No. 11-5017

Oral Argument Has Not Been Scheduled

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JEFFREY KAPCHE,

Plaintiff-Appellant/Cross-Appellee

v.

ERIC HOLDER,

Defendant-Appellee/Cross-Appellant

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT O COLUMBIA

_____

OPENING BRIEF FOR THE APPELLANT

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Certificate as to Parties, Rulings, and Related Cases:

(A) **Parties**

The appellant/cross-appellee is Jeffrey Kapche, who was the plaintiff in the District Court. The appellee/cross-appellant is Eric Holder, who was the defendant in the District Court.

(B) **Rulings Under Review**

At issue in this appeal are the District Court's June 1, 2010, judgment denying appellant equitable relief, Dkt. 135, for reasons in Dkt. 133, and the District Court's November 30, 2010 order denying appellant's Rule 59 motion to alter or amend judgment. Dkt. 141. Honorable James Robertson entered the first judgment and order. Honorable Reginald Walton entered the second order.

(C) **Related Cases**

This case has not previously been before this Court and counsel are aware of no currently pending related cases.

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GLOSSARY OF ABBREVIATIONS

EEOC	-	Equal Employment Opportunity Commission
FAA	-	Federal Aviation Administration
FBI	-	Federal Bureau of Investigation
Fed.R.App. Pro.	-	Federal Rules of Appellate Procedure
Fed.R.Civ.Pro.	-	Federal Rules of Civil Procedure
FRE	-	Federal Rules of Evidence

Statement of Jurisdiction

The district court had federal question jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 791, since this case addresses the FBI's failure to hire Kapche because of his disability.

This Court has jurisdiction under 28 U.S.C. § 1291 since the appeal comes from a final judgment in the district court entered on June 1, 2010, and a November 30, 2010, order denying appellant's motion to alter or amend that judgment. Dkt. 135; 141.[1]

This appeal was timely filed on January 20, 2011. Dkt. 144, Notice of Appeal. Fed. R. App. Pro. 4(a)(1).

This appeal is from a final judgment that disposes of all parties and issues in the case. Dkt. 135, Final Judgment. Dkt. 141, Order Denying Motion to Alter or Amend Judgment.

Request for Oral Argument

Kapche believes that oral argument is important because the district court's

[1] "Dkt. __" refers to items on the district court docket sheet. "Transcript ___" refers to the trial transcript. "Hearing Transcript" refers to the transcript of the district court hearing on equitable relief held on October 21, 2009. "Plaintiff's Ex.__" or "Defendant's Ex. __" refer to trial exhibits. "Hearing, Plaintiff's Ex. __" or "Hearing Defendant's Ex. __" refer to exhibits at the October 21, 2009 hearing on equitable relief.

decision to deny any and all equitable relief fundamentally changes the after-acquired evidence defense to allow an employer to cut off damages even if it cannot prove that the misconduct requires disqualification under its actual practices. Under the district court's construct, an employer that unlawfully discriminates can avoid equitable relief through conclusory assurances that "the same decision would have been justified . . . [and without] proving that the same decision would have been made." This is precisely what the Supreme Court warned against in *McKennon v. Nashville Banner Pub. Co.,* 513 U.S. 352, 363 (1995) (*quoting Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1995) (plurality opinion) (internal quotation marks and citations omitted)).

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Statement of the Issues

1. Was it error to deny Kapche equitable relief where the government failed to meet its burden to prove that it would have rejected Kapche based on evidence of its own actual employment practices?

2. Was it error to allow the government to prevail on this matter of avoidance – the affirmative defense of after-acquired defense – that was never raised in the pleadings and identified for the first time in a motion for summary judgment?

3. Was it error to allow the government to prevail when it failed to timely disclose anyone with personal knowledge of the facts regarding the after-acquired evidence defense, and, over Kapche's objection, allowed an undisclosed witness to testify, and, further, based its decision on that testimony?

4. Was it error for the court to enter judgment on a defense raised after the discovery cut-off when it also, despite frequent requests, denied Kapche the right to depose the only person who would have personal knowledge of the employer's decision-making, assessment of this specific situation, and whether it was consistent with the employer's actual employment practices?

5. Did the district court err in refusing Kapche access to a key piece of evidence – the government's contemporaneous and exculpatory polygraph report that found no deception?

6. Did the district court err in relying on flawed and untimely evidence from the defense on the question of back pay while simultaneously, and over Kapche's objection, refusing Kapche's efforts to rebut that evidence?

Statutes or Regulations

This case was brought under the Rehabilitation Act of 1973, 29 U.S.C. §791 *et seq.,* to challenge the government's failure to hire Kapche because he has a disability.

Statement of the Facts

The evidence in this case was presented to and weighed by two decision-makers. A jury heard the evidence that the government's 2005 rejection of Kapche for a special agent's position violated federal law that prohibits discrimination against individuals with disabilities. After a five-day trial, the jury found the government had unlawfully discriminated against Kapche, and determined the amount of compensatory damages Kapche should receive.

The verdict was the first in the country to reject the FBI's blanket ban of those with diabetes managed by insulin injections. The FBI vigorously defended the ban, while at the same time arguing, as it will do in its cross appeal, that Kapche's Type 1 diabetes was no disability at all. On an exhaustive record, the jury disagreed with the FBI on both issues, finding that Kapche has a disability and that the ban was not supported by the business necessity defense, which the FBI pled and attempted to prove.[2] Kapche does not challenge the jury's findings or the court's acceptance of its verdict. Dkt. 101, Jury Verdict.

The ban, as the jury heard at the trial, was one derived by and known solely to the FBI's medical director, Dr. James Yoder. Although Dr. Yoder is not an expert

[2] Because Kapche does not appeal the jury's findings, he provides only a very cursory statement of the evidence presented at trial.

on diabetes or how to successfully manage that disability, he chose to overrule the decision of the medical doctor in the field who qualified Kapche for special agent duty. Yoder's decision was based, not on medical knowledge, but instead on unfounded prejudice about diabetes. Yoder admits his lack of appropriate training:

> Q. And in the FBI, the way it works, is that nonexperts in diabetes are overruling experts when comes to whether or not people will be declared fit or unfit for duty, right?
>
> A. That's correct.

Transcript p.130. While Yoder admitted that he had never seen anyone with better controlled diabetes than Kapche, Transcript p. 84, that fact was not relevant to his decision: he had a rule, an unwritten rule, that no one who manages diabetes with insulin injections – as Kapche does – could work as a special agent. Transcript pp.70-72, 77.

> Q. But even if a person is sort of a superman type, if they were using insulin injections, they could not qualify by you, right?
>
> A. That's correct.

Transcript p.93.

Yoder's rule, as he acknowledges, effectively precludes more than 90% of individuals with Type 1 diabetes from serving as FBI special agents -- simply because they use insulin injections. Transcript p.104, 108, 218. Yoder's rule is not written down, and was not known to even the FBI's head of Human Resources.

