OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CHRISTINE McKENNON, Petitioner v. NASHVILLE BANNER PUBLISHING COMPANY

CASE NO: No. 93-1543

PLACE: Washington, D.C.

DATE: Wednesday, November 2, 1994

PAGES: 1-55

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - -X

CHRISTINE McKENNON, :

Petitioner :

v. : No. 93-1543

NASHVILLE BANNER PUBLISHING :

COMPANY :

- - - - - - - - - - - - - - - - - - -X

Washington, D.C.

Wednesday, November 2, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

MICHAEL E. TERRY, ESQ., Nashville, Tennessee; on behalf of the Petitioner.

IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the petitioner.

R. EDDIE WAYLAND, Nashville, Tennessee; on behalf of the Respondent.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

PROCEEDINGS

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 93-1543, Christine McKennon v. Nashville Banner Publishing Company.

Mr. Terry.

ORAL ARGUMENT OF MICHAEL E. TERRY

ON BEHALF OF THE PETITIONER

MR. TERRY: Mr. Chief Justice and may it please the Court:

Our case is about age discrimination. Particularly, this case is about the after-acquired information doctrine, or the after-acquired evidence doctrine.

The so-called after-acquired information in these cases varies, but it bears two common characteristics. First, the information is acquired after a questioned employment practice, usually after litigation has begun. Second, the employer contends that the information would be a legitimate basis for terminating the employee.

Simply stated, the issue in this case is, what significance should attach to such after-acquired evidence in cases, in discrimination cases arising under the Federal civil rights statutes?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Clearly, there are two camps. The Sixth Circuit and other courts have determined that such after-acquired evidence is a complete defense to liability and bars all relief. The Third Circuit and other courts have determined that after-acquired evidence is not a defense to liability but may, in appropriate cases, impact upon relief.

We come to this Court with the notion that the after-acquired evidence doctrine is nothing new. We believe that for more than 30 years this Court's construing the decisions of this Court and agencies construing other Federal statutes have been confronted with the after-acquired defense by employers seeking to avoid liability under other statutes protecting employees' rights. In each case, beginning with Still v. Norfolk & Western Railroad in 1961, this Court and the other courts and the agencies have found that after-acquired evidence, as a defense, does not bar all remedy.

QUESTION: Well, Still was somewhat different than the present case, wasn't it? Wasn't that the question of whether the person was an employee for purposes of the FELA, even though he might have had misinformation on his application form?

MR. TERRY: Mr. Chief Justice, Still was under the Federal Employers' Liability Act, and it was a case

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

involving an employee seeing compensation for a back injury, and there was a question about information that he had provided in his form, but he railroad in Still took the position that he was not an employee, not qualified to be an employee. The respondent in this case takes that position, and so do some of the courts that extend the --

QUESTION: The respondent doesn't say that the petitioner in this case never was an employee.

MR. TERRY: No, but the plaintiff in Still had worked for Norfolk and Western Railroad for 6 years, just like the plaintiff here had worked for the Nashville Banner for 40 years, so the theory that somehow the misconduct or the application error or misstatement has removed the standing or the qualification was the same.

QUESTION: Well, what remedies, Mr. Terry, do you say are available to the petitioner if it is discovered during the course of the discovery proceedings that valid cause existed for the employer to fire the petitioner?

MR. TERRY: Justice O'Connor, the first -- in answering your question, and maybe you have already suggested that we think the first and very important part of this rule that we propose is that the employer show under a standard similar to the standard in Price Waterhouse that they would have terminated the employee.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

They must show this by objective evidence in a fair, factfinding proceeding. If that is done, we believe that the remedies should be fashioned by the facts. Clearly, if the employer would have terminated the employee, then in most cases reinstatement and front pay are inappropriate, but we do not believe that backpay should be barred, and we believe that their backpay should be awarded in most cases, and awarded to the point of judgment to satisfy the -- to satisfy the objectives of the ADEA and title VII.

QUESTION: What about the situation of an employer discovering that there was a fraudulent employment application, that a qualification for the job, for example, was a certain education degree, and the employee had fraudulently said she had that degree, and it's later discovered. Now, what kind of relief there, do you suppose?

MR. TERRY: We -- the answer to your question is the same. We propose that that employee should receive backpay if they can -- if they can establish a discrimination claim, but the fear in that result, and the problem with that result, is removed by the idea that the employer should be able to pursue State civil and criminal remedies to recover any unjust compensation or any injury that the employer has suffered, so in these extreme cases,

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

when we talk about the so-called nondoctor doctor, or the case where the day-care worker is a child molester, that type of case that are used as examples, the case, the facts of the case take care of themselves.

QUESTION: Do they do that by way of a counterclaim? Would the offset be on the employer's part -- you said you imagine, you could imagine a case where civil, even criminal liability, but let's take the civil. Would that come into the very same case, the discrimination case, by way of counterclaim? How would it play out?

MR. TERRY: We believe that the counterclaim may be -- will mostly be found in State law. If the counterclaim is in State law, then it should be presented as a defense, or a counterclaim in --

QUESTION: Well, it could be a pendant cause of action, I take it.

MR. TERRY: Yes, exactly.

QUESTION: But then, as Justice Ginsburg said, it would be an offset to the judgment?

MR. TERRY: Absolutely. There would be no money exchanged in a lot of these cases that people seem to be afraid about, and the purposes of title VII and ADEA would be served by --

QUESTION: Wouldn't you argue in that case that

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the ADEA trumps any other State recovery mechanism? Wouldn't you say that the Federal policy should prevail, and therefore there shouldn't be a recoupment?

MR. TERRY: No. Our position is that if the employer has a valid State law claim, and I might mention that some of the recoupment --

QUESTION: For the recovery of some of this compensa -- backpay, for example?

MR. TERRY: Or it could be a situation, let's take for -- where the employee has caused some actual damage or injury on the job.

QUESTION: Well, that I can understand, but if you're talking about recovery of the very backpay to which the employee is entitled under the act, or determined by the court to be entitled under the act, are you conceding that that might be a proper subject of recovery under some State law action?

MR. TERRY: Absolutely not.

QUESTION: Okay.

MR. TERRY: Absolutely not. We're talking about --

QUESTION: The employer would have to prove damage, I take it?

MR. TERRY: Absolutely.

