LITIGATION

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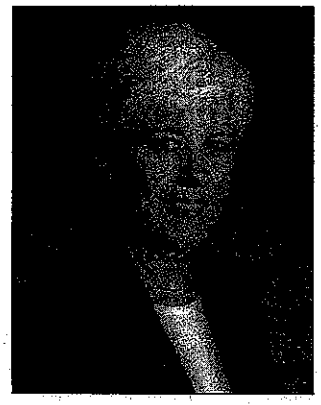
From the Chair:

The Survey - The Results - The Programs

By Jane L. Johnson



Jane L. Johnson

The results are in! One thousand one hundred Litigation Section members, an amazing 35% of the membership, responded to the Continuing Legal Education ("CLE") survey conducted in June of this year. In response to such an overwhelming response, we first want to thank you for taking the time to complete and mail the survey. Second, we want you to know that the Litigation Section's Executive Committee and its Programs Committee, the latter of which is ably headed by Lee Edmon, have carefully analyzed the results of the survey and have designed a series of programs that respond to the needs and desires expressed in survey responses.

What is it that the membership wants from Litigation Section sponsored programs? 74% of the respondents prefer programs of between two and three hours duration. 72% want programs in the evening, 5:00 or after. Wednesday and Thursday evenings are preferred. 55% want programs without formal meals. There is a strong contingent expressing an interest in programs on the west side of town. 49% of the respondents indicated that they found programs in West Los Angeles convenient, while 61% stated that Downtown was their venue of choice.

79% of the respondents expressed an interest in attending programs on advanced level procedural and litigation skills. In the designated areas of substantive law affecting litigation, the respondents' areas of interest were business/commercial (58%), business torts (58%), insurance (43%), labor & employment (36%), and real property (35%). Although not a designated subject matter area on the survey, several respondents expressed a desire for a program dealing with intellectual property law litigation issues. Notably, 75% of the respondents stated that they would be likely to attend "recent developments" programs.

In selecting a program, respondents ranked topic as the most important consideration, with location and convenience both close seconds. The next most important consideration was speaker. Although there was no more than a 9% difference between the highest and lowest rated preference, program price, provider

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After-Acquired Evidence In California: A Doctrine In Search Of Principles

By Robert P. Baker

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Hypothetical Case No. 1:

A thirty year employee with a spotless employment record is terminated by a moving and storage company solely because of her age. She files a complaint for age discrimination, and during discovery the employer learns that the employee had misrepresented her background and experience on her job application and had also deliberately misrepresented her medical condition to justify her absence from work ten years earlier.

The employer moves for summary judgment on the ground that the employee cannot make a claim based upon an employment relationship that was fraudulently induced, and on the further ground that the misrepresentation regarding her illness would, if known contemporaneously, have been grounds for termination.

Hypothetical Case No. 2:

An accounting firm which represents financial institutions and the Resolution Trust Corporation hires a secretary who falsely swears on her job application that she has no felony record. The Resolution Trust Corporation and several other clients of the firm require it to certify that it has a felony-free work force. In fact, the secretary has been convicted of defrauding a federally insured financial institution, has served time for that offense, and was later reincarcerated for parole violations. The secretary fabricated job experience to cover the periods of her incarceration and lied about virtually all of the relevant education and work experience appearing on her resume.

The secretary cannot get along with the partner to whom she is assigned. After eighteen months, she refuses to work with him any longer, or to accept an assignment to any junior accountant. She "floats," waiting for assignment to another partner. When the secretary receives no suitable reassignment within thirty days, she refuses to continue to float and is terminated by the accounting firm.

The secretary sues for wrongful discharge, but cannot settle upon which public policy issue is involved. Her case is basically an ad hominem attack on the partner for whom she worked. During discovery,

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The Survey - TheResults - The Programs

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reputation, and the quality of written materials were deemed to be the least important considerations in selecting a program.

The Programs Committee has planned programs that are responsive to the survey's results. Litigation Section programs this year will be offered at both Westside and Downtown locations and, with one exception, all programs will begin in the early evening after regular business hours and will continue for two hours or more.

We encourage our members and other interested parties to plan to attend an exciting and informative three hour evening program on Recent Developments planned for November. This program will review the most important developments in the areas of civil procedure, real property, insurance, labor and employment, and intellectual property for the past year, and will explore anticipated developments in those areas in the coming years. This program will devote one hour to civil procedure developments and two hours to substantive law developments.