Transcript pp.71-72, 78. Nor was it ever made known to the physician in the field who screened Kapche and found him qualified – or to Kapche himself. Transcript p. 338. Nor had Yoder ever inquired of those with greater expertise if it was consistent with good medical practice to exclude all individuals from FBI special agent jobs simply because they were managed on injections. Transcript p.118. Kapche, on the other hand presented the jury with abundant expert testimony that such a ban made no sense. Transcript p.221-22; 674-75. The jury's verdict of disability discrimination is well-supported by the evidentiary record.

The district court accepted the verdict and, in subsequent proceedings, addressed the question of make whole equitable relief – what amount of money should Kapche be awarded in back pay, and whether he should be instated to the job he sought or be awarded some amount in front pay. It is this part of the proceeding that Kapche appeals because the district court erroneously denied him all equitable relief. Dkt. 133, Order pp. 6, 8.

In advance of the post-trial hearing on equitable relief, the government contended that Kapche was not entitled to any equitable relief after March 1, 2007, the date on which the government issued its second decision to deny him a special agent's job. It alleged that the defense of after-acquired evidence sanctioned this result. Dkt. 116, Defendant's Pretrial Memorandum Regarding Equitable Relief

pp.4-5.

The parties entered into a settlement agreement during the EEOC process. While the EEOC was investigating whether the government's rejection of Kapche in January 2005 violated federal law, the parties reached a tentative settlement. Hearing, Defendant's Ex. 30. The government agreed to reconsider Kapche's application for a position. And Kapche agreed that, if he were hired, he would dismiss the discrimination charge and receive a modest monetary recovery for lost pay and attorneys' fees. Hearing, Defendant's Ex. 30.

After that reconsideration, the FBI rejected Kapche a second time, claiming he had not been candid during his second personal security interview with agent Lucretia Robinson. Hearing, Defendant's Ex. 60.

The FBI Never Revealed Its Decision Maker. The decision to disqualify Kapche was made by someone who has not been heard from to this day – Tracy Johnson. Hearing Transcript pp. 144-45, 161. Johnson, in a document, recommended that Kapche be disqualified. Hearing, Defendant's Ex. 35. She is the only one who reviewed his file – including his polygraph examinations, his security interview, and his background investigations. Hearing Transcript pp. 166 , 152-153, 213-214, 224-225. She was the one charged with applying the FBI's policies on how to handle lack of candor cases. Hearing Transcript, p. 161, Defendant's Ex.

37.

Even though Johnson was the only witness who would know whether the FBI had a valid after-acquired evidence defense, the FBI never listed her in its discovery responses or disclosures, strenuously fought her deposition, and made sure she never appeared. Dkt. 117, Plaintiff's Motion to Exclude An Unpled Affirmative Defense, Ex. A; Dkt. 129 Response to Plaintiff's Motion for Discovery, Ex. E; Dkt. 121, Plaintiff's Reply to Defendant's Opposition to His Motion to Exclude An Unpled Affirmative Defense, Ex. A at Interrogatory 13; Dkt. 129 Response to Plaintiff's Motion for Discovery, pp. 7-8; Hearing Transcript p. 195. Johnson's name, however, was mentioned more than 50 times at the hearing. Without the testimony of this critical witness, the government could not prove what Johnson did, why she did it, or that her conclusion was in line with its past practices. In other words, it could not meet its burden of proving its after-acquired evidence defense.

The FBI's second security interview of Kapche. The government alleges Kapche was not candid in a personal security interview with special agent Lucretia Robinson. That interview occurred on November 22, 2006. Hearing Transcript pp. 20-21. Robinson asked Kapche a series of questions from a form and checked off boxes as they talked. Hearing Transcript p. 91.

The government argues that, during that interview, Kapche deliberately failed

to reveal that he had been disciplined by his employer. The argument is based on the face of the document itself – because she checked the word "no" beside the printed question at hand. Robinson did not afford Kapche the opportunity to insure she had checked the right boxes. Transcript pp. 92-93. She admits she never showed the document to Kapche. *Id.*

Thus, there is no direct evidence of any deliberate failure to provide negative information. Neither Robinson nor Kapche recalls this specific question or answer. Hearing Transcript pp. 22-23, 93, 103.

Kapche told other employers, and Robinson made mistakes. At the hearing, Kapche presented circumstantial evidence supporting his position that no deliberate deception occurred. Kapche testified that he would have said "yes" if he had been asked and points to the fact that he fully disclosed the discipline only a month earlier – while applying for a job with the Houston Police Department. Hearing Transcript pp. 42-43, Plaintiff's Ex. 2. There he explained at length that he had been disciplined for taking a gallon of gas without prior authorization at the time a huge hurricane was approaching Houston and the city was being evacuated.

On the other hand, Robinson said she considers herself thorough and thus believes she did ask the question about discipline and properly recorded the answer. Hearing Transcript pp. 73, 95. However, Robinson made other errors on the form –

unrelated to the issue of discipline. Hearing Transcript p. 99. The final question was: "Is there anything we haven't discussed that you feel may be important to the investigation?" Hearing, Defendant's Ex. 26 at FBI001237. She admitted leaving this answer completely blank. Hearing Transcript p. at 95-96.

Robinson admitted that the polygraph would test Kapche's candor. And subsequent events also undermine Robinson's assumptions. Robinson stressed to Kapche that the truthfulness of his responses to her would be tested in his polygraph examination. Hearing Transcript p. 45. She even met with the FBI's polygrapher to help him prepare questions for the examination, sharing information from the oral interview. Hearing Transcript p. 114-15.

Three weeks later, Kapche underwent, and passed, the FBI's polygraph examination. According to the FBI's polygraph examiner, there was no indication of any deception on Kapche's part during this detailed two-hour examination. Hearing Transcript pp. 45, 182-183. At that examination, the FBI specifically asked Kapche, "Have you deliberately withheld any important information from your application? (Answer – No)." Hearing, Plaintiff's Ex. 3. As addressed below, the district court refused Kapche access to the remaining questions and answers, including those that were specific as to Kapche's employment.

Meanwhile, as part of its supplemental background investigation, the FBI

obtained a copy of Kapche's personnel records from the Fort Bend County Sheriff's Department, which contained documents showing he had been disciplined by the department. Hearing Transcript pp. 139.This is the same discipline Kapche disclosed in applying to work for the Houston Police Department.

The agency then instructed Robinson to contact Kapche again. Robinson asked him about the report of no disciplinary action on the form. As Kapche explained, "my response to that was, well, if that was what was checked off, that would be incorrect." Hearing Transcript pp. 32, 47-48.

Robinson sent the information she had gathered to Washington. Hearing Transcript p. 103-04. She heard nothing further. No one asked her if Kapche appeared to be deliberately deceiving her at any time. If they had, she would have said no – just like the polygraph examiner. Hearing Transcript p. 98.