QUESTION: So that if the person holds himself

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

out as a lawyer, and in fact is not a lawyer, and they discover that, if he had been doing his job adequately and the employer hadn't been sued, I take it no damage under your theory?

MR. TERRY: In a lot of these cases, that's the situation, Justice --

QUESTION: Despite the fact that it's somewhat outrageous that the person held himself out as a lawyer and in fact was not.

MR. TERRY: Yes, and -- but in that case you may also find some theory of unjust enrichment, and you will also find that the local district attorney will probably initiate a criminal prosecution just like they would in the nondoctor doctor situation, and part of the criminal prosecution could also involve restitution of part of the money that was received.

QUESTION: Well, now you're causing me to get confused again. I thought that you told Justice Souter you can't get the backpay back. You say you can't get it back as backpay, but you can get it back as restitution, or as unjust enrichment?

MR. TERRY: You can get it back if there's injury and if there's harm, or if there's some viable State remedy that the title --

QUESTION: So you can get the backpay back.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. TERRY: If --

QUESTION: You just need a state cause of action for unjust enrichment or for restitution, right?

MR. TERRY: If -- if the -- yes. If there is a -- we do not believe that the purpose of title -- I think this Court has said in cases such as McDonnell Douglas and McDonald v. Santa Fe and Sure Tan that title VII, that wrongdoing by an employee doesn't remove that employee from the protections of title VII and ADEA.

QUESTION: Okay, let me make sure I understand. I take it you are saying that a State action for the return of backpay on the theory that backpay is, per se, unjust enrichment in these circumstances, would be barred, is that correct? The employer could not simply bring an unjust enrichment claim to recover the backpay under State law which had just been awarded by Federal court under this act.

MR. TERRY: The answer to that question is if the State law was passed and promoted as a defense to title VII, then it would have those problems. If there was a valid existing State remedy --

QUESTION: And wouldn't your argument be that in fact the State law was barred by the ADEA?

MR. TERRY: If that was the purpose, if the purpose of the State law was to frustrate the purposes of

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

ADEA, or title VII, then it would have problems.

QUESTION: Sure.

MR. TERRY: But if --

QUESTION: Now, what if it's a general State law saying no one shall be unjustly enriched, and let's assume that under State law as a general rule the payment of salary to someone who has misrepresented qualifications for the office for which the salary is paid would be a proper subject for unjust enrichment recovery, would you say that the ADEA would not bar that State law claim?

MR. TERRY: Yes, I would, but I would also say that it would be my understanding of that claim that the employee, as Justice Kennedy has suggested, if they've done the job, if the employer has received benefit for what he's paid, that the unjust enrichment claim would not succeed to the extent of the backpay.

QUESTION: Okay, and the easy claim would be the case of the nonlawyer lawyer whose firm has been sued for malpractice and has had to recover. They would certainly be able to claim against the nonlawyer lawyer. It wouldn't be a claim for the return of backpay, it would simply be a claim for what they had been forced to pay as under respondeat superior. That would be easy. They could do that.

MR. TERRY: Absolutely, and we think --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Could a judge in such an instance determine the order of trial and say, I'm going to try the counterclaim first, and that may render any discrimination claim academic because of the size of the damages?

MR. TERRY: Your Honor, no. We believe that the plaintiff is entitled to establish the title VII or ADEA claim even if damages is completely out of the equation because of unjust enrichment or some other recovery. There is other relief that the plaintiff may be entitled to, or that the defendant should be affected by other than damages.

QUESTION: Let me take you back just one step to clarify, if I understand correctly, that even if you lose on your main argument you are contesting the propriety of summary judgment here, because it was -- you were not given an opportunity to challenge whether this misconduct would in fact have led to the discharge.

MR. TERRY: Absolutely, under the appropriate standard, which we think is articulated in Price Waterhouse, where -- which requires objective evidence and clear issues of fact which were present in this case, a fair factfinding proceeding. The district judge in this case found as a matter of law that the Nashville Banner could have fired --

QUESTION: But you didn't raise that question in

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the petition.

QUESTION: You didn't raise that issue.

MR. TERRY: I didn't --

QUESTION: You didn't raise that question in your certiorari petition.

MR. TERRY: We have raised that question. That question is in our -- is in our brief. We have --

QUESTION: We know it's in your brief, but not in your --

QUESTION: It wasn't in the petition.

QUESTION: Not in your certiorari petition. You just raised your basic legal argument. You only have one question in your certiorari petition, and it did not include that.

MR. TERRY: Well --

QUESTION: You may be right on it, but I'm not sure you preserved it.

MR. TERRY: Well, Justice Stevens, our approach to this is that until there is a rule, a rule articulated by this Court, when you start with the procedural problems that are presented in the district court, the problems are shown in this case. It's not something that just occurs as soon as an employer says, I would have terminated. It's a problem in determining the process for would have terminated --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Yes, I understand, but your principal argument is that even if they clearly would have fired her for this conduct, you still say that she's entitled to recover under the statute.

MR. TERRY: Absolutely.

QUESTION: That's a question you primarily addressed, at least.

MR. TERRY: Yes. I would like to reserve my --

QUESTION: Is it your submission that the time runs at the -- when judgment is entered in the trial court or when the judgment becomes final after appeal?

MR. TERRY: When judgment runs in the trial court.

QUESTION: Don't some circuits say that the cutoff date is when the employer actually discovers the grounds for discharge?

MR. TERRY: Yes. Yes, Justice O'Connor, and --

QUESTION: Isn't that what the EEOC has used as well?

MR. TERRY: We think that the EEOC has changed its ruling in that area a couple of times. We don't believe that a rule that stops short of judgment will serve the purposes of Albemarle, and we think Albemarle is served if backpay runs to judgment.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: What about the rule that backpay would terminate when the employer would have found out, which could conceivably be never? That's one of the cutoffs that --

MR. TERRY: If the employer can demonstrate that absent discrimination they would have found out, then it's just as if the plant had closed. Then it stops at that point.

QUESTION: But suppose the employer can't prove that? I mean, you are suggesting a cutoff that we can determine a fixed time when the judgment becomes -- when the judgment is entered in the district court. Another cutoff could be when the employer finds out in the course of discovery. Another could be when, absent the litigation, the employer could have found out. What reason would we have for picking one or the other of those stopping points?

