to serve the master as "faithfully and diligently" as the employment contract required, the servant was not entitled to "any compensation whatsoever."[72]

The principle of master-servant law is rooted in a preindustrial economy in which the relationship of master to servant was predicated on a feudal-like obedience. In *Von Heyne*, the court held that there was no excuse for servant disobedience, even though the servant's actions did not result in any loss to the master.[73] In the end, "[i]t is not a question of profit or loss, or of results at all, but of insubordination, which is inconsistent with the relation [of master to servant]."[74] Given the high premium society and the courts placed on obedience, it would have contravened "sound public policy"[75] to excuse disobedient servants simply because their masters did not immediately discover their disobedience.

Today, strains of this justification remain. Employers still seek trust and obedience from their employees, especially in safety-sensitive positions or positions that require employees to exercise a great deal of discretion. Without a way of ensuring trust and obedience in the employment relationship, employers would have to expend a great deal of resources to screen and monitor employees, which would ultimately result in lower overall wages and potentially discriminatory hiring.[76]

Nonetheless, it is unclear that the AAE defense is an appropriate mechanism for ensuring trust and obedience in the employment relationship. First, only the most sophisticated employees are likely to know about the AAE defense at the time of their misconduct. Less sophisticated employees will probably first learn of the defense much later, when they consider bringing an action and then consult a lawyer.[77] Second, even assuming employees are

70. *Id.* at 906–07.
71. *Id.* at 903.
72. *Id.* at 907.
73. *Id.* at 904.
74. *Id.*
75. *Id.*
76. *See* Jenny B. Wahl, *Protecting the Wolf in Sheep's Clothing: Perverse Consequences of the* McKennon *Rule*, 32 AKRON L. REV. 577, 596–98 (1999).
77. Below I argue that the AAE defense acts as a deterrent to employee *claims*. On its face, this argument may seem to contradict the argument that the AAE defense does not act as a deterrent to employee *misconduct* because employees do not know of the defense. The contradiction disappears when one realizes that employees generally will not learn of the AAE defense until they present their potential claim to a lawyer. At that point, the AAE defense deters both the client and the lawyer from moving forward with the claim. However, the AAE defense cannot act as a direct deterrent to employee misconduct, since at the time of misconduct the employee probably does not know of the defense (or, in the unlikely event that she does know, is not likely to give it much weight in deciding

aware of the AAE defense, the defense will likely not influence their decision to misbehave because the possibility of future lawsuits based on facts yet to occur is too remote, except perhaps for a very small group of highly sophisticated and calculating employees.

Thus, while the AAE doctrine may, over time, through word of mouth and mass media, seep into the public consciousness and thereby exercise some deterrent effect on employees contemplating misconduct, this deterrent effect is much weaker than commentators presume.[78] In any case, it does not justify invariably barring potentially meritorious employee claims. If the employee has caused real harm to the employer, that harm is better remedied through a counterclaim,[79] which has a more direct deterrent effect in that it punishes the misconduct itself rather than an unrelated employment claim.

The AAE defense also effectively weakens some of the deterrent effect that work-law claims exercise over employers. Employers may more readily engage in socially undesirable practices because they know they can reduce their overall liability for these practices by unearthing evidence of employee misconduct. Thus, assume that 10 percent of all employees commit résumé fraud[80] and that 10 percent of all employees commit some form of workplace misconduct. Assume further that these two subsets of employees do not overlap and that plaintiffs are not more or less likely to commit résumé fraud or workplace misconduct. Then, the employer knows that it can potentially bar or limit 20 percent of all employee claims with the AAE defense (assuming it can uncover the résumé fraud or misconduct in most cases[81]). Thus, on average, the

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whether to commit the misconduct because the possibility of a claim against the employer is too remote).

78. *See* William J. Collins III, *An Exception for Deception: Why* McKennon *Should Not Be Extended to Employment Application Misrepresentations of Pre-existing Injuries*, 37 S. TEX. L. REV. 779, 782 (1996) (arguing that limiting the AAE defense "encourages job applicants to misrepresent themselves"); Wahl, *supra* note 76.

79. *See* Pandya, *supra* note 17, at 876.

80. Factually, the number is probably much higher. *See* Mark N. Wexler, *Successful Resume Fraud: Conjectures on the Origins of Amorality in the Workplace*, 12 J. HUM. VALUES 137, 139 (2006) (indicating 41 percent of entry-level job applicants had already committed résumé fraud, and that 95 percent were willing to do so). With the economic downturn, which has created greater desperation in the job search, the number may be even higher today.

81. Presenting after-acquired evidence of résumé fraud is a particularly inexpensive and systematic way for employers to defend against employee claims, since they need only look back at the employee's résumé and then, in a deposition or through a simple background check, comb for misrepresentations. About half of the cases in which employers present the AAE defense are résumé-fraud cases. *See* Melissa Hart, *Retaliatory Litigation Tactics: The Chilling Effects of "After-Acquired Evidence"*, 40 ARIZ. ST. L.J. 401, 415 (2008). The breakdown of the remaining 293 cases that make it to court is as follows:

Falsification of Application Documents – 146
Workplace Misconduct – 101
Unauthorized Removal of Documents – 20
Violation of Confidentiality – 10
Abuse of Leave – 9

employer can commit five violations of workplace law for the price that it formerly paid for four. It can increase this number by strategically violating the rights of those employees whom it most suspects of misconduct and who thus have a greater than 20 percent chance of having their claim barred. In the most cynical scenario, the employer can turn a blind eye to misconduct and use it as a blank check to later violate the rights of an employee, assuming it is willing to falsely assert that it did not know of the misconduct.

This discussion is not intended to downplay the importance of trust in the employment relationship or the legitimate right of employers to be free of misconduct. It is merely meant to underscore the following two points: (1) that both the deterrent and compensatory goals of the AAE defense may be better served by other means, such as direct employer counterclaims; and (2) that whatever deterrent effect the AAE defense may have on employees is outweighed by the anti-deterrent effect—the systemic lowering of liability for violations of employee rights—it has on employers.

B. Contracts: Excused Nonperformance

In contract law, the AAE defense is based on a basic doctrinal principal: contract nonperformance is not actionable if a legal basis existed for excusing performance—such as the other party's material breach—even if the nonperforming party was unaware of that legal excuse.[82] There is an important exception, however, when "because of unreasonable ignorance, [the nonperforming party] has accepted the other party's performance or has given no reasons or the wrong reasons for its rejection."[83]

Unfortunately, the AAE defense contains no such exception, allowing employers to assert employee misconduct as a post hoc excuse even when the employers should have known of the misconduct beforehand. Moreover, as Pandya points out, the traditional test for whether a breach is material is objective.[84] The AAE test, by contrast, is subjective; it only requires an employer to show that it subjectively would have found the employee's misconduct to be grounds for discharge (instead of showing that the misconduct was objectively grounds for discharge, as labor arbitrators routinely decide in determining whether an employer had "cause" to fire an employee).[85]

Violation of Policy – 8
Lying – 7
Other [Various On-the-Job Misconduct] – 47
Employee Performance – 5
Employee Status – 8
Other – 33

Id. at 415 (footnotes omitted).