Standard of Review

The Court wrongly allowed the government to prevail on a defense that it had not pled pursuant to Rule 8(c), on which it had not provided discovery in compliance with Rule 26, and which it could not and did not prove.
Kapche challenged each of these decisions, as the court's opinion reveals. Dkt. 133 at 3-4. But the court did not apply the correct legal standard to any of them. It allowed the FBI to prevail even though the defense is not applicable where the

alleged misconduct arises as a direct result of discrimination. It allowed the FBI to prevail even though it had first raised the defense after discovery closed. It denied Kapche critical discovery even though the government had failed to comply with its Rule 26 obligations. It allowed an undisclosed witness to testify in the case even though the failure to disclose her was neither harmless or justified. And it shifted the evidentiary burden on this affirmative defense from the government to Kapche.

These are legal errors that are properly considered under a *de novo* standard of review. As this Court has previously acknowledged, when a legal error is involved '[l]ittle turns ... on whether we label review of this particular question abuse of discretion or *de novo,*' for '[a] district court by definition abuses its discretion when it makes an error of law.' " *Chappell-Johnson v. Powell,* 440 F.3d 484, 487 (D.C.Cir.2006) (*quoting Koon v. United States,* 518 U.S. 81, 100 (1996)).

And while the district court's fact-findings are generally set aside only if clearly erroneous, Fed.R.Civ.Pro 52(a), the findings in this case certainly qualify. Further,"insofar as that conclusion derived from the court's application of an improper standard to the facts, it may be corrected as a matter of law." *U.S. v. General Motors Corp.*, 561 F.2d 923, 932-933 (D.C. Cir. 1977). Here the court was under the misapprehension that the after-acquired evidence defense was Kapche's to disprove – rather than the government's to prove. Dkt. 133 at 4. That

misapprehension impacted the court's factual findings to the point that it did not make the required findings on the ultimate issues – whether the FBI's decision about Kapche was in line with its past practices and whether Kapche committed deliberate misconduct in the first place.

Summary of Argument

This appeal arises from a combination of errors that led the district court to deny Kapche all equitable relief – despite the jury's verdict that the government violated the law by refusing to hire Kapche to be an FBI special agent. The most significant error is the conclusion itself – because it is not supported by the evidence; the government did not meet its burden of proof. The court used the wrong legal standard on the after-acquired evidence defense, and placed the burden of that defense on Kapche, instead of on the government, where it belonged.

Underlying that ruling are a series of erroneous decisions pertaining to the evidentiary record: (1) the court upheld the government's efforts to unilaterally pick and choose the parameters of the evidentiary record in the equitable relief phase of the case; (2) it sanctioned the government's failure to make mandatory disclosures about key witnesses and documents; and (3) it denied Kapche's efforts to obtain significant, relevant evidence through discovery. These rulings were accompanied by the erroneous conclusion that the government had sufficiently raised the after-

acquired evidence affirmative defense in its pleadings when, in fact, the defense was never once raised until the government filed a motion for summary judgment.

Argument and Authorities

A. The Legal Issues – Equitable Relief and After-Acquired Evidence

This appeal contests whether the FBI can, under applicable law, avoid all equitable relief to Kapche, after he prevailed on his disability discrimination claim. Once an employee prevails on the underlying claim, the rule provides, he is entitled to "the most complete relief possible." *Lander v. Lujan*, 888 F.2d 153, 156 (D.C. Cir. 1989) (*quoting Franks v. Bowman Transp. Co.,* 424 U.S. 747, 764 (1976)). The goal of the judiciary is to place the individual "in the situation he would have occupied if the wrong had not been committed." *Id*. (*quoting Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418-19 (1975) (*quoting Wicker v. Hoppock,* 73 U.S. (6 Wall.) 94, 99 (1867))). The judgment in this case falls well below that mark in achieving the desired goal.

Generally speaking, equitable relief consists of back pay, which compensates the plaintiff for lost wages and benefits from the time of the incident to the date of judgment, plus an order that he either be given the job he was unlawfully denied or be awarded front pay. Such broad relief serves two purposes: it compensates the victim for the employer's unlawful behavior and it provides the "spur or catalyst" to deter like behavior in the future. *Albemarle*, 422 U.S. at 417-18 (*quoting Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)).

There are exceptions. When a litigant has engaged in grave misconduct unknown to the employer at the time, but so grave that, in and of itself, it would have led the defendant to end the plaintiff's employment (or in this case fail to hire him), equitable relief may be cut off. This is referred to as the after-acquired evidence defense and it is the defense the FBI belatedly raised in this case.

B. The FBI's Burden of Proof on the After Acquired Evidence Defense

The significant Supreme Court opinion about the after-acquired evidence defense is *McKennon v. Nashville Banner Pub. Co.,* 513 U.S. 352, 360 (1995), an age discrimination case. There, the after-acquired evidence issue arose when the employee revealed in her deposition that, in the year leading up to her termination, she made copies of confidential documents about the company's financial operations and took them home without authorization. After that deposition, the

employer fired her a second time, citing her removal of those papers without authorization. *Id*. at 355.

In *McKennon,* the Supreme Court rejected the argument that after-acquired evidence operates to avoid liability altogether – if the employer violates an anti-discrimination law, it must be held accountable. On the other hand, an employer is not deprived of lawful prerogatives at hand in the usual course of business simply because it violated the law on another occasion. Balancing those two equities, the Court ruled that after-acquired evidence can operate to limit the employee's recovery of damages such that they will end on the date the "new" wrongful conduct was discovered. *Id*. at 362-63.

Recognizing the ease with which some employers could engage in extensive discovery and, as a result, find other justifications for having fired the employee against whom it discriminated, the Court was careful to note that its ruling did not open the door quite so wide. It was specific that not just any evidence of other wrongdoing would suffice. To succeed on this defense, an employer must show, not merely that it *could have* terminated the individual on this new ground, but instead that it *actually would have* done so. And self-serving testimony is insufficient to sustain this burden of proof.

In other words, a party must prove, not simply what it has a right to do, but what it actually *does in its day to day practice*. "The court must look to the employer's actual employment practices and not merely the standards articulated in its employment manuals, for things are often observed in the breach but not in the keeping." *Sellers v. Mineta,* 358 F.3d 1058, 1064 (8th Cir. 2004). *See also Wilken v. Cascadia Behavioral Healthcare, Inc.*, 2008 WL 44648 at *10 (D. Or. 2008) (employer failed to offer any evidence that its practice was to terminate employees under similar circumstances; hortatory language in manual that termination "may" result from similar conduct insufficient as a matter of law).