MR. TERRY: The reason is that if the -- anything other than what we propose allows the employer to improve their position because of the discrimination. My client would be working at the Nashville Banner today except for the discrimination. The discrimination that originally terminated her also leads to this after-acquired information, and to cut it off any place else allows the Nashville Banner to profit from that.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Well, that's true even under your rule.

MR. TERRY: Well --

QUESTION: Let's assume that but for the lawsuit this never would have been found out, so even under your rule she -- the employer is better off because of the discharge.

MR. TERRY: Because they don't have to face reinstatement or front pay, but they have the same obligations under backpay, and backpay is critical.

As this court said before, it's the spur, it's the catalyst, it is the backbone to deterrence and compensation under Albemarle, and we do concede that there is some advantage to the employer, but it puts the employer in the same position they would have been absent the discrimination. If they have a legitimate reason at that point, they can refuse reinstatement.

We do think that this rule balances the employer and employee interests. The rule proposed by the Nashville Banner is a rule that establishes a predetermined national penalty. It's a rule that says no matter what the conduct, here's the penalty. You've lost your right to bring a civil rights claim, and the penalty is the same in every case, no matter what the misconduct is, and that's a --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: But why don't you go for the whole hog in this case, because in this case, presumably absent discovery the employer would never have found out and would never have discharged for any other reason, other than the age discrimination.

MR. TERRY: The rule we proposed, Your Honor, is structured with regard to reinstatement and front pay to accommodate the employer's interest. We don't believe that title VII should overreach to the point where it implicates the future and requires two people who now have a legitimate reason not to be tied in this relationship to be in that relationship.

CHIEF JUSTICE REHNQUIST: Very well, Mr. Terry.

Mr. Gornstein.

ORAL ARGUMENT OF IRVING L. GORNSTEIN

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MR. GORNSTEIN: Mr. Chief Justice, and may it please the Court:

Our position is that evidence of an employee's misconduct that is acquired after the employer has discharged that employee on the basis of age has no bearing on the question of liability under the Age Discrimination in Employment Act.

Evidence or proof that the misconduct would have

caused the employer to discharge that employee had he known about it can affect the scope of relief, but the Sixth Circuit's holding that such proof precludes all relief under all circumstances is incompatible with the language and purposes of the ADEA.

QUESTION: Well, Mr. Gornstein, what should the cutoff date be for any so-called backpay relief?

MR. GORNSTEIN: We believe that the appropriate cutoff date is the date upon which the employer would have discovered the information had there been no discrimination and no lawsuit.

QUESTION: That's kind of a hard test to employ. Don't you think that -- isn't it true that the EEOC has used, and perhaps now uses, a cutoff date of when the employer actually discovers it?

MR. GORNSTEIN: The EEOC position on this issue has evolved, and at one point it was using or advising its investigators -- there's never been an EEOC regulation on this.

QUESTION: What is it using now?

MR. GORNSTEIN: Right now, the position is the one reflected in our brief, which is that the cutoff date should go to the date on which the employer would have discovered the information had there been no discrimination.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Well, that just inserts a new and difficult factual inquiry into the equation. I don't see much to commend it.

MR. GORNSTEIN: I think what commends it is that it advances the purposes of the statute here, which --

QUESTION: Well, but do you agree that it does insert an often difficult factual question into the equation?

MR. GORNSTEIN: Yes, but I think what it --

QUESTION: Well, it's very difficult in this case. It could be argued that absent this litigation the employer never would have discovered it.

MR. GORNSTEIN: And in cases like that, then the backpay period should go to the date of judgment.

QUESTION: Mr. Gornstein, can I interrupt with this question? Do you think the remedy issue is embraced within the question presented in the cert petition?

MR. GORNSTEIN: Well, I would just --

QUESTION: It only relates to liability in all three briefs.

MR. GORNSTEIN: The remedy issue as to what particular remedies ought to be granted --

QUESTION: You first have to decide whether there's liability, and that's the only issue that the cert petition raised.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. GORNSTEIN: I think that it fairly raises whether, assuming there --

QUESTION: What the remedy should be if she wins?

MR. GORNSTEIN: No. What I would say is that it raises the question of whether all relief can be precluded, even assuming there's liability. It arises the question of whether there's liability at all, and the question of, assuming there's liability, can you preclude all relief.

QUESTION: But then you don't have to decide which of the various alternatives would be right.

MR. GORNSTEIN: You do not.

QUESTION: You say there's some -- some --

MR. GORNSTEIN: That's all you have to decide in this case, this --

QUESTION: It's clearly all that we should properly decide under the question presented, it seems to me.

MR. GORNSTEIN: Well, I think that that's probably so.

On the issue of liability, I wanted to make two basic points. First, with a few exceptions that are not applicable here, the language of the statute broadly prohibits employment discrimination on the basis of age

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

against any individual. There is no exception in the statute that would license an employer to discriminate on the basis of age against an employee who is engaged in this conduct.

Second, as this Court's decisions have made clear, the critical question in determining the issue of liability under the statute, is what actually motivated the employer at the time of the adverse action, and that point is crucial here.

Since this case arises on summary judgment, it must be assumed that at the time the respondent discharged petitioner, it acted entirely on the basis of her age. Under the plain language of the statute, that was sufficient to establish a violation.

After-acquired evidence of petitioner's misconduct could not change the historical fact that by then there had already been a violation of the act, so the only remaining question is what the appropriate remedy is for that violation, and that's governed by 29 U.S.C. section 626, which authorizes district courts to grant such legal and equitable relief as may be appropriate to effectuate the purposes of the act.

QUESTION: All right. Then how is it -- imagine the employee is dismissed on day 1, because of age. The employer says, you're too old. I'm firing you. All

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

right. During the discovery, 10 months later, they discover that this employee has been stealing all the money in the company, I mean, totally dishonest crook, and they never would have found it without the discovery.

The judgment takes place a year after that. You're saying that this employee who was stealing them blind should receive backpay not only for the first 10 months before they discovered it but also for the next 14 until judgment.

MR. GORNSTEIN: Unless the employer can show --

QUESTION: He couldn't show he discovered -- he never would have found out --

MR. GORNSTEIN: Then --

QUESTION: -- and yet there is this word, equitable, in the statutory section dealing with relief. How is that equitable? They don't -- I mean, I take it that the -- go ahead.