82. *See* RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. c (1981).
83. *Id.*
84. *See* Pandya, *supra* note 17, at 900–02.
85. *Id.*

Thus, there are two ways in which courts have broadened the AAE defense from its original contractual justification: (1) the AAE defense uses an "actually-knew" rather than a "should have known" standard, and (2) the AAE defense is a subjective rather than an objective standard. The following illustration demonstrates the first broadening:

> A and B make an employment contract. After the service has begun, A, the employee, commits a material breach of his duty to give efficient service that would justify B in discharging him. B is not aware of this but discharges A for an inadequate reason. A has no claim against B for discharging him. B has a claim against A for damages for total breach . . . based on B's loss due to A's failure to give efficient service up to the time of discharge, but not for damages based on the loss of A's services after that time, because that loss was caused by B's discharge of A and not by A's failure to give efficient service.[86]

Thus, where there is AAE of failure to give efficient service, not only does the employee have no claim against the employer for breach of contract, but the employer also has a claim against the employee for the loss caused by this failure.[87]

This analysis fails to acknowledge that, in the employment context, the employer generally receives and inspects the performance for which it bargained on a daily basis. Thus, under well-established contract principles, the employer waives any objection to the employee's performance by failing to raise those objections during her time of employment, unless the employer had no reasonable way of knowing of the deficiencies in the employee's performance.[88]

Under the current AAE doctrine, however, only employers who "actually knew" about the employee's misconduct are precluded from asserting the AAE defense; employers who had "reason to know" of such misconduct can still

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86. RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. c, illus. 8 (1981).

87. This second principle is based on a *Hadley v. Baxendale*-type analysis. (1854) 156 Eng. Rep. 145, 151; 9 Ex. 341, 354 (establishing the principle that a breaching party is liable for losses caused by the breach that were reasonably foreseeable at the time of contracting). It is foreseeable to the employee at the time of entering into the employment relationship that failure to give efficient service would proximately result in loss to the employer, so the employee is liable for this loss even though the contract does not expressly obligate him to indemnify it.

88. Restatement § 246 provides that, where an obligor accepts the obligee's performance "with knowledge of or reason to know" of the obligee's material breach, the obligor must perform despite the breach. RESTATEMENT (SECOND) OF CONTRACTS § 246(1) (1981). Building on this general principle, comment c to section 237 (the section that illustration 8 purports to exemplify) states that where the obligor "accepted the other party's performance or has given no reasons or the wrong reasons for its rejection," or where the obligor "fails to make timely objection . . . because of unreasonable ignorance," then the obligor may be precluded from relying on the obligee's failure of performance as an excuse for not performing. *Id.* § 237 cmt. c. The comment then analogizes to U.C.C. § 2-608, which provides that a buyer who accepts goods in ignorance of their defects loses her right to insist upon strict performance as a condition of her duty to pay. *Id.*

assert the defense. There is no justification for allowing an employer's unreasonable ignorance—or worse, willful blindness—of an employee's misconduct to act as a bar to an employee's contract claim.

For example, imagine an employee who works as a claims representative at an insurance company and is disciplined for falsifying company documents.[89] If the employee is later fired because of her religion, and the employer subsequently discovers 150 new falsifications, the employer should not be able to use this as AAE. The employer is already on notice of the employee's tendency to falsify documents and has a readily available means of checking for future falsifications.[90] Thus, the employer has "reason to know" of this misconduct and should not be allowed to use it as an excuse for nonperformance.[91]

There are, of course, many kinds of conduct—such as on-the-job theft—of which employers have no reason to know. It is fairer and more consistent with contract law to allow employers to raise the AAE defense in these cases; however, for policy reasons, the defense may still be problematic, as discussed in Part III of this Comment. In any case, the test that courts use in applying the AAE defense—asking only whether the employer "actually knew" of the misconduct and not whether it had "reason to know"—does not square with this contractual justification for the defense.

This misfit is further exacerbated by the fact that, whereas the AAE defense applies a subjective test of determining whether an employer would have fired an employee, the traditional test for whether a breach is material is an objective one.[92] In practice, this difference is often not important because courts will likely find most instances of AAE of misconduct—such as falsifying records, stealing sensitive documents, or rendering inefficient performance—to constitute a material breach. Nevertheless, the difference is procedurally important, as an objective test places a higher burden on the employer.

C. Contracts: Fraud in the Inducement

Fraud in the inducement provides another contractual justification for the AAE defense where an employee has made material misrepresentations on a job application. If the employee fraudulently induced the employer to hire her by misrepresenting her job qualifications, the employer has the option of

89. Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988).

90. *Id.* at 702 (indicating the employer could perform random checks and had already done so).

91. *See supra* note 88. One might argue that the employer did not have reason to know that the employee's tendency to falsify documents was extreme. However, if we analogize to a buyer of goods who finds a crack in a product and fails to inspect the crack further, she cannot later object to the goods on the grounds that they had an unknown defect if she accepts the goods and later discovers that the crack was part of a much deeper structural defect.

92. *See* Pandya, *supra* note 17, at 900–02.

voiding the contract.[93] If the employer exercises that option, it cannot be held liable for breach, even if it did not discover the employee's misrepresentation until after the breach occurred. Although the employer may avoid paying expectation damages to the employee, it is still liable for restitution damages for any services the employee performed. The employer may also avoid liability for certain statutory claims that require an employer-employee relationship—such as workers' compensation.

For instance, in *Crawford Rehabilitation Services, Inc. v. Weissman*, Weissman, a clerical typist, misrepresented on her job application that she had not been discharged by her penultimate employer and that she had worked full-time for her last employer.[94] She also failed to disclose that she had worked for a third employer.[95] Unaware of these misrepresentations and omissions, Weissman's employer discharged her for other reasons.[96] In doing so, the employer failed to follow proper termination procedures.[97] Weissman subsequently brought suit for breach of an implied contract, promissory estoppel, and wrongful discharge in violation of public policy.[98] During deposition testimony, the employer discovered Weissman's misrepresentations and raised the AAE defense.[99]

The *Weissman* court laid out a two-factor test for determining whether the AAE defense barred a private contract claim: (1) whether a reasonable employer would have regarded the misstated or omitted fact as important; and (2) whether the employee concealed or misrepresented the fact or facts with the intent to mislead the employer.[100] Applying these factors to Weissman's case, the court upheld the employer's AAE defense as a complete bar to Weissman's claim of wrongful termination in violation of public policy.[101]

The *Weissman* test differs from the traditional fraudulent inducement test. The traditional test analyzes whether (1) there was a fraudulent misrepresentation of material fact, (2) the recipient relied on the misrepresentation, (3) the recipient was justified in relying on the misrepresentation, and (4) the reliance resulted in damages.[102] The *Weissman* court collapsed the second and third factors into one: whether a reasonable employer would have regarded the misstated or omitted fact as important. Further, the court eliminated the fourth factor on the grounds that "[a]n employment relationship is inherently damaged if it is predicated upon

93. *See* RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981).
94. 938 P.2d 540, 543–44 (Colo. 1997).
95. *Id.*
96. *Id.* at 543.
97. *Id.*
98. *Id.* at 543, 545.
99. *Id.* at 544–45.
100. *Id.* at 549.
101. *Id.* at 550–51.
102. M.D.C./Wood, Inc. v. Mortimer, 866 P.2d 1380, 1382 (Colo. 1994) (en banc).

intentional, material fraud."[103]

In applying the "reasonable employer" prong, the *Weissman* court committed a slight but important conceptual error. According to this test, the court was supposed to decide whether a reasonable employer would have regarded the misstated or omitted *fact* as important; instead, it decided whether "[a] reasonable employer would have considered this deceit to be important."[104] The distinction is subtle but fundamental. Insofar as trust is at the heart of an employment relationship, an employer is likely to find important *any* deceit on the part of an employee. However, an employer will not invariably find a misstated *fact* important. For instance, an employee's address may be of no importance to the employer, since the employer would not likely rely on this information in hiring decisions; however, whether the employee lies about her address may nevertheless be important to the employer. The issue, according to both the traditional fraudulent inducement test and the literal terms of the *Weissman* test,[105] is whether the recipient relied on the misrepresentation of fact to enter into an agreement that she otherwise would not have entered into. The issue is not whether the recipient would have considered doing business with a party had she known of the misrepresenting party's deceitful character. One might consider the latter scenario a "misrepresentation of character," especially in the employment context where the character of a potential employee is important. However, the case law has not supported this approach in the employment context or otherwise.[106]

The tension between the *Weissman* court's test, as announced, and the test it ultimately applied mirrors two competing standards that courts have used in résumé fraud cases. Some courts use a "would have hired" standard whereas others use a "would have fired" standard. The "would have hired" standard,

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103. 938 P.2d at 550 n.14. The "reasonable employer" prong seems objective, whereas the "justifiable reliance" prong of the traditional test is both subjective and objective. Nonetheless, the *Weissman* court built in a subjective component by allowing consideration of the "employer's past conduct or policies" to determine "what the employer regarded as important in a non-adversarial context." *See id.* at 549.