Beginning in February and ending in May, we will sponsor the Masters Series, featuring some of the finest litigators in Los Angeles County. This series will spotlight the skills required to be an effective trial lawyer. Topics ranging from the development of a case theme to effective closing argument will be addressed. Each session will emphasize particular trial skills and will provide for interaction among participants.

Because of the many current crises facing our Courts and the practice of law which are of importance to all of us, the Litigation Section will continue its State of the Courts program, which traditionally has been staged in January. This tradition will continue, but this year the format will be altered. Rather than simply an address by the Chief Presiding Judge of the Superior Court, the program will feature the Presiding Judge of the federal District Court as well. The program will follow an interactive format, providing an opportunity for attendees to pose tough questions to the judges who are responsible for making the system work.

To top off our program year, we hope to bring a speaker of national renown to the Litigation Section. In years past, we have enjoyed wonderful talks by Michael Tigar and Gerry Spence, among others. This year's speaker will be no less talented and engaging. May is the target month for this program. The Programs Committee is now at work attempting to identify a speaker to rival the superb performances of Gerry Spence and Michael Tigar.

So get out your calendars, mark the dates, and plan to attend the programs that you asked for. We are confident you will be happy you have done so. When this year's programs are complete, you will be 17 hours closer to meeting your CLE requirements. You will have done so with programs that are of the highest quality at bargain prices. As always, attending Litigation Section programs gives you the opportunity to mix with some of our finest lawyers and judges. We look forward to seeing you.

MARK THESE DATES AND PLAN TO ATTEND

Recent Developments Program:

Downtown: November 15, 1995
Westside: December 5, 1995

Topics to be discussed are recent developments in:

Business Torts
Civil Procedure
Insurance
Real Property
Intellectual Property
Labor & Employment

State of the Courts Luncheon

January 11, 1996 (Downtown only)

Format: Judges Klausner and Byrne respond to questions from a moderator and the audience.

Masters Series

Feb, March, April, May 1996

A series of four evening programs featuring master litigators addressing trial skills topics. Master Series programs will be presented at Downtown and Westside locations. Participants may attend one, some or all of the series. See the next issue for more details.

Evening Program With Nationally Known Speaker

May 1996: Speaker and date to be announced.

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After-Acquired Evidence In California: A Doctrine In Search Of Principles

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the accounting firm learns of her criminal history and misrepresentations and moves for summary judgment on the ground that her true background disqualified her from employment and that she would have been terminated if the true facts had been discovered during her employment.

* * * * *

These hypotheticals point out the conundrum presented by what has come to be known as the after-acquired evidence doctrine. On one hand, long-term employees alleging serious matters such as age or race discrimination in employment should not be deprived of their legal claims because the employer has dredged up some small piece of dirt in the employee's distant past which the employer now contends would, if known, have resulted in the refusal to hire, or the termination of, the employee. On the other hand, employers who have been defrauded, and put at risk of great harm by employees who have fraudulently obtained a place in the work force for which they are indisputably disqualified, should not have to face a jury trial against felons and others hoping to strike it rich. If there were no after-acquired evidence doctrine, a person who falsely claimed to be a physician could sue a hospital or medical group for wrongfully terminating his privileges to practice. So too, a lawyer could sue her firm for sex discrimination following her termination, even though she had concealed a felony conviction or misrepresented her graduation from law school, or her passage of the bar examination.

In some cases, after-acquired evidence of fraud or wrongdoing is a defense available to the employer to certain claims made by employees. But, no California case has thoroughly analyzed what the precise nature and elements of the defense are and when, if ever, a court can adjudicate the defense on a motion for summary judgment. This article details the development of the after-acquired evidence doctrine, seeks to illuminate its present form, and recommends several relevant factors for applying the doctrine to future cases.

The Development of the After-Acquired Evidence Doctrine: From Summers to McKennon

The seminal case in the development of the after-acquired evidence doctrine is *Summers v. State Farm Mutual Auto. Ins. Co.*[1] In *Summers*, the plaintiff sued under federal employment discrimina-

tion law for age and religion discrimination, after being terminated for a "poor attitude." During the litigation, the employer discovered that the plaintiff had falsified a number of business records.[2] The court held that this after-acquired information was relevant to the plaintiff's claim of injury from the loss of employment, and, once admitted, precluded any relief or recovery as a matter of law. The court stated:

> To argue, as Summers does, that this after-acquired evidence should be ignored is utterly unrealistic. The present case is akin to the hypothetical wherein a company doctor is fired because of his age, race, religion, and sex and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a "doctor." In our view, the masquerading doctor would be entitled to no relief, and Summers is in no better position.[3]

A number of federal courts have applied the reasoning of the *Summers* case to grant summary judgment under similar circumstances.[4] In each of these cases, the employer established by declaration or other admissible evidence that had it known of the employee's pre-employment misrepresentations and/or work place misconduct, it would have refused to hire or would have terminated the employee. Based on such undisputed evidence, each court held that the plaintiff's claim was barred as a matter of law.