After *McKennon*, the EEOC promulgated specific guidelines to assist investigators in cases where the after-acquired evidence defense is raised. This guidance also directs investigators to look at the employer's actual employment practices – specifically advising them to look at "incidents of like misconduct" and "analyze whether other applicants were rejected ... for similar behavior." [3]

This Circuit likewise requires that, in order to prevail on this defense, a defendant must present evidence of its actual practices. After a finding that an employee was unlawfully fired for his union activities, the employer in *Frazier*

[3] http://www.eeoc.gov/policy/docs/mckennon.html

Industrial Co., Inc. v. NLRB, 213 F.3d 750 (D.C. Cir. 2000), argued that he was not entitled to back pay or reinstatement because, it claimed, it would have terminated him anyway as soon as it discovered (during the employee's unemployment compensation proceedings) that he had falsified his job application. *Id*. at 760. Falsifying a job application can indeed be misconduct and, as the employer itself warned applicants, "false information, omissions, or misrepresentations *may* result in a discharge of the employee." *Id*. (Emphasis in original.) Nonetheless, the company failed to meet its burden of proof – it showed only that it might have fired the employee upon the discovery of the omission. It did not adduce evidence that it had an actual practice of routinely firing employees found with such misinformation. *Id*. at 761.

The *Frazier* court stressed the employer had the "burden of showing that it *would have* discharged the employee because of the misconduct, not simply that it *could have* done so. " 213 F.3d at 760. (emphasis in original)). Without any evidence of its own practices, the employer could not meet this burden. And the Court explained that *McKennon* had clearly stated why this evidence was required. It referred back to *McKennon's* admonition that "[t]he concern that employers might as a routine matter undertake extensive discovery into an employee's

background or performance on the job to resist claims is not an insubstantial one." 513 U.S. at 363.

The nature of the evidence required to prove that after-acquired evidence bars equitable relief was also made clear in *Sellers*. There the Court of Appeals remanded the case for the district court to consider whether the after-acquired evidence defense would bar reinstatement and pointed out the critical distinction that many employers miss: the fact that "the FAA chose not to offer Sellers reinstatement does not equate with finding that Sellers' conduct alone made her ineligible for reinstatement." *Id*.

In *Sellers,* the government claimed that the plaintiff was not entitled to reinstatement because, at a subsequent banking job, she had processed a dummy loan application to find out the credit history of her husband's ex-wife. Again, the misconduct sounds disqualifying. But, as the Supreme Court said in *White v. Burlington Northern,* 548 U.S. 53 (2006) "context matters." 548 U.S. at 69. And when the government's actual practices were revealed so as to put the misconduct in context, the court learned that the FAA had reinstated individuals charged with or convicted of criminal sexual misconduct with a child, child pornography, harassment of jurors/witnesses, substance abuse, and bribery. *See Sellers v. Peters,* 2007 WL 390771 at * 5 (E.D. Mo. 2007). The court thus rejected the after-acquired

evidence defense because the employer could not meet its burden of proof in light of its actual employment practices.

C. The Court Wrongly Ruled for the Government When it Failed to Meet its Burden of Proof

As the authorities cited above reveal, the FBI had the burden of proving that its decision to disqualify Kapche was in line with its practices in other cases. The FBI did not meet this burden. It offered no evidence that, when it had encountered inconsistencies between an applicant's oral statement and documents from that individual's background, and one employee formed an opinion that there was a lack of candor on the applicant's part, those individuals were routinely rejected.

Still, even though the government presented no such proof, the court denied Kapche all equitable relief. This was clear error.

As revealed at the beginning of the hearing on equitable relief, the district court was not relying on the well-established law that places the burden of proof on the employer – saying instead that the burden of showing that the government was not entitled to that defense fell on Kapche:

> I think my role is to decide whether they made a good faith decision, or whether it was in some sense a retaliatory decision. But even if the FBI got it wrong, I think the McKesson (sic) case would support the after-acquired evidence defense.

Hearing Transcript p. 8.

Kapche's attempts to dissuade the district court from that error were several, but unsuccessful. In its opinion, the court acknowledges Kapche's argument – "that the FBI must show that it was its actual practice – not just its stated policy – to refuse Special Agent employment to a person who conducted himself as Kapche did." Dkt. 133, Order p. 4. Rejecting the significant distinction in what party bears the burden of proof in this inquiry, the court wrongly focused on what Kapche did not prove, saying,

> No evidence was adduced, either at the trial or at the evidentiary hearing on equitable relief, that supported plaintiff's suggestion that the FBI applied its "lack of candor" policy arbitrarily, or discriminatorily.

Id. The court both misconstrued the government's burden of proof under *McKennon* and, by so doing, erroneously did not hold the government to the proper standard – to the need for evidence from the FBI showing that it was the FBI's actual practice to refuse employment to an applicant who conducted himself as Kapche did.

And, there is no such evidence in the record. The FBI did not present any evidence whatsoever about its actual practices – the practices followed on the ground, or about what happens to other applicants who are determined to have shown a lack of candor in the application process. On no occasion did the FBI ever present any evidence about any specific occasion on which it outright rejected a

candidate as it did Kapche. Dkt. 116-2, Defendant's Proposed Findings of Fact and Conclusions of Law Regarding Equitable Relief; Dkt. 125, Defendant's Proposed Findings of Fact and Conclusions of Law Regarding Equitable Relief.

Even though its own employee testified that a lack of candor was not in-and-of-itself an automatic disqualifying factor, Hearing Transcript p. 162, 169-170, that argument is what the government relied upon in attempting (and failing) to prove its entitlement to the after-acquired evidence defense.

D. The FBI's Actual Practices Contradict The Court's Decision.

Evidence undermining the government's reliance on the "lack of candor" argument was presented by Bonnie Adams, who was chief of the unit that determines the suitability of applicants. Adams testified that, when lack of candor is at issue, an applicant is denied a job *only* when there is a pattern of such behavior. Hearing Transcript p. 122. The rejection is not, in other words, based on just one incorrect answer – deliberate or not. Instead, the FBI's actual practice is to assess an applicant based on the "whole person" concept:

> Q. Is that true, what you said about the evaluation, is supposed to be made on the whole person; based not on one or two incidents, but based upon a pattern over a course of years?
>
> A. Yes, the FBI does utilize a whole person adjudicative process.

Id. p.162. Adams further testified that the agency needs *unequivocal* proof of a

deliberate lack of candor because only a "proven lack of candor" is enough. *Id*. pp. 132, 169.

1. The FBI Has a Rigorous Suitability Process, but No Proof That it Was Followed Here

Although they were not followed in Kapche's case, the FBI has very specific rules about how to evaluate a potential lack of candor issue, which are set forth in the FBI's published Suitability Guidelines. Those rules make clear – just as Adams did – that lack of candor is not an automatic disqualifier. Hearing, Defendant's Ex. 37 at FBI 3066. Some issues "absent mitigating circumstances, *may* be disqualifying." (emphasis by FBI). Yet others are "issues which would *not* be disqualifying." (emphasis by FBI). "[U]nintentional" omissions are not disqualifying, while deliberate ones may be, but are not always, disqualifying. There is no criteria for judging when a "deliberate" omission is disqualifying and when it is not. *Id.*

That determination is, according to the Guidelines, left to the adjudicator, who was Tracy Johnson here. Hearing Transcript p. 161. In reaching a decision, the adjudicator is ordered to take "into consideration *all* relevant factors and *prior experience in similar cases*. *Id*. (emphasis supplied). The FBI's policies explicitly require "continued dependence on the *adjudicator's sound judgment, mature thinking and careful analysis*." *Id.* (emphasis supplied); Hearing, Defendant's Ex.