MR. GORNSTEIN: I think that it is equitable because you look at what is equitable in light of advancing the purposes of the statute, which are deterrence, and making whole the victims of discrimination. Running the backpay to the date of judgment provides further deterrence and it slots the employee more nearly in the position that that employee would have occupied had there been no discrimination.

QUESTION: What about the employer's claim? Wouldn't the employer have a very good claim?

MR. GORNSTEIN: Absolutely, that there would -- in that case, it would look like a clear claim for offset that would probably offset all the backpay.

QUESTION: Claim for what, a claim for --

MR. GORNSTEIN: Theft.

QUESTION: -- to get his money back that's been stolen?

MR. GORNSTEIN: Yes.

QUESTION: He's still paying this guy wages. He would never get those wages back.

MR. GORNSTEIN: Well, only in the sense that the --

QUESTION: That doesn't seem equitable to me.

MR. GORNSTEIN: Well, Justice Scalia, we --

QUESTION: The statute does use the word equitable, doesn't it?

MR. GORNSTEIN: It does, but that's --

QUESTION: It doesn't say whatever -- whatever helps to further the purposes of the act.

MR. GORNSTEIN: Well, it does --

QUESTION: It says, equitable.

MR. GORNSTEIN: Well, it says such legal or equitable relief as may be appropriate to effectuate the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

purposes of the act. That's exactly what it says.

MR. GORNSTEIN: That's my question. It would seem in that circumstance, contrary to the Sixth Circuit, that the employee should get paid for the first 10 months before they found it, perhaps, but why the next 14?

MR. GORNSTEIN: Our answer to that is, and I think this is the question is which of those two rules best advances the purposes of the statute, and we think that the rule that you -- the backpay ends on the date on which the employer would have discovered it follows directly from this Court's decision in Albemarle.

QUESTION: It doesn't say best advances, it says such legal -- as may be appropriate, right? The question is whether this kind of relief is appropriate to advance the purposes of the statute.

MR. GORNSTEIN: That's right.

QUESTION: Don't you think some people may think it's inappropriate?

MR. GORNSTEIN: Well, I don't think there should be an -- that implies a sort of unguided discretion to deny relief based on your reaction to the personal character of the plaintiff. You still have to decide whether it's appropriate in light of the purposes of this statute.

QUESTION: Is ease of administrability, is that

taken into account at all? You can say, you don't know -- you would have to have a kind of a satellite trial on this question of when would the employer have found out. You are accepting Mr. Terry's outer limit of the day of judgment.

MR. GORNSTEIN: Yes.

QUESTION: But then, if you take the day of discovery, that's something fixed, and you don't have to quarrel about it, apart from any equitable clean hands doctrine. It's easy to administer that kind of rule, and your rule is difficult, as Justice O'Connor pointed out.

MR. GORNSTEIN: I think that the virtue of the date of discovery rule is that it's easier to administer, but I think that that should be balanced against -- the more important question is which rule is more appropriate to effectuate the purposes of the statute, not which rule is easier to administer.

QUESTION: You say our discretion is unguided. Is the law in such a beginning primitive state that we can't call a thief a thief?

MR. GORNSTEIN: No, I would not -- you can call a thief a thief, sure.

QUESTION: But it's unguided discretion to allow that --

MR. GORNSTEIN: No, I would say that --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: -- to allow that to shape the remedy that we provide?

MR. GORNSTEIN: Well, I think it's unguided when the rule is, if somebody who's engaged in serious misconduct, they get relief, somebody who's engaged in less serious misconduct, they do not get the relief. That's the rule that's proposed by the respondent in this case. That, it seems to us, leads to unguided discretion, which this Court has had experience with in the Federal Employers' Liability Act.

QUESTION: But your submission is there be no discretion at all.

MR. GORNSTEIN: No, there will be discretion, but not on the basis of the employer's misconduct.

QUESTION: What about criminal? Couldn't we at least draw the line, criminal, if there's criminal misconduct?

MR. GORNSTEIN: I don't think --

QUESTION: That's a pretty clear line.

MR. GORNSTEIN: I don't think it's an appropriate line to draw, because there are many things that are not criminal that are very serious, and there are many things that are criminal --

QUESTION: Oh, so therefore we have to let even larceny go unpunished because there are some things that

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

aren't criminal that are serious.

MR. GORNSTEIN: Well, larceny will not go unpunished, because that violates the criminal law and the State will punish it. At the same time, the employer will have a right to recover whatever the value of the larceny is, but that should not take away from the point that --

QUESTION: Thank you, Mr. Gornstein.

MR. GORNSTEIN: Thank you.

QUESTION: Mr. Wayland.

ORAL ARGUMENT OF R. EDDIE WAYLAND

ON BEHALF OF THE RESPONDENT

MR. WAYLAND: Mr. Chief Justice, may it please the Court:

The court below properly held, on the facts of this case, that employee misconduct and evidence of employee misconduct that undeniably would have resulted in the termination of the plaintiff had the company known about it bars this plaintiff's, or similarly situated plaintiffs' claim for relief for wrongful discharge.

QUESTION: The court didn't have an "undeniably" case before it though, did it?

MR. WAYLAND: Yes, Your Honor. The facts in this case show it was admitted that it was misconduct. The plaintiff in her deposition admitted she knew that she could be --

QUESTION: The conduct was undeniable, but what would have followed from it, whether her employment would have terminated, was a debatable fact question, was it not?

MR. WAYLAND: No, Your Honor, it was not. The court below found, on the basis of the undisputed facts, that --

QUESTION: Undisputed facts, there were only affidavits, no cross-examination, even.

MR. WAYLAND: No, that is not correct, Your Honor.

QUESTION: It was?

MR. WAYLAND: There was. There were depositions of all four of the individuals who submitted affidavits. The court below, on the plaintiff's motion, extended the discovery period, gave them the opportunity to depose all of the executives, to try to prove pretext, or prove that the company would not have done what the executive said they did, and no evidence, absolutely no evidence came forward to show that.

It's a finding of fact, uncontradicted in the record, that she would have been terminated, and the only reason she wasn't terminated is because she successfully concealed her misconduct.

QUESTION: Is a deposition the same thing as

presenting a witness before a trier of fact who will then take into account the credibility of the witness? Couldn't a witness -- couldn't -- well, you see the point of my question. A deposition is not the same as presenting a witness in court before the trier of fact, subject to cross-examination. It didn't have that setting here.