Two illustrative cases that are particularly significant are *Mathis* and *Washington*. In each case, the employee had pled guilty to criminal charges prior to seeking employment, but lied to its employer about the conviction.[5] In *Washington*, the plaintiff was hired as a jailer for the Lake County Sheriff's Department in 1986. He had answered "No" to a question on his employment application asking whether he had ever been convicted of a crime. In fact, the plaintiff had pled guilty to a criminal trespass charge in 1974, and had been convicted in 1981 of assault, although he had not served any jail time on either matter. After the plaintiff was terminated about 10 months later, he sued the sheriff's department for race discrimination. The department moved for summary judgment after discovering the plaintiff's prior convictions, contending that he would not have been hired and/or would have been terminated had the convictions come to light earlier.[6] The trial court granted the motion. After extensive discussion of the case law, including *Summers*, and the policies underlying federal employment discrimination law, the Seventh Circuit ruled that there was no triable issue as to whether the plaintiff would have been fired for the misrepresentations, and affirmed the summary judgment.

Similarly, in *Mathis*, the plaintiff submitted a resume that omitted her employment with several federal agencies from which she had been fired for cause, as well as a conviction (pursuant to a guilty plea) for devising a scheme to defraud the Oklahoma Department of Human Services. On the strength of that fraudulent resume, the plaintiff was hired as a clerk-typist. During her employment, she asserted that she had been harassed because of her race and her sex, and after her termination, filed suit on these claims. The court granted summary judgment in favor of the employer on the ground that it was undisputed that the employer relied upon plaintiff's misrepresentations in hiring her and that she would not have been hired if her background had been fully disclosed.[7]

On the other hand, in *Punahele v. United Airlines, Inc.*,[8] a trial court denied a summary judgment motion against a plaintiff who had been refused employment allegedly based upon his age. Defendant had argued that plaintiff had failed to disclose a felony conviction and his prior tardiness record on his job application, and that, had he done so, he would not have been hired in any event. The court found that the factual record before it in that particular case was not so clear-cut that it was beyond dispute that plaintiff would not have been hired had the true facts been known.

Courts have been more reluctant to grant summary judgment, however, when the alleged misrepresentations seem relatively minor and it is not undisputed that the employee would have been terminated had the employer known of them earlier. In *Cooper v. Rykoff-Sexton, Inc.*,[9] for example, the California Court of Appeal addressed the issue of "resume fraud," and the circumstances under which summary judgment might be appropriate based upon after-acquired evidence of employee misrepresentations. In *Cooper*, the plaintiff repaired dishwashers, and had worked for the defendant employer for about 10 years. After the plaintiff was terminated, he sued for wrongful termination and breach of contract. During discovery, the employer learned that the plaintiff had been fired from two jobs before coming to work for the employer. Relying on the plaintiff's long-term, satisfactory performance, and the fact that he had been fired without cause, the court reversed the grant of that summary judgment. Although the *Cooper* court declined "to adopt a blanket rule that material falsification of an employment application is a complete defense" in a wrongful discharge case,[10] it specifically referred to *Washington*, *Mathis* and *Churchman's v. Pinkerton's, Inc., supra*, citing them with approval, and stated that these decisions "probably reached the correct result on their facts."[11]

Comparison of the *Mathis* and *Washington* decisions with *Cooper* reveals the critical factual distinctions that resulted in opposite holdings. In both of the former cases, the plaintiffs lied about prior criminal convictions. In addition, in *Mathis*, the plaintiff failed to disclose prior employment with four different federal agencies and several other employers that had fired the plaintiff for cause, or allowed her to resign in lieu of termination, all within three years prior to her hire by the defendant. In both cases, the misrepresentations were indisputably material.[12] Further, both plaintiffs were relatively short-term employees, 10 months and 32 months, respectively, one was a problem employee,[13] and the employers had strong evidence of the propriety of termination, wholly apart from the "after-acquired evidence of fraud."