37 at FBI 3065.

Johnson can thus safely be presumed to be the one individual at the FBI would could present testimony, based on personal knowledge, as to whether and, if so, how, she went about applying the Suitability Guidelines – and, if so, why she decided that Kapche should be disqualified.

But, the FBI never identified Johnson as a person with knowledge of relevant facts; Dkt. 117, Plaintiff's Motion to Exclude An Unpled Affirmative Defense, Ex. A and Dkt. 129 Response to Plaintiff's Motion for Discovery, Ex. E. Nor did it provide her identity in response to discovery requests. Dkt. 121, Plaintiff's Reply to Defendant's Opposition to His Motion to Exclude An Unpled Affirmative Defense, Ex. A at Interrogatory 13. And, when Kapche attempted to take her deposition, the government argued vociferously against Kapche's rights under the Rules, Dkt. 129, Response to Plaintiff's Motion for Discovery, pp. 7-8, and the district court inexplicably, and erroneously, sided with the government. Dkt. 134, Order. Nor did the FBI present Johnson to testify at the evidentiary hearing on the question of equitable relief. Hearing Transcript p. 195.

All that is known about what Johnson allegedly did or thought comes from a memorandum the court admitted into evidence under FRE 803(6). Hearing, Defendant's Ex. 35. This document purports to state her "synopsis of unfavorable information" about Kapche, but contains no word about whether Johnson applied the suitability guidelines to her evaluation of Kapche; it says nothing about how she determined Kapche's lack of candor was deliberate despite the contrary result from the polygraph examination; it says nothing about the errors in Robinson's report. And it says nothing about how she analyzed Kapche's information vis-a-vis that from other applicants in which lack of candor was the stated concern.

Without Johnson, the FBI had no witness, and no document, that proves that its decision to disqualify Kapche was in line with its practices in other cases.

2. Kapche Himself Provided Evidence that Lack of Candor is Not an Automatic Disqualifier.

As the FBI's witnesses admitted, the FBI does not employ a one-size-fits-all approach to assessing an applicant's lack of candor. Hearing Transcript pp. 132, 162, 169.

In addition to pointing out that the FBI did not present the necessary evidence to establish this defense, Kapche presented the Court with case studies showing that the FBI offered jobs to applicants with histories of lying, stealing, and receiving workplace discipline. Dkt. 127, Plaintiff's Post-Hearing Brief and Motion for

Further Discovery; Ex. D, E. Those records show that, contrary to its assessment of Kapche, the FBI has ignored much more serious forms of misconduct for some applicants and has given the benefit of the doubt to people whose written records show repeated misrepresentations. Ex. D, p. 7; Ex. E, p. 50.

Specific examples, taken from the case of *Jones v. Ashcroft,* show this to be true.[4] The FBI hired one applicant despite the fact that he was denied a job by the United States Capitol Police because he had "falsified his application" and omitted the fact that he "had been arrested for the sale of illegal drugs." Dkt. 127, Plaintiff's Post-Hearing Brief and Motion for Further Discovery, Ex. D, p. 15. The applicant had also been rejected by the Montgomery County Police Department for "an alleged pattern of recurring and significant thefts revealed during his background investigation." *Id.* at 14. Rather than admit the real reason for that rejection, the applicant falsely told the FBI that he was not selected due to the large number of applicants and that he had lost the rejection letter. *Id.* at 25. The FBI also had evidence that the Secret Service rejected this applicant for failing a polygraph examination. *Id.* at 5. Further, persons interviewed by the FBI recommended that this applicant not be hired. *Id.* at 14, 23-24. One stated that he had a "history of theft

[4] These FBI documents are a part of the record in *Jones v. Ashcroft*, No. 04-941 in the U.S. District Court for the District of Columbia, Dkt. 35-5.

and lack of integrity." *Id.* at 23. Despite this evidence – which was from multiple sources, the FBI hired this man as a special agent. *Id.* at 7.

The FBI hired another applicant after learning that he had lied to the FBI about whether he had ever had psychological counseling. Dkt. 127, Plaintiff's Post-Hearing Brief and Motion for Further Discovery, Ex. E[5] at 19-20. This applicant, in fact, had been sent for a psychological evaluation by his own employer and his psychological profile had been found "to be a predictor of future disciplinary action in law enforcement officers." *Id.* at 50. The applicant also failed to disclose to the FBI that he had received counseling after his wife discovered an explicit letter he wrote to another woman suggesting an affair. *Id.* at 26. Further, the applicant failed to admit to the FBI that four citizen complaints had been lodged against him, including a complaint of excessive force. *Id*. About those complaints, the background investigator stated, "Complaints should have been recalled [during PSI] as all four complaints have been in the past six years, and the types of complaints are all serious." *Id.* The background investigation further revealed the applicant had deliberately looked the other way and released a law enforcement officer who was suspected of driving under the influence. *Id.* at 11. At the end of

[5] These FBI documents are a part of the record in *Jones v. Ashcroft*, No. 04-941, Dkt. 35-9.

the agency's investigation, the initial recommendation was to discontinue the applicant. *Id.* at 20. Instead, the FBI hired him. *Id*. at 50.

The district court did not mention any of this evidence in its opinion. While the details of how an employer actually handled (as opposed to could have handled) other, similar problems are pivotal in assessing an employer's entitlement to the defense of after-acquired evidence, the court failed to require it of the FBI. Instead, it erroneously relied upon generalities and assurances from individuals without personal knowledge of whether Kapche's treatment was in line with how the agency treated others. The acceptance of such hollow evidence ignores the Supreme Court's explicit admonition in *McKennon*.

The court misstated the evidence when it stated that there were two witnesses who testified that "applicants who demonstrate a lack of candor are unsuitable for employment under the guidelines." Dkt. 133, Order p. 6.

That stated conclusion does not comport with the record. Adams, in fact, testified that more than one incident of a lack of candor was required – because the FBI's policies require a pattern of deliberate lack of candor for disqualification. Evidence from previous decisions to hire individuals with highly questionable backgrounds is also at odds with the court's conclusion. And, Brian Chehock's facially unequivocal testimony directly conflicts with the Suitability Guidelines – guidelines he admits

he had no experience with. Hearing Transcript pp. 256- 257.

As in the *Sellers* case, it is easy to say a woman who wrongly dummied up a loan application is ineligible for the job, but when child pornographers are given a second chance, the woman's misconduct looks petty by comparison. And where the FBI has admitted applicants who lied about serious matters – such as being denied employment because of repeated and significant thefts – the accusations against Kapche – which were fully cleared by a polygraph – cannot reasonably be considered as falling within the FBI's own standards for disqualification, much less the rigorous standards of the after-acquired evidence defense.