104. *Id.* at 550.

105. The most developed articulation of the fraudulent inducement test in the employment context comes from AAE cases, insofar as the vast majority of cases in which employers assert the fraudulent inducement defense are AAE cases. This is presumably because employers generally do not discover résumé fraud until after the fact, and if they do discover it before the fact, they have two options: (1) turn a blind eye to it, in which case it will not become an issue unless the employer attempts to raise it after the fact as a defense; or (2) discharge or refuse to hire the employee because of the résumé fraud, in which case it will be very difficult for the employee to claim that the employer would have hired her despite the misrepresentation. I have only found one case dealing with the latter scenario, a case involving a wrongful-refusal-to-hire claim based on national origin discrimination in which the court held that an employee's misrepresentation of his college education and employment history was a legitimate nondiscriminatory reason for not hiring the employee. *See* Lopez v. Cont'l Ins. Corp., No. 3:95-CV-1894-D, 1997 WL 148032 (N.D. Tex. Mar. 25, 1997).

106. The only "misrepresentation of character" cases that I have found involve defamation suits where one party misrepresents the character of another. *See, e.g.*, Jonap v. Silver, 474 A.2d 800 (Conn. App. Ct. 1984).

which more faithfully adheres to the traditional fraudulent inducement test, asks whether the employer would have hired the employee had the employee filled out the employment application truthfully.[107] The "would have fired" standard, which has been fashioned by courts in the AAE context, asks whether the employer would have fired the employee based on résumé fraud alone.[108] The latter test is much harsher because virtually *any* form of résumé fraud could be considered grounds for discharge. As a practical matter, it is more or less equivalent to asking whether the employee misrepresented *anything* on her résumé. Perhaps trust and the preservation of transparent hiring signals[109] are important enough in the employment context to justify the "would have fired" test as a policy matter. Nevertheless, it is a clear departure from the contractual doctrine of fraudulent inducement.

Moreover, it is not clear that the "any material misrepresentation" test is good as a matter of policy. First, for the reasons discussed in Part II.A, it will not deter résumé fraud as much as one might think. Second, it gives employers an almost automatic get-out-jail-free card for a significant number of claims.[110] Indeed, about half of all cases in which an employer has raised the AAE defense involve résumé fraud.[111] The employer need only look back at the employee's job application, conduct a quick background check, and see if there are any misrepresentations.

Of course, not all cases are as morally unambiguous, and résumé fraud is not something that society should quietly tolerate. However, if employers are serious about weeding out résumé fraud, there are other tools for doing so: they could conduct more random background checks on applicants and employees or require applicants to provide proof of certain qualifications. Alternatively, states could enact anti-résumé-fraud legislation to provide for criminal penalties and a direct cause of action for employers. The AAE defense, which allows employers to avoid liability for unrelated wrongdoing, is a poor mechanism for deterring résumé fraud and, as discussed above, provides a strong countervailing incentive for employers to violate employees' workplace rights.

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107. *See, e.g.*, Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 414 (6th Cir. 1992) (establishing its own fraudulent inducement test: (1) the misrepresentation or omission was material, (2) it directly related to measuring a candidate for employment, and (3) it was relied upon by the employer in making the hiring decision).

108. *See* Milligan-Jensen v. Mich. Technological Univ., 975 F.2d 302, 304 (6th Cir. 1992).

109. *See* Wahl, *supra* note 76, at 577 (arguing that the AAE defense preserves "the effectiveness of labor-market signaling," that is, the information that employees give to employers to show they are qualified for the job).

110. *See* Wexler, *supra* note 80.

111. *See* Hart, *supra* note 81, at 415.

D. Unclean Hands

Under the unclean-hands doctrine, courts may deny relief to a plaintiff suing over a matter in which she has acted illegally, fraudulently, or in bad faith.[112] The unclean-hands doctrine traditionally applied to suits at equity but in many—though not all—jurisdictions has been extended to claims for legal as well as equitable relief.[113] Courts have traditionally justified the unclean-hands doctrine on the grounds that it preserves "judicial integrity" by precluding the courts from acting as a vehicle for the plaintiff's wrongdoing.[114] The doctrine also has a strong retributive element, in that it punishes the plaintiff for her wrongdoing by denying her the relief to which she otherwise would have been entitled.[115]

In shaping the AAE defense, many courts have cited the unclean-hands doctrine as a guiding doctrinal principle.[116] In some jurisdictions, notably California, the unclean-hands doctrine acts as a separate defense to employee claims in the AAE context[117] (though this may change after the pending California Supreme Court decision in *Salas v. Sierra Chemical Co.*[118]). Ultimately, the unclean-hands doctrine cannot justify the AAE defense, either from a doctrinal or moral perspective.

First, there are important doctrinal differences between the unclean-hands defense and the AAE defense: (1) the unclean-hands defense applies even if the employer was aware of the employee's misconduct;[119] (2) the unclean-hands defense has a relatedness requirement—the plaintiff's misconduct must be related to the subject matter of her suit—that the AAE defense does not;[120]

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112. *See* Ori J. Herstein, *A Normative Theory of the Clean Hands Defense*, 17 LEGAL THEORY 171, 173 (2011) (discussing the unclean-hands defense in general); *see also* Pandya, *supra* note 17, at 907 (discussing the unclean-hands defense as applied to the AAE context).

113. *See* Pandya, *supra* note 17, at 907.

114. Herstein, *supra* note 112, at 178.

115. *Id.* at 198.

116. *See, e.g.*, Camp v. Jeffer, Mangels, Butler, & Marmaro, 41 Cal. Rptr. 2d 329 (Ct. App. 1995). The *Camp* court points out that even *McKennon*, which explicitly rejects the unclean-hands doctrine as a justification for the AAE defense, seems to draw upon the basic equitable principles underlying the doctrine.

117. *See* Murillo v. Rite Stuff Foods, Inc., 77 Cal. Rptr. 2d 12, 18–19 (Ct. App. 1998). In California, the unclean-hands defense acts as a complete bar not only to private breach of contract claims but also to claims rooted in public policy. However, for the defense to apply to public policy claims, it must meet a higher standard. *See id.*

118. Salas v. Sierra Chem. Co., 264 P.3d 33 (Cal. 2011) (granting review of Court of Appeal decision denying employee all relief based on unclean-hands defense). In this case, the employee, an undocumented worker, brought a disability and wrongful discharge claim. The employee used a false Social Security number to obtain employment. The Court of Appeal held that the unclean-hands defense barred the employee's claim entirely, and the California Supreme Court granted review. Schwartz & Lee, *supra* note 19, at 2. Hopefully, the Court will, at a minimum, bring California law in line with *McKennon* and hold that for claims rooted in public policy, the employee's relief should be limited but not entirely barred.