In *Cooper*, by contrast, the misrepresentations were relatively minor. The plaintiff failed to disclose that he had been fired on two prior occasions, one more than seven years before his hire by the defendant. Neither prior termination disqualified the plaintiff from employment by the defendant. Further, he had performed his job as a dishwasher satisfactorily and without any disciplinary problems for 10 years, and there was strong evidence that his termination was without cause.

Cooper thus does not in any sense preclude summary judgment in a proper case of after-acquired evidence. To the contrary, it affirmatively supports the proposition that summary judgment based upon after-acquired evidence ought to be granted in appropriate cases.

On January 23, 1995, the United States Supreme Court decided *McKennon v. Nashville Banner Publishing Co.*[14] The employee in *McKennon* had been employed for 30 years when she was discharged, her employer claimed, as part of a work force reduction plan. She alleged age discrimination and sued under the Age Discrimination in Employment Act of 1967 ("ADEA").[15] At her deposition, the employee admitted that she had copied and taken certain company records to which she had access as secretary to the comptroller. The District Court granted the employer's motion for summary judgment on the ground that the employee's misconduct, if known, would have been grounds for her termination and that neither backpay nor any other remedy was available under the ADEA. The Sixth Circuit affirmed.[16]

The Supreme Court granted *certiorari* and reversed. The Court

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determined not to seize upon the employee's misconduct as constituting unclean hands barring any relief, citing precedent that unclean hands is not a complete *in limine* bar to any relief where Congress has specifically authorized broad equitable relief to serve important national policies.[17] However, the Court went on as follows:

> That does not mean, however, the employee's own misconduct is irrelevant to all the remedies otherwise available under the statute. The statute controlling this case provides that 'the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation, judgments compelling employment, reinstatement or promotion, or enforcing the liability for [amounts owing to a person as a result of a violation of this chapter].' 29 U.S.C. § 626(b); see also § 216(b). In giving effect to the ADEA, we must recognize the duality between the legitimate interests of the employer and the important claims of the employee who invokes the national employment policy mandated by the Act. The employee's wrongdoing must be taken into account, we conclude, lest the employer's legitimate concerns be ignored. The ADEA, like Title VII, is not a general regulation of the workplace but a law which prohibits discrimination. The statute does not constrain employers from exercising significant other prerogatives and discretions in the course of the hiring, promoting, and discharging of their employees. See *Price Waterhouse v. Hopkins, supra,* at 239 ('Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice'). In determining appropriate remedial action, the employee's wrongdoing becomes relevant not to punish the employee, or out of concern 'for the relative moral worth of the parties,' *Perma Mufflers v. International Parts Corp., supra,* at 139, but to take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing.[18]

But precisely how are courts to consider and balance these matters? The Supreme Court directed that each case should be decided on its own facts:

> The proper boundaries of remedial relief in the general class of cases where, after termination, it is discovered that the employee has engaged in wrongdoing must be addressed by the judicial system in the ordinary course of further decisions, for the factual permutations and the equitable considerations they raise will vary from case to case.[19]

In *McKennon*, the Supreme Court found that only backpay was available to the employee, because once the employer had learned of the misconduct, a proper discharge would then have been in order.

> We do conclude that here, and as a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.
>
> The proper measure of backpay presents a more difficult problem. Resolution of this question must give proper recognition to the fact that an ADEA violation has occurred which must be deterred and compensated without undue infringement upon the employer's rights and prerogatives. The object of compensation is to restore the employee to the position he or she would have been in absent the discrimination, *Franks v. Bowman Transportation Co.*, 424 U.S. at 764, but that principle is difficult to apply with precision where there is after-acquired evidence of wrongdoing that would have led to termination on legitimate grounds had the employer known about it. Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit. The beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered. 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.[21]

The Supreme Court closed with a parting shot at both sides, stating that the employer must prove that, if the wrongful conduct had been discovered, the employee would have been terminated on those grounds alone, and that the court was confident that sanctions and fee awards were sufficient to curb discovery abuses by employers.[21]

The Supreme Court did **not** take issue with the District Court's attempt to resolve these issues in a motion for summary judgment. Rather, it validated that procedure *sub silencio* by finding that backpay, and only backpay, was available to petitioner as a matter of law.

After *McKennon*, The California Court of Appeal, Second District, Division One, decided *Camp v. Jeffer, Mangels, Butler & Marmaro.*[22] *Camp* presented facts similar to those recited in hypothetical number two of this article. Relying on *Summers*, the Court of Appeal affirmed summary judgment for the employer, concluding that the employee's felony convictions disqualified them from employment by virtue of the requirements of the Resolution Trust Corporation and 12 C.F.R. 1606.4(a)(12)(i). However, the Court did not articulate the parameters of the after-acquired evidence doctrine, or advance the analysis of the defense beyond the rationale of *Summers*.