MR. WAYLAND: Well, Your Honor, if that's the standard, then there could never be summary judgment in any case where someone could argue that credibility of witnesses may be appropriate.

QUESTION: I thought that was the case, in fact. Where there's a credibility question to be resolved, then you do not have a case where there is no genuine doubt of what the facts are.

MR. WAYLAND: I believe the teachings of this Court establish, Your Honor, that when faced with a properly supported motion for summary judgment, the person opposing the motion has to come forward with evidence that would show that there is a genuine factual dispute. That did not happen here.

There is no evidence showing that there is a genuine factual dispute, and it's certainly consistent with this Court's standards and with controlling law for a court to grant summary judgment on those principles and on

those facts.

QUESTION: Was it shown what had happened in similar situations, or was the testimony just that, yes, we would have fired her?

MR. WAYLAND: The testimony was, Your Honor, that there was no similar situations to compare it to, that it had never happened before, that the rule at the company was so well understood -- in fact, the plaintiff admitted that anyone would know that if you did this you could be discharged for it, and the company in the testimony was that they would have unequivocally terminated the employee the minute they found out about it.

Four different executives testified to that under oath, Your Honor, and not one shred of evidence contradicts that. On those facts, we think it's a matter of fact that she would have been terminated. It was a fact that she had engaged in this misconduct at the time that she was chosen for a lay-off. Those facts are undeniable.

QUESTION: Mr. Wayland, I take it the trial court went no further than to say, than to conclude that there was no genuine issue on the point?

MR. WAYLAND: The trial court concluded that there was no genuine issue, Your Honor, and also further

concluded that, on the basis of the undisputed facts, that the company had objectively stated a legitimate cause for discharge. I believe the court said that it would be cause for discharge as a matter of law.

The court then went further and said, on the basis of the undisputed facts, not only was it objectively cause for discharge, but the company subjectively would have discharged the employee on these situations.

QUESTION: Well, whatever the deficiencies, the question presented at least does assume that the conduct here would have provided a basis for dismissing the employee.

MR. WAYLAND: That is correct, Your Honor.

QUESTION: And that we take the case on that assumption.

MR. WAYLAND: That is correct, Your Honor.

QUESTION: That is not much to argue about.

MR. WAYLAND: And if you look at what's happened here, if you look at the statute, and we submit that's the place to start, in the Age Discrimination Act, Congress specifically provided that if someone -- if there's good cause for termination, or if there's a reasonable factor other than age, then that is not age discrimination.

Congress also provided that a person must be aggrieved to bring a claim. What the plaintiffs are

trying to argue here is, simply because there's bad motive, that therefore that's a violation of the law, and the teachings of this Court are that that's not enough.

QUESTION: Well, at the time of the discharge of the petitioner, the employer did not know of any other ground for discharge, and I guess we take the case on the assumption that the discharge was made at that time on the basis of her age.

MR. WAYLAND: For purposes of --

QUESTION: For purposes of our disposal of this case we take it on that assumption, do we not?

MR. WAYLAND: That is correct, Your Honor.

QUESTION: And so as of that date, it appears that there was indeed discrimination as described in the statute, and an injury occurred on that date.

MR. WAYLAND: Well, the question, we submit, Your Honor, is, did an injury occur on that date, a legal injury, and if so, even assuming that it did, is it redressable, and that's the real -- that's what we're dealing with here.

What the plaintiffs and the Government are trying to read into the statute is the word shall, that this Court shall provide a remedy, and that's not what the statute says. The statute says, in the Court's discretion, when it's appropriate, a remedy may be

provided.

QUESTION: Mr. Wayland, suppose what was at issue here was not intentional misconduct, but simply gross incompetence that the employer had not theretofore been aware of, but it comes out during the course of the trial that this employee is really grossly incompetent, would that in your view lead to the same conclusion, that no recovery could be had for firing this employee because of race, or sex, or age?

MR. WAYLAND: It may well lead to that conclusion, Your Honor. I think --

QUESTION: I know it may well.

(Laughter.)

QUESTION: I want to know what your answer is.

MR. WAYLAND: Well, I think it would depend upon the employer. The test that we submit, Your Honor, is applicable is, are there undisputed facts, is that -- would that be an objective reason for discharge, and can the company prove it would have terminated the employee --

QUESTION: Had it known about the incompetency.

MR. WAYLAND: Had it known about the incompetency.

QUESTION: So it's not a matter of intentional misconduct alone, it's if there were any reason for which this employee might have been, would have been discharged

had the employer known about it?

MR. WAYLAND: That's correct, Your Honor. The statute says, good cause. It doesn't define good cause, but it says good cause, and in enacting the discrimination laws and the Age Discrimination Act, Congress was very sensitive to the employer's right to exercise its legitimate prerogatives except for when -- a discriminatory motive --

QUESTION: So I gather --

MR. WAYLAND: -- that resulted in an injury. Excuse me.

QUESTION: -- if you bring a suit under this statute you better expect your employment history to be very carefully scrutinized not only for intentional misdeeds but for general incompetence?

MR. WAYLAND: Yes, Your Honor.

QUESTION: And that would be rather risky, wouldn't it, to bring such a suit?

MR. WAYLAND: I don't believe so, Your Honor.

QUESTION: Even if the employer is unable to establish the general incompetence, it would make good reading for any subsequent employer, wouldn't it?

MR. WAYLAND: Well, Your Honor, I guess there's protective orders that would deal with that.

But the point, Your Honor, is that the -- you

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

look at the conduct and what the employer would have done, and whether or not that rises to the level of actual discrimination.

QUESTION: Well, Mr. Wayland, I would have thought you would look at the situation at the time the employment action occurred, and that's what Congress was trying to prevent. They don't want employment action, a discharge, based on the employee's race or sex or age, and they're trying to discourage that kind of action, so I don't see how your rule implements the goal of the statute at all.

MR. WAYLAND: Well, Your Honor, it's also a goal of the statute not to reward bad employees, and if you buy the plaintiff's theory, if you ignore the fact of the misconduct that would have resulted in their termination, then the result is you are rewarding an employee for their stealth and for the concealment of their misconduct.

QUESTION: Well, not if you look at it, for example, as of the date of the acquisition of the subsequent knowledge. Then it looks to me like you can sort out the appropriate remedy.