Here, the FBI did not show a single other instance in which an applicant was rejected on grounds similar to, or even dissimilar from, Kapche. Its witnesses – all admittedly without knowledge of what Johnson reviewed, how she reconciled the polygraph with the form, and why she recommended disqualification – simply parroted the statement that lack of candor is disqualifying.

3. Hidden Evidence – The FBI Hid the Database That Showed its Actual Practices.

The district court also disregarded the fact that the FBI had easy access to evidence that would be useful in assessing whether it followed its own standard practices when it rejected Kapche's second application. According to Magargle, the FBI maintains a database on the applicants it rejects and the reasons for those

rejections. Hearing Transcript p. 230. Yet, even after acknowledging this information was available, the FBI refused to produce it at the hearing. It deliberately chose to withhold the very type of evidence that would have proved – or negated – its entitlement to the after-acquired evidence defense. A failure to produce evidence that readily exists, and would be of great consequence in deciding the critical question at hand, is a strong indicator that the document would not serve the FBI's interests in this case. *See International Union, UAW v. NLRB,* 459 F.2d 1329, 1336 (D.C.Cir.1972) ("when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him").

The court failed to note the existence of this evidence withheld by the FBI, failed to address the significance that evidence would have had to the question at issue, and did not explain why it did not make any adverse inference about the FBI's claims given its failure to produce the database.

E. The Court Allowed the FBI to Prevail Even though It had not Pled this Affirmative Defense.

The FBI did not mention the after-acquired evidence defense until its summary judgment motion – long after discovery had closed. Dkt. 37, Defendant's Motion for Summary Judgment p. 55. In his response to that motion, Kapche noted that the defense was never pled. Dkt. 49, Plaintiff's Memo in Opposition to

Summary Judgment p. 44. And before the hearing on equitable relief, Kapche asked the court to either strike the defense because it was not pled. Dkt. 117, Plaintiff's Motion to Exclude An Unpled Affirmative Defense. The court disagreed, ruling that the FBI's amended answer "sufficiently alleged the defense." Dkt. 133 Order p. 3.

This court's ruling in this regard is also clearly erroneous. The government's boilerplate language[6] cannot fairly be read as providing notice of the after-acquired evidence defense. First, Kapche brought this lawsuit to challenge his 2005 rejection, so a statement that he would not have been hired in 2005 for other reasons in no way explains the government's decision to deny him the job in 2007. Second, the government's language made no mention of after-acquired evidence, of any lack of candor problem or of a later determination at all. In other words, it gave Kapche no fair notice.

[6] The defense pled was the assertion that "Plaintiff was not appointed as a Special Agent for legitimate non-discriminatory reasons, and would not have been appointed as a Special Agent even in the absence of his diagnosis and treatment for Type 1 diabetes." (Dkt. 23, Amended Answer p. 2).

The government's failure to plead the defense thus violates Rule 8(c)'s requirement that a party must "affirmatively state any avoidance or affirmative defense..." This Circuit recognizes that pleading is not a meaningless formulaic requirement, but one that is fundamental to each party's right to a level playing field in litigation. As this Court observed in *Harris v. Secretary, U.S. Dep't of Veterans Affairs,* 126 F.3d 339, 343 (D.C. Cir.1997), where – as here – a party first mentioned its affirmative defense in a summary judgment motion:

> A party must make strategic decisions about how to proceed, and can plot its course adequately only if it can anticipate which issues will dispose of the case. Failure to raise an affirmative defense in pleadings deprives the opposing party of precisely the notice that would enable it to dispute the crucial issues of the case on equal terms.

126 F.3d at 343. In *Harris,* the Court specifically noted the reality that "mounting a proper defense will necessitate further discovery..." The court's failure to follow law that is well-settled in this Circuit constitutes yet another reversible error.

F. The Court Allowed the FBI to Benefit from Violating the Discovery Rules.

In addition to ruling that the defense had been properly pled, the court stated that "plaintiff has not asserted and cannot assert that he was surprised by the after-acquired evidence defense." It then stated that the defense was "the subject of active pre-trial discovery." Dkt. 133, Order p. 3. These two findings are also clearly erroneous.

As to the question of surprise, Kapche admits that, months after discovery had closed, the FBI put Adams' and Magargle's names on its trial witness list. But the government did not advise him of its intentions at the proper time – when he would have had the right to conduct additional discovery.

And, while the court said that this defense was the subject of active pre-trial discovery, the truth is that Kapche's discovery efforts were thwarted by the FBI. Although not mentioned by the court, Kapche made an effort to ensure that he would not face this situation where the FBI hid critical witnesses and denied him needed discovery. He wanted to ensure a level playing field so, in his first set of discovery requests, he asked the FBI to name all persons with knowledge of relevant facts and to explain their knowledge. Dkt. 121, Plaintiff's Reply to Defendant's Opposition to His Motion to Exclude An Unpled Affirmative Defense, Ex. A at Interrogatory 13. Despite this direct request for information, the FBI never named either Tracy Johnson or Sharon Magargle – even though no one else was involved in Kapche's disqualification, according to the government.[7] Neither did it list them in the disclosures that it amended on multiple occasions to add people.

[7] And it only mentioned Adams belatedly, after kapche served a 30(b)(6) deposition notice about a variety of issues, including the FBI's statement in interrogatory responses that he had engaged in lack on candor. The FBI designated Bonnie Adams as a 30(b)(6) witness on this topic and kapche deposed her, only to learn that she knew nothing about why Kapche was disqualified and was not even in the office when it occurred. Hearing Transcript pp. 152, 166.

Dkt. 117, Motion to Exclude Defense, Ex. A. In fact, it never listed any individual as having knowledge of the after-acquired evidence defense.

As explained below, because of the court's erroneous view that Kapche bore the burden of proof on this defense, it wrongly judged discovery and witness issues based on an incorrect legal prism. It is important to note that, while Kapche sought to strike the defense because it was not timely pled, Kapche also asked in the alternative that he be allowed pertinent discovery *before* the hearing on equitable relief. That motion was not addressed by the district court until it issued its order denying all equitable relief.

1. The court allowed the FBI to call an undisclosed witness at the hearing.

At the hearing, the FBI called one of the witnesses it had failed to disclose – Sharon Magargle, to which Kapche objected. She had not, after all, ever been identified as a person with knowledge of relevant facts and Kapche had not had an opportunity to depose her – as he had requested. The court, however, overruled those objections, stating "I don't understand this business of the right to cross-examine before she testifies. She's going to testify here." Hearing Transcript p. 198.