Proposed Factors For Resolving After-Acquired Evidence Cases

The after-acquired evidence doctrine is, at bottom, an attempt to strike a balance. On one side are the public policies or constitutional rights, such as freedom from age or race discrimination, or the right to practice legitimate whistle blowing or political activities, which the employee seeks to vindicate by a lawsuit. On the other side are the employer's legitimate business interests in avoiding the internal damage or liability to third parties which may arise from resume fraud by job applicants or wrongful conduct by employees.

The large number of after-acquired evidence cases decided on a motion for summary judgment, together with the paucity of cases being reversed and sent back for trial, makes it clear that the court rather than the jury should strike this balance, unless there is a genuine factual dispute as to what happened. Although no court has expressly articulated the factors that should be considered in striking this balance, an analysis of the decided cases suggests that the following factors are important:

The Employee's Length Of Service.

In *McKennon*, the petitioner who was deemed entitled to seek backpay had been employed by respondent for thirty years. So too, in *Cooper*, a 10 year history of employment was deemed to be a major factor in defeating an employer's claim that minor misrepresentations on an employment application barred all relief as a matter of

law. In contrast, the plaintiff in *Mathis* was employed for only fourteen months and was on maternity leave for five and one-half of them. And in *Washington* and *Churchman's*, the employees had worked for less than a year.

But not even many years of employment will be sufficient to avoid summary judgment if the alleged misrepresentation or misconduct is particularly egregious, as in *Johnson* (eight year employee falsified education and experience) and *O'Driscoll* (six and one-half year employee stole his personnel file), for example.

The Constitutional Right Or Public Policy The Employee Seeks To Vindicate.

McKennon strongly suggests that matters which arise from the constitution and/or are the subject of special protective legislation such as race or age discrimination are to be given special consideration. However, even claims of insidious discrimination are subject to summary judgment in proper cases, as in *Summers*, *Bonger* and *Washington*.

The Nature Of The Employee's Fraud Or Wrongdoing.

A court is more likely to grant summary judgment when the misrepresentation concerns the employee's criminal record,[23] or education and work experience.[24] Courts have been less likely to take the case from the jury, however, when the alleged misrepresentation is merely a "little white lie" about the employee's work history.[25]

The Degree Of Risk Or Harm To Which The Legitimate Interests Of The Employer Are Exposed.

Faking professional credentials or disclaiming factors which threaten the business of the employer are given heavy weight, such as in *Summers* (one hundred fifty instances of falsification of insurance records) and *Washington* (jailer concealed criminal record).

The Diligence Of The Employer In Protecting Its Interests.

A "don't ask, don't tell" policy might foreclose the employer from seizing on a concealed fact as a bar to all claims by an employee as a matter of law.[26] On the other hand, if the employer sought the hidden information from the employee, or guidelines require termination in the event of the relevant conduct, a court would be more inclined to grant summary judgment.[27]

Application Of Proposed Factors

Before these factors can be weighed and a decision reached, a more fundamental question must be answered. Specifically, what exactly is the after-acquired evidence doctrine? Is it a subset of the doctrine of unclean hands, as suggested in *McKennon*? If so, does it apply where only damages are sought, not equitable relief? Is it a way of proving that the plaintiff suffered no cognizable injury proximately caused by the defendant's conduct, as suggested in numerous cases? If so, is it a defense to all relief sought in civil rights claims? Is it a defense of rescission due to fraud in the inducement? If so, does it apply to tort claims?

The relative importance of any one factor may depend on how the after-acquired evidence doctrine is being used. If unclean hands is alleged, then the nature of the wrongdoing by plaintiff could be very significant, as would be the risk faced by, or harm suffered by, the defendant. If causation is the issue, then the length and nature of employment, and the employer's efforts to protect itself, as shown by written policies and guidelines, might be key inquiries. If rescission is at issue, then all factors which bear on the materiality of the concealment or misrepresentation become paramount.