MR. WAYLAND: Well, the employee is still being rewarded, Your Honor, because that's going to, employees that conceal it better than others are going to be rewarded more, because it's going to take longer for the

company to find out about it. It might also, we submit, foster a situation where there's more deceptiveness in the discovery process.

What we submit --

QUESTION: Mr. Wayland, let me put it this way. This is a statute that says, thou shalt not discriminate. As you describe this scenario, you are turning that around and say, well, let's just assume that, arguendo, this case is going to be about whether this was an inadequate employee.

And you have turned what Congress set up as a discrimination claim into something where the discrimination claim never even sees the light of day unless the employee can first survive this hurdle of showing that she would have kept the job that she was a competent employee, that she had not engaged in any misconduct, so it seems to me just destructive of the claim that Congress set up when it passed these antidiscrimination laws.

MR. WAYLAND: The question, Your Honor, is to relief. Congress did not guarantee that every plaintiff who could prove a violation is going to get a remedy. This Court has recognized this in Albemarle Paper case.

QUESTION: How about even a matter of a declaratory judgment? Employer discharged this person for

an impermissible reason. That has been proved. The lawyer who proved it against the employer is going to get counsel fees. Just that much.

MR. WAYLAND: Your Honor, this Court, under my reading of the statute, would have the discretion to award that if it found that that was appropriate, and that would certainly be consistent with what Congress has enacted in the 1991 Civil Rights Act.

QUESTION: Then how can you give summary judgment and not even have that proof in the case?

MR. WAYLAND: Well, Your Honor, we submit that in the cases that we're dealing with when we're dealing with misconduct serious enough to warrant discharge, that would have warranted discharge, that that ends the inquiry, because the -- that conduct becomes a superseding cause for any injury. There's no relief, or the redressability question comes into play.

QUESTION: You're running two theories, Mr. Wayland, and I think you're going to have to pick between them.

One is that there's simply no cause of action because there's been no harm done, and if you run that theory, you do, indeed, have to answer my earlier question about whether even an incompetent employee is not entitled to relief, the way you did. Incompetence, just like

intentional misdoing, eliminates the cause of action.

But there is a second theory which you seem to be running in your discussion with Justice Ginsburg, and that is, it doesn't go to whether there's a claim at the outset, but to whether relief is appropriate, and under that theory you could get a declaratory judgment. But there's no basis for a declaratory judgment under your first theory, that there's simply no cause of action. That is, no harm has been done.

MR. WAYLAND: That is correct, Your Honor.

QUESTION: Well, which theory do you want?

MR. WAYLAND: Well, we would submit that the first theory is the correct one.

QUESTION: That's what I thought your brief contained, the first theory, not the remedial theory.

MR. WAYLAND: But if the Court determines that there is a violation, then we think you have to go to the remedial theory as a -- a, for lack of a better term, a fall-back position, and that's certainly appropriate then.

QUESTION: I thought your starting point is, we can concede the violation. You have no claim if you engage in the kind of misconduct that would have led to your termination anyway. I thought your starting premise is, we can concede arguendo that there was age discrimination, but it doesn't matter, because you don't

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

have a claim for relief unless you show that you would not have been terminated for another reason.

MR. WAYLAND: Your Honor, the teachings of this Court in the Price Waterhouse case is there are three things that are necessary for a legally cognizable injury under the discrimination law.

There has to be a bad motive, which we are assuming for purposes of argument here, there has to be an action pursuant to that bad motive, and there has to be an injury. There has to be a tangible, economic injury that results before there is liability. Now, that's the teaching of this Court --

QUESTION: I had not understood the Price Waterhouse decision to involve the scenario here, that is, that there is never any proof of discrimination because we go right to the defense.

MR. WAYLAND: The difference between the Price Waterhouse scenario and this one, Your Honor, in the abstract, we submit, is that in Price Waterhouse both motives were present at the same time, whereas in this case by definition the after-acquired knowledge was not present at the time the decision was made, but once you set that aside --

QUESTION: That makes this one a case where, less sympathetic to the discrimination charge? They both

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

occur simultaneously, then there is proof of the discrimination. If they -- the one occurs later, there should be a different trial scenario. I don't comprehend that --

MR. WAYLAND: Well, Your --

QUESTION: -- why it makes any difference whether they knew, on the very day they discriminated against her on the basis of her age they also knew, say another officer knew that she had taken confidential documents. Why should it turn on whether the discovery was simultaneous or the discovery of misconduct came later?

MR. WAYLAND: I don't believe it does, Your Honor. That's the point. It turns on whether or not there's an injury, and here, the misconduct that would have resulted in her termination becomes a superseding event that results in --

QUESTION: Why is there no injury? Look, I'm a thoroughly incompetent employee, but my employer has not tumbled to that fact yet.

(Laughter.)

QUESTION: I'm drawing a nice salary, week by week, and I get fired because of my age. Why haven't I suffered an injury?

MR. WAYLAND: Well, Your Honor, you haven't

suffered a legally cognizable injury under the discrimination laws.

QUESTION: Why? You -- it's not self-evident to me. You simply say that there has been no injury, but de facto, there certainly has been an injury.

MR. WAYLAND: There is an injury, but there is a superseding cause, or another cause of that injury. That's the teaching of Mount Healthy, Your Honor. In the Mount Healthy case --

QUESTION: But that wasn't the cause. The employer didn't know about my incompetence. He only found out about it later because of this lawsuit.

MR. WAYLAND: Well, Your Honor, it was a fact at the time, and if the Court ignores the existence of that fact simply by a lack of employer knowledge, then it is rewarding employees for their concealment of misconduct, and that's not --

QUESTION: Well, that goes to the appropriateness of the remedy, but it doesn't go to the existence of a cause of action. It does not go to whether there was any injury. It seems to me the more incompetent I've been, the more dishonest I am, and hence less likely to get a later job, the more I've been injured.

(Laughter.)

MR. WAYLAND: Well, Your Honor, again, we submit

that in terms of looking at the legal injuries, this Court has said there has to be a tie, it has to be traceable to the event.

But turning to --

QUESTION: Legal injury has got to be defined in statutory terms, and the statute uses discharge because of age.

MR. WAYLAND: That's correct, Your Honor.

QUESTION: That is the legal injury, and if there has been a discharge because of age, it seems to me that under the statutory language, that is the end of the inquiry as to whether there has been a legally cognizable injury. We can fight about relief later, but the injury is within the terms of the statute.