The Federal Rules do not sanction that approach. When a party does not honor its obligation to name those with knowledge of relevant facts, Rule 37 provides that the party cannot use that witness to supply evidence at a hearing unless the failure was substantially justified or is harmless. In *Norden v. Samper*, 544 F.Supp.2d 43 (D.D.C. 2008), the court explained that "Rule 37(c)(1) is a self-executing sanction, and the motive or reason for the failure is irrelevant." 544 F.Supp.2d at 49.

Obviously the failure was not justified since Kapche asked a direct question to elicit just this kind of information. And this failure was anything but harmless. The court relied on Magargle's conclusory testimony to deny Kapche relief. Dkt. 133, Order pp. 5-6. And she gave this conclusory testimony even though she had no idea what information Johnson looked at before making the decision. Hearing Transcript pp. 214-215. Indeed, Magargle admitted that she had never spoken with Johnson about her decision and what Johnson considered. Hearing Transcript pp. 216-17, 224-25, 227-28.

Allowing a witness who has not been disclosed to aggressively support the FBI's decision is by definition sanctioning trial by ambush. A party who has failed to honor the rules should never be rewarded in this way. To do so "guts the discovery rules." *Coles v. Perry*, 217 F.R.D. 1, 5 (D.D.C. 2003)

In any event, the court's decision cannot be squared with Rule 26. Indeed, the Federal Rules Advisory Committee has made it clear that the whole purpose of Rule 26's requirement to list witnesses is to allow the adverse parties to decide *"which depositions will actually be needed."* Fed.R.Civ.P. 26(e) (emphasis added). As with pleadings, the issue is fair notice so that a party can make informed decisions about depositions. That, after all, is why the question about persons with knowledge was asked in the first place.

2. The court denied Kapche critical discovery.

At the hearing on equitable relief, Kapche renewed his request to depose Johnson. And the court acknowledged that Kapche had objected "that he never had access to" her. Dkt. 133 Order p. 6, n.4. But, rather than ensuring this access, the court ruled that Johnson's memorandum, combined with the testimony of Magargle and Adams was "a sufficient demonstration of good faith." *Id*. Good faith, however, is not the operative legal standard. The standard is whether Kapche's rejection was in line with the FBI's actual practices in similar cases. Again, the burden was not on Kapche, it was on the government – and the government did not meet it.

Adams could not provide evidence that the FBI's decision was in line with its practices in other cases. She admitted she had no idea about the FBI's practices when there is a concern that an applicant failed to disclose information in an

interview, Hearing Transcript p. 162 – much less when that same person passes a subsequent polygraph examination as Kapche did. Hearing, Plaintiff's Ex. 3 Adams also admitted to the court that she had no role in Kapche's disqualification:

> The Court: Did you ever play a part actually in this decision?
> Adams: No, Your Honor.

Hearing Transcript p. 152.

As for Magargle, who accepted Johnson's recommendation, she did not discuss any other cases in which an applicant was denied employment. So again there was no discussion of the FBI's actual practices. She simply rubber stamped what Johnson had prepared and even the court recognized that her entire review was limited to the memo she received from Johnson. Hearing Transcript pp. 215-216. Magargle conceded that only a demonstrated lack of candor would suffice, but was not even aware that Robinson's form – which supposedly showed Kapche's lack of candor – contained several errors. Hearing Transcript pp. 218-19. Magargle further conceded that she had not seen Kapche's adjudicative file and did not know what was in it. Hearing Transcript pp. 212-13. She admitted that it was Johnson's job to review polygraphs, Hearing Transcript p. 213, and admitted that, if anyone had looked at the underlying documents, it would have been Johnson. Hearing Transcript p. 214. She did not recall ever discussing Kapche with Johnson. Hearing Transcript p. 216.

Because Magargle's role was, at most, to rubber-stamp the work of some third party, it is Johnson's knowledge, not Magargle's, that matters. *Cf. Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151-52 (2000) (because the company's director of manufacturing conducted the study and recommended the plaintiff's dismissal, it was his thinking and motivation that was at issue, not that of the president, in this age discrimination case); *Griffin v. Washington Convention Center*, 142 F.3d 1308, 1311-12 (D.C. Cir. 1998) (because the record did not affirmatively establish that the ultimate decision-maker's estimation of the quality of the plaintiff's work was reached independently, it was the supervisor's knowledge, motive and intent, not that of the ultimate decision-maker, that was at issue).

Rule 26(e) requires a party to supplement or correct a response to an interrogatory, if "the party learns that in some material respect the ... response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing...." Fed.R.Civ.P. 26(e)(1)(A). But the government never supplemented with information about Johnson or Magargle.

Only Johnson would know if the decision on Kapche was in line with the FBI's actual employment practices. But the government succeeded in depriving

Kapche, the district court, and this Court of that evidence.

G. The Court Wrongly Allowed the Government to Hide Exculpatory Evidence.

One of the many unanswered questions about Kapche's disqualification for lack of candor is how anyone could find that Kapche engaged in deliberate deception when his polygraph showed the exact opposite.

After first assuring Kapche that any dishonesty in the personal interview would come out in the polygraph, the government then pretended that the polygraph did not matter when it supported his position. It fought vigorously to keep Kapche from getting access to his unredacted polygraph, which would provide contemporaneous evidence as to his candor. To this day, Kapche has seen only a heavily redacted copy of that document, and the court's order denying his effort to discover the entire document is inexplicable. And, at the end of the day, the court cited to the polygraph, Hearing Transcript pp 291-92, when it ruled that it would allow the government to proceed, and prevail, on its after-acquired evidence defense. Dkt. 133, Order.

At the same time that the FBI was strenuously objecting to Kapche obtaining his polygraph, it admitted that it has used polygraph questions and answers *offensively* in cases to prove a lack of candor. Dkt. 123, Defendant's Memorandum Related to Production of Unredacted Polygraph, p. 4. It cited the case of *Delgado v. Ashcroft,* 368 F.Supp.2d 3, 6 (D.D.C. 2004), where the FBI relied on specific questions and answers from the polygraph to support its claim of lack of candor. But, now, when the polygraph showed the opposite, i.e., that the individual has not deliberately omitted information, the FBI sought to conceal the answers – and has succeeded to date.

H. The Impropriety of the After-Acquired Evidence Defense in This Case

Under the specific facts of this case, there is yet another reason the FBI should not have prevailed on this defense. An employer who unlawfully discriminates against an individual cannot avail itself of the after-acquired evidence affirmative defense when it relies on supposed misconduct that arises as a direct result of the unlawful adverse employment action. *Sellers,* 358 F.3d at 1063-1064 (*citing Medlock v. Ortho Biotech, Inc*., 164 F.3d 545 (10th Cir. 1999)).