All of the foregoing questions are more or less unanswered in California. Given the number of labor cases being filed on a daily basis in California, however, we can expect substantial direction from reviewing courts in the near future. Returning to the hypotheticals, the employer's motion for summary judgment should be denied in Case No. 1 based upon *Cooper* and *McKennon* in view of the employee's length of service and clean record, as well as the lack of gravity in the misrepresentations contrasted with the serious allegations of age discrimination. On the other hand, the employer's motion for summary judgment should be granted in Case No. 2 based upon *Summers*, *Camp*, *Mathis*, *Washington*, *Bonger* and *Churchman's* in view of the materiality of the misrepresentations, the short duration of employment, the risk of harm to the employer, and the lack of serious allegations by the employee implicating important social issues.

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1 864 F.2d 700 (10th Cir. 1988).
2 Summers was a claims investigator for State Farm who had falsified certain medical records, forged an insured's signature on a "loss of wages" claim, and falsified over 150 other records.
3 864 F.2d at 708.
4 Washington v. Lake County, Ill., 969 F.2d 250 (7th Cir. 1992) (discussed below); Johnson v. Honeywell Informations Systems, Inc., 955 F.2d 409 (6th Cir. 1992) (jury verdict on breach of contract claim reversed and judgment entered for employer where plaintiff had misrepresented that she had a college degree); O'Day v. McDonnell Douglas Helicopter Co., 784 F.Supp. 1466 (D. Ariz. 1992) (summary judgment granted on plaintiff's contract and employment discrimination claims where employer learned during discovery that plaintiff had removed confidential records from employer's files); Bonger v. American Water Works, 789 F.Supp. 1102, 1106 (D. Colo. 1992) (employer established that plaintiff would not have been hired if it had known that she did not have a college degree - summary judgment granted on Title VII claims); Churchman's v. Pinkerton's, Inc., 756 F.Supp. 515 (D. Kan. 1991) (plaintiff failed to disclose prior terminations for cause, and prior drug abuse - summary judgment for employer granted based upon Summers); O'Driscoll v. Hercules, Inc., 745 F.Supp. 656 (D. Utah 1990) (summary judgment granted where plaintiff had misrepresented her age on pre-employment documents); Mathis v. Boeing Military Airplane, Inc., 719 F.Supp. 991 (D. Kan. 1989) (discussed below).
5 Washington v. Lake County, Ill., 969 F.2d at 251; Mathis v. Boeing Military Airplane, Inc., 719 F.Supp. 992-993.
6 These contentions were based solely upon affidavits submitted to the court. There was no evidence of any written policy or procedure concerning employee misrepresentation of prior convictions or of anything else.
7 Mathis v. Boeing Military Airplane, Inc., 719 F.Supp. 991, 994-995 (D.Kan. 1989).
8 756 F.Supp. 487 (D. Colo. 1991).
9 24 Cal.App.4th 614, 29 Cal.Rptr.2d 642 (1994).
10 24 Cal.App.4th at 617.
11 id. at 616.
12 In Washington, a criminal record was plainly material to employment as a jailer. In Mathis, the record established that the plaintiff would not have been hired had the defendant known of her felony conviction, and history of termination for cause.
13 In Washington, the plaintiff had been given 12 disciplinary notices of violation of jail policy.
14 513 U.S. ____, 115 S.Ct. ____, 130 L Ed2d 852 (1995).
15 29 U.S.C. § 621, et seq. (1988 ed. and Supp. V).
16 9 F.3d 539 (1993).
17 130 L Ed2d at 862-863.
18 130 L Ed2d at 863.
19 id.
20 130 L Ed2d at 863-864.
21 130 L Ed2d at 864.
22 35 Cal.App.4th 620, modified at 36 Cal.App.4th 454 (1995), review denied (August 17, 1995).
23 *See*, e.g., Washington v. Lake County, Ill., 969 F.2d 250, 251-252 (7th Cir. 1992); Mathis v. Boeing Military Airplane, Inc., 719 F.Supp. 991, 992-993 (D. Kan. 1989).
24 *See*, e.g., Bonger v. American Water Works, 789 F.Supp. 1102, 1104, 1106 (D. Colo. 1992) (misrepresentation of college degree) and Johnson v. Honeywell Informations Systems, Inc., 955 F.2d 409, 411-412 (6th Cir. 1992) (misrepresentation of education and experience).
25 *See*, e.g., Cooper v. Rykoff-Sexton, Inc., 24Cal.App.4th 614, 29 Cal.Reptr.2d 642 (1994).
26 *See* Punahele v. United Airlines, Inc., 756 F.Supp. 487 (D. Colo. 1991).
27 *See* Churchman's v. Pinkerton's, Inc., 756 F.Supp. 515 (D. Kan. 1991).