MR. WAYLAND: We believe the proper test is, is there has to be a but-for causation, Your Honor.

QUESTION: What do you do with the language, because of age?

MR. WAYLAND: Your Honor, we think that the proper interpretation is, that's a but-for test. But for the discrimination, the injury would not have occurred, that the after-acquired evidence which was a fact at the time that the court should look at, we submit the court should look at the plaintiff as they stand, not the issue they try to raise.

QUESTION: Mr. Wayland, could I interrupt for just a second? I want to get one thought on the table.

Isn't it true that in the orderly presentation of a trial the plaintiff puts her evidence in first, she puts in the evidence that she was a loyal employee, she was fired, fired because of age, and she lost her job. Prima facie, she has established injury, and she rests. Nobody says anything about this that's found out later.

Then, in your case, you put this evidence on, but is it not true that at the time she completes her case, she has established injury, and then you come up with an affirmative defense, trying to say, well, you really didn't get hurt.

MR. WAYLAND: I don't know that she's established injury, Your Honor.

QUESTION: She's lost her job.

MR. WAYLAND: She's established a presumption that the loss of her job was the result of discrimination.

QUESTION: But if you put in no evidence at that point, judgment would be entered against you. Is that not correct?

MR. WAYLAND: That is correct, Your Honor, but here, using your example, the after-acquired evidence and what we're talking about here goes to that case. We think it's a flip side, and one of the argument's we made in our

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

brief. She was not otherwise qualified. She stole from her employee.

QUESTION: Well, I have other questions similar to Justice Stevens. Suppose that the evidence of discrimination is very clear, smoking gun in the record. We fire you because of your age. That's in the complaint. In the pretrial stage, you now go to the district court, and you say, Your Honor, we want to take discovery, because there is some indication here that this employee may have been incompetent. Under your rule, that discovery has to be allowed?

MR. WAYLAND: Yes, Your Honor.

QUESTION: Can I go to the point, which might not be in the case question, but nonetheless is bothering me, on day 1, the person's fired because of age, 10 months later, in discovery, they find out the person was a terrible thief, and 14 months after that, judgment enters.

Assume, contrary to everything you've been arguing, but just assume it with me, that I don't really think Congress wanted to subject people who've made complaints to inquisitions about every feature of their past life, and therefore you're going to lose on that point. I'm saying, just make an assumption.

The point that's bothering me then, on that assumption, is whether the damages should run to 10 months

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

when the thing turns up, or run to 2 years because it wouldn't have turned up in the absence of this case.

That's what I'd appreciate your addressing, you see, because you could make the same argument about not subjecting people to inquisitions. If you're going to permit that employer to stop his damages once he finds out this thing on discovery, that also would encourage inquisitions.

MR. WAYLAND: Well, Your Honor, I think that the discovery is governed by the normal discovery principles, and it would be job-related discovery. I don't think anything suggests --

QUESTION: I'm asking you to address the point of when, in your opinion, if you lost on your main point, the damages would be stopped, and why.

MR. WAYLAND: The answer to that question, Your Honor, is the damages should be stopped as of the time that the employee engaged in the misconduct, or the alleged injury occurred, so it would be the time of the lay-off, because otherwise what the court is doing is rewarding an employee for their misconduct. Moreover --

QUESTION: You understand, I'm making the assumption that you lose on that point.

MR. WAYLAND: I understand that, Your Honor.

QUESTION: I'm making the assumption that for

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

argument's sake that our choice is between stopping it at the time the employer discovers it, or letting the damages run, despite the discovery, until judgment enters.

Now, you don't have to address that, because you might say, since that whole assumption's wrong and so forth -- I understand that, but if you want to address that, I'd appreciate it.

MR. WAYLAND: Your Honor, on your assumption, then the damages should stop when the employer learned of the misconduct, because if not, then this Court is ignoring the teachings of Mount Healthy and its progeny that a plaintiff should not be better off because they raise a discrimination claim.

If we had found out about Ms. McKennon's misconduct in another lawsuit, or some employee came forward and spilled the beans on her, or she became, at a party one night she let it slip what she had done, then nobody, I think, would seriously argue that we could not have acted at that time.

What the Government and the plaintiff argued is that because this came out in discovery, which was a result of her exercising her right to bring a civil action, that we are precluded from relying on it at that time.

If we accept that, the plaintiff is better off

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

than they would have been otherwise solely because they filed a discrimination claim, and that is not what the law of this Court says is the law of the land. So in that answer it would be, once the employer finds out about it, damages stops, the end.

We would note that the EEOC has taken the position that initially that there were no damages, that the only thing the court could -- would award would be declaratory relief and backpay.

Then they went to the position of saying it stopped when the employer found out about it, and now if I understand what they're saying, it goes on ad inf -- until there's a judgment, unless we could prove metaphysically somehow that we would have found out about it otherwise, and I think here we concede that there's no way we would have known about this misconduct. She was too good at what she did.

QUESTION: Mr. Wayland, can we just go back to the question, the liability question, the basic claim? Suppose this case had been one where there was clear proof of a pattern and practice established at the top level of this company that we don't want old secretaries around this place, so we're going to get rid of them all, and there's a memo from the boss saying, look for flaws, look for faults, and then we'll be able to have a reason to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

dismiss them.

You have such a case, and the plaintiff copies certain confidential documents, just what happened here. Would you say even then there is no claim for relief, even if you had the clearest, wilful violation of the statute?

MR. WAYLAND: If the employer could prove, Your Honor, that it would have terminated her absent the illegal intent, if it would have taken the same action based upon the stealing of the confidential documents, then the answer is yes, she would not have a claim for relief under the discrimination laws, and that is the teaching of this Court in the plurality opinion in Price Waterhouse, that's the teaching of the principle in Mount Healthy, and that's what this Court has recognized over and over again.

Turning to the relief aspect, Your Honor --

QUESTION: How do you -- can you just explain one thing that I don't understand clearly?

In the Mount Healthy setting, in the Price Waterhouse setting, you have the plaintiff putting on a case. Here, you say, we can win without the plaintiff ever putting on a case. It's that difference.

That was not happening in Mount Healthy, it was not happening in Price Waterhouse, but with your case and others like it, the plaintiff never makes a prima facie

case. We never have that showing.