119. *Murillo*, 77 Cal. Rptr. 2d at 19.

120. *Id.*

(3) the unclean-hands defense completely bars relief, whereas the AAE defense merely limits liability for claims rooted in public policy;[121] and (4) the unclean-hands defense is an equitable doctrine and is therefore discretionary.[122]

Second, the unclean-hands doctrine differs from the AAE defense on a moral or policy level. The moral norm underlying the unclean-hands defense is that a plaintiff should not be allowed to profit from her wrongdoing, *not* that only plaintiffs with good character deserve judicial relief. This distinction is captured by the relatedness prong of the unclean-hands defense, as articulated in an oft-cited passage: "[t]hus while equity does not demand that its suitors shall have led blameless lives . . . it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue."[123] Courts have formulated this relatedness prong in a variety of ways including:

1) The misconduct must have infected the cause of action, "so that to entertain it would be violative of conscience."[124]
2) It is not sufficient that the wrongdoing is remotely or indirectly connected with the matter in controversy.[125]
3) The defense does not apply if the wrong is shown to be merely collateral to the complainant's cause of action.[126]
4) A party may have relief as to a transaction in itself untainted, although the party's title to the subject matter may have originally grown out of his or her wrongful acts not connected with the present controversy.[127]
5) "[A] finding of unclean hands generally does not prejudice the offending party in subsequent cases, but only provides a bar to relief in the case at hand."[128]
6) The defense does not extend to any misconduct, however gross, which is unconnected with the matter in litigation.[129]

When these formulations are juxtaposed with the typical AAE scenario, they do not justify denying or limiting employees' relief except in limited circumstances. In most AAE contexts, the employee's misconduct is totally unrelated to the subject matter of the employee's claim, unless one takes such a broad view of "subject matter" that it encompasses everything that happens in the workplace. This appears to violate Formulations 2 and 3, which require more than an indirect or tangential relationship between the misconduct and the

121. *Id.*
122. Farahani v. San Diego Cmty. Coll. Dist., 96 Cal. Rptr. 3d 900, 908 (Ct. App. 2009).
123. Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814–15 (1945) (internal quotations omitted).
124. Zaglin v. Atlanta Army Navy Store, Inc., 622 S.E.2d 73, 76 (Ga. Ct. App. 2005).
125. *See* Jackman v. Pelusi, 550 A.2d 199, 204 (Pa. Super. Ct. 1988).
126. *See* Lyon v. Campbell, 33 Fed. App'x 659, 665 (4th Cir. 2002).
127. *See* Sprenger v. Trout, 866 A.2d 1035, 1045 (N.J. Super. Ct. App. Div. 2005).
128. Aptix Corp. v. Quickturn Design Sys., Inc., 269 F.3d 1369, 1376 (Fed. Cir. 2001).
129. Adrian v. McKinnie, 639 N.W.2d 529, 535 (S.D. 2002).

claim. An employee's résumé fraud, for example, has nothing to do with an employer's race discrimination.

Formulation 4 would allow an employee to recover so long as she is untainted regarding the transaction over which she is suing. This is so even if the claim grew out of the employee's résumé fraud because the employee would not have gotten the job and thus would not have been entitled to any wages or benefits but for her fraud. There is a competing formulation that bars relief where the employee sues on rights that her wrongful conduct created.[130] One could argue, however, that for claims such as discrimination or wrongful discharge in violation of public policy, the employee has not *created* these rights at all. Rather, they are publicly created rights that apply to all employees, regardless of how they obtained employment. Such rights are analogous to the right to be free from physical assault within a building; this right is independent of whether one gained access to the building fraudulently. Courts have recognized this principle in part by refusing to limit employee relief for noneconomic damages.[131]

In addition, employee misconduct (e.g., on-the-job theft) generally does not so "infect" the employee's claim (e.g., wrongful discharge in violation of public policy) that it would "violate the conscience" to entertain it (Formulation 1). Again, the facts of the employee's misconduct are generally totally separate from the facts of the employee's claim against the employer, except that both sets of facts take place in the workplace. Indeed, as we discuss below, the AAE defense is problematic in part because it brings into evidence a set of facts that are (1) totally unrelated to the employee's claim and (2) highly prejudicial to the employee.

Of course, there are cases in which employee misconduct *is* related to the employee's claim, and where application of the unclean-hands defense makes much more sense. For instance, in the *O'Day* case described at the beginning of this Comment,[132] an employee, after being denied a promotion, rifled through his supervisor's papers to find proof of age discrimination and later brought an age discrimination claim.[133] In this case, the employee's misconduct was directly related to the employee's claim. An almost identical scenario arose in the *McKennon* case.[134] However, the unclean-hands defense does not make sense in the typical AAE case, where the connection between the employee's claim and her misconduct is based on nothing more than a common site—the workplace. Thus, most AAE cases do not appear to satisfy the relatedness prong of the unclean-hands defense.

130. *See* Pandya, *supra* note 17, at 907 n.136.
131. *See, e.g.*, McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995).
132. *See supra* notes 1–4 and accompanying text.
133. O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466, 1467 (D. Ariz. 1992).
134. *See McKennon*, 513 U.S. at 354–55.

On an even deeper normative level, the unclean-hands defense does not justify denying relief in the AAE context because the employee generally does not seek relief that would in some way implicate the courts in the employee's misconduct. In the typical unclean-hands case, the plaintiff is attempting to make the courts enforce an outcome that forms part of a wrongful scheme.

Consider the following example: Owner is sued by various creditors. To place his assets out of the creditors' reach, Owner pays Third Party to hold certain assets until his debts are resolved. After Owner resolves his debts, Third Party refuses to transfer the assets back, and Owner brings suit. Owner is denied relief because he has unclean hands, in that he fraudulently attempted to evade his legal obligations to his creditors.[135]

Here, Owner attempted to use the courts to consummate a fraudulent scheme. He asked the courts to enforce the precise outcome (the return of his assets) he intended to produce via his fraudulent scheme. The moral norm at work behind the unclean-hands defense thus fully supports denying the plaintiff relief, since the coercive machinery of the courts would otherwise directly further the plaintiff's wrongdoing. We might still have misgivings that Third Party, who also committed intentional wrongdoing, appears to get a windfall by keeping Owner's assets. Indeed, although the unclean-hands defense prevents the courts from actively participating in one wrong, it may lead them to passively condone another.[136]

In the AAE context, employees who sue for race discrimination or wrongful discharge in violation of public policy, or even breach of contract, do not implicate the courts in a fraudulent scheme. Nor, as Pandya notes, do they generally commit misconduct with the purpose of later suing their employer upon suffering an adverse employment action.[137] An employee's misconduct may be egregious, but it is generally not connected closely enough to the employee's claim for relief to risk implicating the court in that misconduct. Moreover, there is an independent remedy for egregious misconduct by an employee: a counterclaim.[138] Thus, neither the letter nor the spirit of the

135. These are roughly the facts of *Osborne v. Nottley*, 136 P.3d 81, 82–83 (Or. Ct. App. 2006).

136. *See* Herstein, *supra* note 112, at 178 ("While abetting, tolerating, or assisting plaintiffs who are guilty of iniquity, hypocrisy, and wrongdoing may certainly cut against the court's integrity as a court of justice, allowing a legally recognized injustice or wrong to go unchallenged and not remedied *also* cuts against the grain of the court's nature as a court of justice."). Here, the situation might be remedied by forcing Third Party to turn over the assets to Owner's creditors. There is no such solution in the employment context, where the employer gets a windfall by escaping part or all of the liability for its wrongdoing.