That's something different, and would you explain to me why, in the Mount Healthy setting, in the Price Waterhouse setting, you do have the plaintiff's case, and then the answer to it. Here, we have the answer and we just assume the case.

MR. WAYLAND: Well, Your Honor, I suspect because in those cases there were disputes of fact that required a trial.

In your hypothetical, the existence of that smoking gun memo may well be sufficient to create a question of fact that would then go to the jury as to, would the company have in fact put aside the discriminatory motive and done the same thing anyway? In that circumstance, then certainly a trial may be appropriate.

We're not suggesting that summary judgment is always appropriate in these cases, but where there are no disputed facts, and as a matter of law, we submit that we should be entitled to a valid defense because of the employee's misconduct.

The employee has no one to blame but themselves. Any denial of a remedy or relief is a result of their own misconduct. We submit that Congress did not intend that the discrimination laws should be used to benefit

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

employees who were bad applies.

QUESTION: Are you saying, then, if you don't have a summary judgment case on the defense, then under your theory, suppose the employer says, objectively there were grounds for discharging her but there's a dispute whether they would in fact have, could, in your view of this kind of case, the trial judge say, well, I'm going to have a trial on that, because if I find that they would have fired her for a reason for which they could have fired her, I save everybody a lot of time, because that's totally dispositive?

MR. WAYLAND: Yes, Your Honor. That's exactly what the Court could do.

QUESTION: So you could do the same thing in Price Waterhouse, and the same thing in the Mount Healthy setting as well?

MR. WAYLAND: I'm sorry, Your Honor, I did not hear the second --

QUESTION: In the Mount Healthy type case, the mixed motive case, you could do the very same thing, say, I'm going to have a trial on the defense first, and we'll never have a trial on the discrimination part because that becomes irrelevant?

MR. WAYLAND: The Court certainly could do that in handling the case, Your Honor. We submit, and I think

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

we put forth in our brief and one of our amicus submits, this is in the form of an affirmative defense of the employer.

The employer has the burden of proving that there was misconduct that objectively would have resulted in termination, and subjectively it would have resulted in termination. If they can establish that either through undisputed facts on summary judgment or in a trial, then that provides a defense.

QUESTION: Of course, in terms of what is properly disputed, isn't it a relevant fact in determining whether they would have discharged that they are coming forward with this evidence and they are trying to prove this we assume, for the sake of argument, after they have violated the statute, so isn't the fact of the statutory violation always going to be relevant except in a case in which it's stipulated that they would have discharged anyway?

MR. WAYLAND: Well, Your Honor, it's relevant but it's not determinative. It's the same thing as in --

QUESTION: No, but it simply goes to the question whether you can, in fact, litigate solely your affirmative defense, and it seems to me that in the case -- except in a case in which it is stipulated that there would have been a discharge absent the

discrimination, you really cannot so divide the issues, because the one is relevant to your determination under the other.

MR. WAYLAND: Well, Your Honor, I think the better practice probably would be to have a trial on the merits with this being an affirmative defense, but it's similar to going to the qualification requirement of a plaintiff.

QUESTION: But didn't you move for summary judgment? Then you couldn't have thought that.

MR. WAYLAND: I'm sorry, Your Honor.

QUESTION: You moved for summary judgment on the basis of an affirmative defense.

MR. WAYLAND: That's correct, Your Honor. Just --

QUESTION: But you -- so -- but you think the better practice would have been to reject your motion and say well, let's have a trial first and then decide it?

MR. WAYLAND: No, Your Honor. If I understood Justice Souter's question, it went to if there was a question of intent of violation, wouldn't that be wrapped up in this whole question of what you would have done, and I'm saying that I think the better aspect would be if the company cannot prove on the basis of undisputed facts and summary judgment, then the entire case goes to trial,

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

rather than bifurcating the trial just for this issue and then holding the liability issue later.

But if this is proven, if it's proven that the after-acquired evidence would have resulted in the person's termination, was sufficient for that, then that is a valid defense.

You have to -- again, I think what the courts have said that have adopted this bar to relief, as you look at the remedy, you look at the claim of injury, and then you look at the relief that they're requesting.

The claim of injury in a wrongful discharge case is that they were terminated, and they've lost wages and benefits. That's the relief that's available, and the misconduct serves to cut the legs out from under that claim, because it is also a result, or results in that injury, and the plaintiff has no one to blame for theirselves.

On-the-job misconduct, whether it was fact at the time, whether the employer knew it at the time or not, is relevant, and it's properly considered by this Court. We submit that if you ignore this evidence it would be impractical.

This is not something where there is a blanket bar. You look at the facts and circumstances of each case, and the Court --

QUESTION: One of the facts of this case, I guess, is no matter how serious your misconduct was, and we assume, of course, it was serious enough to justify discharge, it didn't cause any pecuniary damage to the employer.

MR. WAYLAND: That it did not, Your Honor?

QUESTION: It did not cause any pecuniary, not even a nickel of damages to the employer.

MR. WAYLAND: I don't think it would be any provable damages to the employer, Your Honor. It's not like she stole money.

QUESTION: No.

MR. WAYLAND: I think there was certainly an injury and a damage to the employer, but I don't know that's something they could recover for.

QUESTION: She just told her husband some company secrets, basically.

MR. WAYLAND: Well, she breached her confidence and trust, Your Honor.

QUESTION: Yes, I understand.

MR. WAYLAND: She stole documents from the company.

QUESTION: Thank you, Mr. Wayland.

MR. WAYLAND: Thank you, Your Honor.

QUESTION: Mr. Terry, you have 1 minute

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

remaining.

REBUTTAL ARGUMENT OF MICHAEL E. TERRY

ON BEHALF OF THE PETITIONER

MR. TERRY: Justice Ginsburg, there are questions of fact in this case.

My client worked there 40 years. The affidavit signed by the publisher in December, where he said he would have fired her on March 6th, 1992, several months later in his deposition, he could not identify the documents that were taken.

My client worked there 40 years. She was positively evaluated for 40 years. There are fact questions on whether or not they would have fired her.

Your Honor, I've nothing further.

CHIEF JUSTICE REHNQUIST: Very well. The case is submitted.

(Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

CHRISTINE McKENNON, Petitioner v. NASHVILLE BANNER PUBLISHING COMPANY

CASE NO.:93-1543

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Mari Federico

(REPORTER)