137. *See* Pandya, *supra* note 17, at 909.

138. *Id.* at 916. In many ways, retaliatory counterclaims by employers can be just as problematic as the AAE defense. However, the AAE defense has broader practical application because many types of misconduct, such as résumé fraud or disobeying supervisor orders, may not cause the employer actionable damages but can still support the assertion of the AAE defense.

unclean-hands defense justifies denying the employee's separate claim for relief and thereby implicitly condoning the employer's wrongdoing.

E. Mixed-Motives Analogy

McKennon emphasized the inapplicability of the mixed-motives framework to the AAE context on the grounds that in AAE cases, the employer only finds out about the employee's misconduct after the fact and thus cannot have been partially motivated by that conduct.[139] However, the mixed-motives framework still stands as a potential normative justification for the AAE defense. Both involve imagining counterfactual scenarios in which the employer's wrongful act did not take place and determining whether the employee would have been better off. However, as discussed below, this analogy falls apart when confronted by key differences between the AAE defense and the mixed-motives framework.

In a mixed-motives case, the employee concedes that the employer may have had a "legitimate, nondiscriminatory reason"[140] (LNDR) for taking adverse employment action. Nonetheless, the employee seeks to prove that an unlawful reason was a "motivating factor" in the employer's decision.[141] If the employee can make this showing, the burden shifts to the employer to prove that, absent the unlawful motive, it would have reached the "same decision"[142] (i.e., the employer would have taken the adverse action against the employee solely on the basis of the LNDR).

Judge Frank M. Johnson of the Eleventh Circuit deftly analyzed the major difference between a mixed-motives analysis and an AAE analysis:

> Whereas the *Mt. Healthy* rule [for mixed-motives claims] excuses all liability based on what *actually* would have happened absent the unlawful motive, the *Summers* rule [the former Tenth Circuit rule holding that after-acquired evidence bars all relief] goes one step further: it excuses all liability based on what *hypothetically* would have occurred absent the alleged discriminatory motive *assuming the employer had knowledge that it would not acquire until sometime during the litigation arising from the discharge*.[143]

In other words, the mixed-motives analysis considers an alternate reality in which one fact is different: the employer had no unlawful motive (when in fact it had). The AAE defense, on the other hand, considers an alternate reality in which two facts are different: the employer had no unlawful motive (when in fact it had), and the employer knew about the employee's misconduct (when in fact it did not).

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139. 513 U.S. at 359–60.
140. Price Waterhouse v. Hopkins, 490 U.S. 228, 243 (1989).
141. *Id.* at 249.
142. *Id.* at 242.
143. Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1179 (11th Cir. 1992).

Together, the two counterfactual assumptions do not control for the effect of discrimination. The rationale motivating the first counterfactual assumption is that if the employer would indeed have made the same decision absent the unlawful motive, then the employee is in the same position she would have otherwise been in. In such a case, no relief is necessary. This reasoning itself is questionable to the extent that discrimination law has a broader goal than just achieving make-whole relief for the employee.

The second counterfactual assumption has no apparent justification. If we assume both that the employer did not have an unlawful motive and that it knew an incriminating fact about the employee that it learned only via a lawsuit arising out of the unlawful motive, then we have not controlled for the effect of discrimination. This approach leaves the employee worse off because of her membership in a protected class.

Consider the following two hypotheticals:

1) Employee *A*, a white male, commits résumé fraud to obtain employment with ABC, Inc. and begins work on January 1, 2000. ABC, Inc. does not discover the résumé fraud, and Employee A continues working for Employer indefinitely.
2) Employee *B*, a black male, also commits résumé fraud to obtain employment with ABC, Inc. and begins work on January 1, 2000. On January 1, 2001, Employee *B* is fired because of his race and brings a race discrimination suit. On January 1, 2002, during discovery, ABC, Inc. discovers Employee's résumé fraud and raises the AAE defense. The court finds that, although ABC, Inc. fired Employee *B* because of his race, it would have fired him absent a discriminatory motive if it had known of his résumé fraud. The court thus limits back pay to January 2002.

Here, Employee *A* and Employee *B* are in different positions solely by virtue of their race (and the wrongful discharge that was a consequence of race). Employee *B* is worse off than Employee *A* because of his race, unless ABC, Inc. discovers Employee *A*'s résumé fraud before March 1, 2002 (which is not likely in the typical AAE scenario). Limited back pay does not put Employee *B* in Employee *A*'s position, because it is premised on the supposition that ABC, Inc. would have discovered Employee *B*'s résumé fraud anyway. In fact it was solely because of the lawsuit (itself a consequence of Employee *B*'s race) that ABC, Inc. was able to make this discovery.

Contrast those hypotheticals with two mixed-motives hypotheticals:

1) On January 1, 2001, Employee *X* is fired for stealing an important company document.
2) On January 1, 2001, Employee *Y* is fired both for stealing an important company document and because of his race. Employee *Y* brings a race discrimination suit. The court finds that the

> employer would have fired Employee *Y* for theft even if it had not been motivated by racial prejudice, and denies Employee *Y* relief.

Here, both employees are equally worse off. As Judge Johnson noted, Employee *Y* would *actually* have been fired absent race discrimination (as Employee *X*'s case demonstrates). By contrast, in the previous hypotheticals, Employee *B* would not actually have been fired absent race discrimination, unless we assume that ABC, Inc. had access to information to which it did not have access in the parallel case of Employee *A*.[144]

These two sets of hypotheticals show that the AAE defense, unlike the mixed-motives doctrine, does not control for the effect of race discrimination. In both sets of hypotheticals, only race and the consequences that flow from race discrimination distinguish Employee *A* from Employee *B* and Employee *X* from Employee *Y*. In the first set of hypotheticals, Employee *A* is better off because he keeps his job, which Employee *B* would also have done but for his race. By contrast, in the second set of hypotheticals, both Employees *X* and *Y* are equally worse off because both lose their jobs and would have lost them with or without race discrimination.

Thus, while the *McKennon* Court recognized that the mixed-motives framework is inappropriate for analyzing AAE cases,[145] it set up an analogous counterfactual framework that leaves plaintiffs demonstrably worse off because of their membership in a protected class. This results from giving employers the benefit of information that they would not have otherwise had. Not only will such a result fail to compensate victims of discrimination, it will also undermine the deterrence of discrimination in the workplace. To the extent that some percentage of all employees—and thus of all potential plaintiffs—will have something in their record that can serve as the basis for an AAE defense, the overall price employers pay for discrimination will drop as a purely statistical matter. If we are truly committed to discouraging employee misconduct, we should do so by some other means than by watering down the efficacy of our discrimination and other workplace laws.

144. Judge Fletcher, in her partial dissent in *O'Day v. McDonnell Douglas Helicopter Co.*, emphasized in a similar vein that courts should not give employers the benefit of a fictional scenario where their wrongful conduct is the reason that reality is distorted (through the artificial prism of litigation). 79 F.3d 756, 766–67 (9th Cir. 1996) (Fletcher, J., concurring in part and dissenting in part) (stating that "[t]he allegedly legitimate motive was only a post hoc explanation that the employer alleged would have justified the decision"). This is already true to a certain extent with mixed-motives cases, but it is even more apparent in the after-acquired evidence context.

145. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 359–60 (1995) (stating that, in after-acquired evidence cases, "[t]he employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason").

III.
POLICY PROBLEMS WITH THE AAE DEFENSE AND POTENTIAL SOLUTIONS

This final Section discusses the various policy problems that the AAE defense raises and lays out potential ways to mitigate those problems.

A. Disparate Impact of Résumé Fraud Penalties on Minorities

Two forms of résumé fraud that come up frequently as AAE are misrepresentations about prior convictions and immigration status.[146] Both of these disproportionately affect disadvantaged social groups: the first disadvantages black persons and Hispanic persons; the second disadvantages Hispanic persons and other immigrant groups.[147] Nearly half of all AAE cases involve misrepresentation on employment application materials.[148] Because so many employment applications inquire about citizenship and conviction record, the AAE defense creates a serious hurdle for undocumented workers and convicted felons who seek to assert workplace law claims.[149]

Perversely, the AAE defense often limits relief for claims brought to vindicate the very protected characteristic that conviction record and immigration status disproportionately impact. Thus, imagine an immigrant worker who lies about her undocumented status and is consequently fired because of her race or national origin. The worker hid her undocumented status to hide a stigma (lack of documentation) that only affects immigrants. Thus, if the worker is fired out of animus toward immigrants, to deny the worker full relief because she hid a stigmatized marker of her immigrant status cuts against the very purpose of antidiscrimination laws.

For undocumented workers, the AAE defense is doubly harmful. Even without the defense, a worker's undocumented status gives employers great "intimidation potential and unfair leverage" since employers can threaten to report undocumented workers and thereby deter their claims.[150] As Judge

146. *See* Schwartz & Lee, *supra* note 19, at 6. As to conviction record, of twenty randomly chosen state discrimination cases in which the AAE defense was raised, six involved black males accused of résumé fraud due to conviction record. As to immigration status, see Kiren Dosanjh Zucker, *From* Hoffman Plastic *to the After-Acquired Evidence Doctrine: Protecting Undocumented Workers' Rights Under Federal Anti-Discrimination Statutes*, 26 WHITTIER L. REV. 601 (2004) (examining many cases in which undocumented workers submitted fraudulent papers during the hiring process and were subsequently denied relief for discrimination claims).

147. *See* Zucker, *supra* note 146; Michael Connett, Comment, *Employer Discrimination Against Individuals with a Criminal Record: The Unfulfilled Role of State Fair Employment Agencies*, 83 TEMP. L. REV. 1007, 1012 (2011) (discussing barriers to employment for ex-offenders). Arguably, employer reliance on these criteria violates Title VII on a disparate impact theory. *See id.* at 1010.

148. *See* Hart, *supra* note 81, at 415.

149. While I have found no empirical evidence to show that the AAE defense is often raised against undocumented workers and convicted felons, I have spoken to a number of plaintiffs' employment attorneys who confirm that the defense often arises in these contexts, particularly for undocumented workers.

150. Schwartz & Lee, *supra* note 19, at 4.

Reinhardt noted in his *Rivera* decision, which prohibited employers from using discovery to inquire into a worker's immigration status:

> While documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution. The caselaw substantiates these fears. As a result, most undocumented workers are reluctant to report abusive or discriminatory employment practices. Granting employers the right to inquire into workers' immigration status in cases like this would allow them to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices or files a Title VII action.[151]

The AAE defense amplifies these concerns. It gives employers an excuse to pursue aggressive discovery into immigration status, when cases like *Rivera* would otherwise prohibit such discovery. As long as the employee has stated on his employment application that he had proper documentation to work legally, or presented some form of such documentation, the employer would have grounds to seek information "reasonably calculated to lead to the discovery of admissible evidence"[152] showing that the employee was undocumented. This intimidating tactic will be available to employers for virtually every claim asserted by an undocumented worker, giving employers blanket immunity to discrimination claims by those employees. Even more perversely, employers are generally in a position—and indeed have a legal obligation—to verify their workers' immigration status when they are hired. Allowing employers to turn a blind eye to their workers' immigration status, and later assert it as a defense to their discrimination claims, essentially guts workplace protections for about 5 percent of the nation's labor force.[153]

The AAE's discriminatory effect on immigrants is particularly pernicious given that immigrant workers, particularly women, are the workers most vulnerable to mistreatment in the workplace. As many employee and immigrants' rights advocacy groups pointed out in their amicus brief in the *Salas* case, workplace abuses, especially sexual assault, harassment and even rape, are rampant among female undocumented workers:

> Sexual violence against immigrant women in industries such as agriculture, domestic work, and food manufacturing and processing is widespread. One recent study reports that hundreds of thousands of

151. Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064–65 (9th Cir. 2004) (citations omitted).

152. FED. R. CIV. P. 26(b)(1).

153. Julia Preston, *11.2 Million Illegal Immigrants in U.S. in 2010, Report Says; No Change From '09*, N.Y. TIMES (Feb. 1, 2011), http://www.nytimes.com/2011/02/02/us/02immig.html?_r=0 (citing Pew Report finding that undocumented workers represent "about 5 percent of the American work force").

> immigrant farmworker women and girls in the United States face a high risk of sexual violence and sexual harassment in the workplace, including rape, stalking, unwanted touching, exhibitionism, or vulgar and obscene language by supervisors, employers, and others in positions of power. Most farmworkers interviewed said they had experienced such treatment or knew others who had. And most said they had not reported these workplace abuses, fearing reprisals. In another investigation of harassment against female agricultural workers, the Equal Employment Opportunity Commission (EEOC) found that "hundreds, if not thousands, of women had to have sex with supervisors to get or keep jobs and/or put up with a constant barrage of grabbing and touching and propositions for sex by supervisors." A similar study of farmworker women surveyed in the Central Valley found that eighty percent had experienced some form of sexual harassment.[154]

The AAE defense exacerbates the fear of reprisals that forces undocumented workers to suffer in silence the most egregious violations of workplace law. A lawyer may be able to convince certain undocumented workers to come forward where *Rivera* protections are available, although there remains a huge risk of retaliatory reporting by employers. But where an employer has license not only to inquire about immigration status but to dedicate a significant part of discovery and trial to it—with the potential reward of severely limiting or wholly eliminating an employee's remedies—the chances of convincing an undocumented worker to come forward with a workplace discrimination claim are significantly diminished. We can never know how many additional undocumented workers will be deterred from asserting rightful claims due to the AAE defense.[155] But the mere possibility—which many practitioners have confirmed anecdotally[156]—that employers use the AAE defense to further bully the most vulnerable workers is enough to justify, morally if not empirically, the defense's elimination.

B. Invasive Discovery

Perhaps the biggest danger of the AAE doctrine is that it promotes invasive discovery. As Bryan Schwartz and Baldwin Lee note:

> The after-acquired evidence doctrine invites employers to "fish" aggressively for employee misconduct in a way that intimidates many victims of statutorily-prohibited wrongdoing from pursuing claims. *McKennon* dismissed this concern with the hope that trial judges could act as a safeguard by regulating the discovery process. However, trial

154. Amici Curiae Brief of Impact Fund et al. in Support of Petitioner & Appellant Vicente Salas at 8–9, Salas v. Sierra Chem. Co., 264 P.3d 33 (Cal. 2011) (No. S196568) (footnotes omitted).

155. *See supra* note 17 (discussing Pandya's argument that mere reduced payoffs are insufficient to justify elimination of the AAE defense).

156. *See* Schwartz & Lee, *supra* note 19, at 4.

> judges are too overburdened to preclude any but the most egregious discovery abuses.[157]

Even if judges did take a more active role, much of the damage occurs at the prelitigation phase.[158] The AAE defense has an *in terrorem* effect that makes clients less willing to bring, and lawyers less willing to take, claims that potentially involve employee misconduct.[159] The AAE defense thus "systematically lowers employee recovery for workplace violations."[160] Although by itself this is not a reason to eliminate the defense,[161] there is substantial reason to fear that the defense's intimidation effect and potential for abuse outweigh its value.

Efforts to mitigate the damaging effects of the discovery process have been unsuccessful. In the wake of *McKennon*, the EEOC issued guidelines providing that an employer violates federal employment discrimination law if it searches for information with the purpose of discouraging other charges.[162] Such a violation meets the level of extraordinary equitable circumstances, triggering back pay to the day the dispute is resolved rather than the date of discovery.[163] This standard, however, does not have sufficient bite to deter invasive discovery. Employers have nothing to lose under this standard: if they fish for misconduct and are found to have the purpose of discouraging claims (a purpose that is probably difficult to prove), the worst result is that the employer must pay full back and front pay. This is precisely what the employer would have paid in the absence of the AAE defense.

Another proposed solution for discouraging invasive discovery procedures is to allow employees to bring retaliation claims against employers who assert the AAE defense with the purpose of discouraging discrimination claims.[164] Counterclaims have been found to constitute illegal retaliation under federal

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157. *Id.* at 5 (footnotes omitted); *see also* Hillary Jo Baker, Note, *No Good Deed Goes Unpunished: Protecting Gender Discrimination Named Plaintiffs from Employer Attacks*, 20 HASTINGS WOMEN'S L.J. 83, 97 (2009) (describing the lack of proper restraint on abusive discovery, particularly in the context of gender discrimination and sexual harassment claims).

158. Schwartz & Lee, *supra* note 19, at 5; *see also* Hart, *supra* note 81, at 431–32 (explaining that the screening process used by plaintiffs' lawyers eliminates many potentially meritorious claims).

159. *See* Hart, *supra* note 81, at 434.

160. *See* Schwartz & Lee, *supra* note 19, at 5 (presenting results of phone interviews conducted with plaintiffs' attorneys showing the detrimental effect of the AAE defense on their financial and strategic decisions to take a case).

161. *See* Pandya, *supra* note 17, at 914 (arguing that, absent proof that the AAE defense has no merit at all, the decreased payoff value of claims is not necessarily evidence that the defense should be eliminated).

162. EEOC Notice No. 915.002 (Dec. 14, 1995).

163. *Id.*

164. *See* Hart, *supra* note 81, at 404–05; Pandya, *supra* note 17, at 919. Pandya also evokes the possibility of raising process torts such as malicious prosecution or abuse of process. *Id.* at 919–21. This article does not address those torts, as they appear to have little chance of success, based on the disfavored status of such claims.

discrimination law,[165] but thus far the AAE defense has not.[166] If courts ever hold that the AAE defense constitutes illegal retaliation, the case will probably require rather egregious facts. It is unclear what would distinguish a retaliatory assertion of the AAE defense from a normal one. Would it be enough, as the EEOC has recommended, for the plaintiff to establish that the employer's fishing for evidence of misconduct went beyond ordinary investigation of the underlying claim?[167] Although relation claims would have the advantage of allowing emotional damages and additional attorney's fees,[168] it is a much less clear-cut and effective solution than simply abolishing the AAE defense altogether.

C. Prejudice at Trial

The AAE defense unduly prejudices employees at trial and distracts from the underlying litigation. The defense allows the employer to undermine the employee during trial in ways that the Rules of Evidence otherwise forbid as irrelevant and unduly prejudicial. As Pandya notes, some evidence of employee misconduct can come in as impeachment evidence or to support a counterclaim.[169] However, as noted above,[170] employers can use the AAE defense more broadly than they can employ counterclaims. As for impeachment evidence, it is much narrower in scope and occupies a much smaller part of trial (and discovery) than an affirmative defense such as the AAE defense.

For example, if an employee files a race discrimination claim, and the employer defends against the claim on the grounds that he fired the employee for arriving late to work, the employer can present AAE that the employee used drugs on the job even if the drug has no link to the claim (race discrimination) or the defense (tardiness). Such evidence is not admissible as impeachment evidence under the Federal Rules of Evidence because it does not bear on character for truthfulness and is highly prejudicial.[171] It could be admissible to buttress the employer's legitimate-reason-for-discharge defense but would have to relate in some way to the employer's asserted LNDR. Thus, if an employer claims that it fired the employee because of dishonesty, and during litigation

165. *See* Hart, *supra* note 81, at 405.

166. *See* Harmar v. United Airlines, Inc., No. 95 C 7665, 1996 U.S. Dist. LEXIS 5346, at *1–2 (N.D. Ill. Apr. 23, 1996) (rejecting retaliation claim based on AAE defense). This is the only case that has considered this issue. *See* Hart, *supra* note 81, at 444.

167. *See* EEOC Notice No. 915.002, at III.A (Dec. 14, 1995) (discussing cases in which evidence of employee misconduct was "deliberately sought to retaliate against [the plaintiff] and to discourage similar charges.").

168. *See* Hart, *supra* note 81, at 447.

169. *See* Pandya, *supra* note 17, at 916.

170. *See supra* note 146.

171. *See* FED. R. EVID. 401 (requiring a relevance link between evidence and a fact of consequence); FED. R. EVID. 403 (limiting unduly prejudicial evidence).

evidence surfaces tending to prove a dishonest character on the part of the employee, that evidence is admissible to buttress the employer's LNDR.[172] But as discussed above, in most AAE cases, there is no relevant link between the employer's original reason for discharge and the AAE.

One proposed solution to this problem is to bar the presentation of AAE of employee misconduct unless the employer can demonstrate that it would have discovered the evidence in the "ordinary course of business."[173] This solution would have the advantage of remedying the problem discussed above, namely that victims of discrimination are left worse off because of their membership in a protected class when courts give the employer the benefit of information that it would not have gotten absent the supra-informational state of litigation.[174] To prove that it would have discovered the misconduct in the ordinary course of business, the employer could show, for example, a history of doing regular checks to screen for the kind of misconduct in question: résumé checks, drug tests, regular inventory checks for employee theft, etc. This solution's major drawback is that it places an additional burden on employers and might lead to wasteful due diligence procedures. It also does not eliminate invasive discovery and requires the fact finder to answer the difficult counterfactual question whether the employer would have discovered the AAE in the ordinary course of business.

Alternatively, some commentators have proposed a bifurcation of the proceedings into a liability phase and a damages phase in order to mitigate the prejudicial effect of AAE.[175] This solution fully addresses the problem of prejudice, but at a very high cost to the court system. In an overburdened judicial system that places a high premium on efficiency and in which highly prejudicial counterclaims are routinely heard as part of one court proceeding, a motion to bifurcate in an AAE case has serious hurdles to overcome.[176] More importantly, bifurcation does nothing to stem the intimidating effect of discovery on the AAE defense.

D. Distraction from the Rhetorical Thrust of Court Decisions

The AAE defense can also skew the rhetorical thrust of court decisions away from employer wrongdoing and toward employee misconduct.[177] This is particularly problematic where the employer's wrongdoing is more socially

172. *See* Barrett v. ASARCO, Inc., 763 P.2d 27, 32 (Mont. 1988).

173. *See* Kenneth A. Sprang, *After-Acquired Evidence: Tonic for an Employer's Cognitive Dissonance*, 60 MO. L. REV. 89, 99 (1995).

174. *See supra* Part II.E.

175. *See* Pandya, *supra* note 17, at 918.

176. *See id.* at 919 (explaining cases in which "bifurcation arguably advances neither judicial economy nor avoids prejudice"). However, Pandya does note situations in which bifurcation may increase judicial efficiency, such as when the jury finds that the employer is not liable during the first proceeding and thus eliminates the need for a second trial. *Id.*

177. *See* Hart, *supra* note 81, at 436.

destructive than the employee's misconduct (race discrimination, say, versus résumé padding). In such cases, the AAE defense may undermine the ideological effectiveness of employee claims. Rather than communicating a strong condemnation of employer discrimination, courts will send the mixed message that when employers can uncover dirt on an employee, they have at least partial license to discriminate against employees. Courts will simultaneously send the signal that certain persons are less worthy of the courts' protection than others and that the laws designed to protect the victims of social inequality demand from these individuals a moral purity that is not expected of everyone else.

The counterargument to this position is that the AAE defense makes it so that only truly deserving plaintiffs are rewarded, which may actually strengthen the ideological force of employee claims in the public mind. Limiting recovery to morally worthy plaintiffs undermines the stereotype that many discrimination claims are brought by undeserving, disgruntled employees lashing out at their employer after a layoff or discharge. It is unclear, however, whether the AAE defense actually does a good job of weeding out "undeserving" plaintiffs. Those most likely to face the AAE defense are those whom social and economic forces have placed in the most difficult circumstances.[178] This is especially true when the defense is based on factors (like conviction record and undocumented-immigration status) that disproportionately affect underprivileged segments of the population or that compensate for the unequal distribution of economic and cultural capital (like résumé padding).

Even assuming that all employees commit résumé fraud with equal frequency despite the unequal incentives to falsify one's résumé, the AAE defense will still disproportionately affect underprivileged segments of society. Employees belonging to these segments of society are more likely to be plaintiffs; that is, they are more likely to bring claims and to need the corrective force of the law to counteract discriminatory social forces. Those who are generally not victims of discrimination and do not need the law's protection will have less to lose from the AAE defense, despite the fact that they may be no less likely to commit the type of misconduct that the defense is meant to deter.

This fairness concern ultimately forms the basis for the central moral argument against the AAE defense. Even if one has no sympathy for employees who doctor their résumé or steal from the till, one should still find it unfair that *many* employees engage in these behaviors and that the AAE defense punishes

178. There is some empirical evidence that employee misconduct, in particular on-the-job theft, is more prevalent among the lowest-paid workers because such workers feel less appreciated and less loyal to the employer. *See* Jerald Greenberg, *Who Stole the Money, and When? Individual and Situational Determinants of Employee Theft*, 89 ORG. BEHAV. & HUM. DECISION PROCESSES 985 (2002).

some (plaintiffs and potential plaintiffs) but not others (generally, the most privileged employees).

E. Final Solutions

Despite the foregoing arguments, from a moral and policy perspective, some forms of employee misconduct are sufficiently egregious that it seems less problematic to bar or limit the employee's right to judicial relief. Such conduct includes, at a minimum, sexual harassment and physical assault. It may also include a willful and malicious attempt to undermine an employer's business, or other outrageous conduct designed to injure staff, customers or supervisors.[179] While they do occur, these cases are not prevalent in the case law, probably because outrageous conduct will less frequently go unnoticed.

Limiting the application of the AAE defense to egregious conduct might mitigate the defense's ill effects. While this still might open the door to aggressive discovery, employers are not likely to "fish" for outrageous conduct unless they have some reasonable suspicion of its existence. In addition, an employee who knows that she has not done anything outrageous—and a lawyer who considers taking on such a client—will feel less intimidated by the existence of the defense; in the defense's current form, however, any minor misconduct, such as sending personal emails on work time, can be blown out of proportion and used to discourage employee claims.

We may still question whether it normatively makes sense to deny or limit relief even for an employee who commits egregious misconduct. If the conduct is truly egregious, then it can be addressed in the form of a separate claim, either by the victim of the conduct (say, in the case of sexual assault) or through an employer counterclaim. For the reasons noted throughout this Comment, letting the employer partially or entirely off the hook for a totally separate claim undermines both the deterrence and compensation rationales of employee protection laws. Moreover, it perpetuates the notion that a plaintiff's entitlement to relief depends on his moral worth. Indeed, if we restricted the defense to egregious employee misconduct only, this moral subtext would be stronger since we would effectively use a moral scale to determine who should face a consequence that we recognize as unfair as applied to everyone else. But our justice system should not operate in this manner. If a murderer is robbed in a transaction separate from the murder, our justice system does not deny him relief, though of course it does seek redress of his crime. That is how the AAE defense should also work.

Another possible solution is to require the employer to prove that he would have discovered the conduct in the ordinary course of business.[180] This

179. *See, e.g.*, Preston v. Phelps Dodge Copper Prods. Co., 647 A.2d 364, 366 (Conn. App. Ct. 1994) (employee spread poison ivy on toilet seat of employer who was allergic to poison ivy).

180. Pandya, *supra* note 17, at 884.

approach seems more tailored to achieve the compensatory goal of employee protection law, while not overcompensating the employee in cases where the misconduct would indeed have been discovered. However, if it is true (as seems likely) that the vast majority of employee misconduct that forms the basis of the AAE defense would never have been discovered, then it seems counterproductive to retain an entire defense for the few cases where the employer could prove otherwise. While it may seem harmless to keep the defense for those employers that can meet the "would have discovered" standard,[181] the very availability of the defense gives employers the opportunity to engage in invasive discovery and litigation tactics that deter and diminish the value of *all* plaintiffs. Thus, retaining the defense would likely hurt 99 percent of employees for the sake of helping 1 percent of employers.

Other ways to mitigate the effects of the AAE defense, noted above, include: (1) barring the defense where employers had constructive knowledge of employee misconduct, in accordance with the "reason to know" standard of contract law; and (2) applying a "would have hired"—as opposed to "would have fired"—standard to résumé fraud, in accordance with the fraudulent inducement defense. Like the "would have discovered" standard, these solutions raise the burden of proof for employers and thus reduce the harmful impact of the AAE defense. However, they too fail to deter invasive and intimidating litigation tactics. Only the defense's complete elimination can address these problems.

CONCLUSION

The AAE defense derives from the common law of contracts, equity, and master-servant law and finds its justification in the principals and values underlying these doctrines, even where they are not invoked—or even when they are explicitly rejected—as sources of authority. This Comment has shown that the principles and values in question do not fully justify the AAE defense.

First, on the doctrinal front, contract doctrine does not justify the defense in its current form, because the defense excuses "unreasonable ignorance" on the part of the employer in cases of on-the-job misconduct. It also applies an unfairly skewed fraudulent inducement test in cases of résumé fraud. Second, neither the analytical principles nor the moral norms underlying the equitable defense of unclean hands fully apply to the typical AAE scenario, where there is generally no link between the employee's misconduct and her claim for relief. Third, the mixed-motives framework for discrimination claims to which the AAE defense bears some resemblance, and with which certain courts have

181. *Id.* at 889 (arguing that the fact that few employers can meet the would-have-discovered standard "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").

conflated it,[182] cannot act as a justification for the defense. The purpose of that framework is to determine what would have happened absent a discriminatory motive, but in the AAE context, courts make the additional counterfactual assumption that the employer had access to information that it could never have accessed without the litigation arising from its wrongful acts. The second counterfactual does not control for the influence of the discriminatory motive, and the employee is left worse off because of her membership in a protected class.

On a policy level, the AAE defense promotes invasive discovery, distracts from the underlying issues (both in the courtroom and in public discourse), and imposes a disparate impact on minorities, especially undocumented workers whose workplace rights are almost entirely eviscerated by the defense. While halfway solutions like a "would have discovered" standard or restriction of the defense to egregious misconduct would mitigate some of these policy concerns, only the complete elimination of the AAE defense can resolve them all.

182. *See, e.g.*, Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988).