In *Medlock*, the plaintiff's alleged misconduct occurred long after the employer's discriminatory conduct. In *Medlock*, the plaintiff "touched and cursed" the employer's counsel at an unemployment hearing after he was wrongly fired. 164

F.3d at 555. The employer's attempt to use that misbehavior as after-acquired evidence sufficient to bar reinstatement, however, was denied. After all, the misconduct arose as a direct result of the unlawful employment discrimination and could not have happened but for the discrimination. The Tenth Circuit agreed it was proper to disallow a jury question on after-acquired evidence. As the Court noted:

> It is not difficult to envisions a defendant goading a former employee into losing her temper, only to claim later that certain forms of relief should be unavailable because it would have discharged the plaintiff based on her inability to control her temper.

164 F.3d at 555 n.7.

That principle applies here because the *only* reason for Robinson's second interview was unlawful disability discrimination. When the FBI first considered Kapche in 2005, he had cleared all the hurdles to employment and was denied a job only because of his disability. Then he was interviewed a second time in 2006 *during the settlement process*. And then the supposed results of that interview were used to justify his second rejection for the job. Just as in *Medlock,* the defense does not apply in this case. The lack of candor allegation could not have arisen absent the government's discrimination.

The court considered this challenge by Kapche but ruled that *Medlock* was distinguishable because "plaintiff's misconduct [taking the gasoline] was unrelated to the discrimination." Dkt. 133 Order p. 5. But this misses the point the court made at the beginning of the hearing. The issue with regard to after-acquired evidence was not Kapche's prior discipline, Hearing Transcript p. 6-7, it was whether he told the FBI about it when asked in 2006 – just as he had told the Houston Police Department.

Additionally, the terms of the FBI's settlement agreement with Kapche demonstrate why the principle announced in *Medlock* should prohibit the government from successfully using the defense here. The FBI made a commitment that, should it not hire Kapche pursuant to the 2006 settlement discussions, the parties would retain all "pre-existing rights." One of those rights was undoubtedly the right to equitable relief. By denying equitable relief, the court wrongly excused the FBI from its commitment. This too was error since the FBI made a considered decision that, even if the settlement fell through, Kapche's relief would be in no way impacted.

Certainly, the FBI would be free to argue on remand that it believes that its lack of candor finding means it would not be feasible to hire Kapche. If the court accepted that argument, Kapche could seek front pay instead. But the FBI's

settlement commitment cannot be squared with a decision to cut off all equitable relief.

I. The Court Denied Kapche Back Pay to Which He was Entitled.

A separate issue is the court's refusal to award Kapche back pay for the period of time between January, 2005, when the FBI unlawfully denied him a job because of his disability, and March, 2007, when it rejected him the second time. The court's conclusion that Kapche is not entitled to any monies for back pay during that period is clearly erroneous. It is based on a flawed analysis presented by the FBI that was, additionally, untimely.

1. The substantive flaws in the measurement of back pay. According to the FBI's expert, which the court adopted, Kapche would have suffered a loss of pay if he had been hired by the FBI in 2005 – even though the FBI position was admittedly a higher-paying job than the one Kapche held at the time. Order at 8. This conclusion is flawed because it compares apples to oranges.

There are two components in a calculation of lost back pay. The first is easy – it compares the wages earned to the wages that would have been earned but for the discrimination. When that number is computed – by either the FBI's expert or the expert retained by Kapche – there is an economic loss to Kapche.

The court erred in accepting the FBI's calculations for the second component – a comparison of the value of the employee benefits earned to the value of the employee benefits that would have been earned but for the discrimination. The court wrongly accepted the FBI's argument in this regard – because the FBI's analysis compared apples to oranges. When calculating Kapche's non-FBI employee benefits for the period in question, the court counted monies that Kapche could only be expected to receive decades into the future – those being annual increases in his retirement account from his non-FBI job.

But, when calculating the prospective employee benefits Kapche would have earned had he been hired by the FBI, the court did not count the economic benefits that Kapche's government employment would yield to him in the decades to come. This was error. "Because of the paramount importance of pension benefits to an employee's future financial security, it would be unfair to exclude them from a calculation of front pay." *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 373 (3d Cir. 1987).

The district court's rationale for excluding the value of the employee benefits from one side of the equation is without merit. The law is well-settled that the courts may treat a victim of discrimination as a vested employee for purposes of awarding pension damages – regardless of whether the employee was vested at the

time the calculation is made. *See, e.g.*, *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1021 (1st Cir. 1979) (reasoning that "an employer need not be allowed to stand on [vesting] requirements that plaintiff cannot meet because of the employer's own wrongful acts.").

Further, if it is too speculative to count monies that would inure to Kapche's benefit as a result of events three and five years into the future, then common sense advises that it would be even more speculative to assume that he would live long enough to collect the value of his non-FBI employee benefits decades down the road. But, the court assumed this fact in its analysis – just as the FBI's expert suggested. That is comparing apples to oranges.

A proper financial analysis compares apples to apples. And, when one assumes that Kapche could be credited with the value of future economic benefits when it came to assessing his non-FBI income in the stated time period, the same would logically be true for an FBI-job. While this was explained in a more technical fashion by Kapche's expert, that information was never considered by the court.

2. The question of timeliness. At the close of the hearing on equitable relief, the court left no reason for anyone to doubt that the time had come for this case to end. The court opined that the case was "an insanely over-lawyered, over-litigated employment case." Hearing Transcript p. 299. In no uncertain terms and without

any exception, he then set a strict deadline for additional filings:

> I want to see *whatever more* you want to file in the next two weeks, two weeks from today. ... File whatever you want to two weeks from today; motions, briefs, proposed judgments, dollar amounts, expert reports, depositions, e-mails, whatever you want. Just file it. Okay?

Hearing Transcript p. 300 (emphasis supplied). Kapche made sure to honor that deadline. For one, he timely filed his expert's report. Dkt. 126, Notice of Filing Expert's Report. While the FBI filed its expert's report on that same day, Dkt. 125, it supplemented that report with an untimely filing. Dkt. 130 Response to Trial Brief. In that supplemental report, the FBI provided a misleading characterization of the report presented by Kapche.

Kapche was left in a quandary – obey the court's order and file nothing, thereby risking that his lack of action would be read as a lack of opposition to the FBI's final word – or obey the court and not file anything substantive without permission. He chose the middle ground. He objected to the FBI's untimely and erroneous report, and he asked that the report be stricken. In the alternative, he asked leave of court to file what would otherwise be a substantive response to the report, because such a filing would be untimely under the existing order. Dkt. 131,

Motion to Strike. While the FBI opposed the former, it voiced no objection to the alternative relief sought by Kapche. Dkt. 132, Response to Motion to Strike.

Unfortunately, the district court never acted upon Kapche's motion – and then relied on the supplemental expert report as to which Kapche was not allowed to respond. Dkt. 133, Order pp. 7-8. Had Kapche been allowed to supplement his expert's report – with a rebuttal of the purported criticisms belatedly raised by the FBI, the court would have had the benefit of an accurate opposing opinion. Dkt. 137-1, Motion to Alter Judgment Ex. A.

Conclusion

Both parties have a right to a level playing field in litigation. Both parties have a right to decisions based on proper standards of proof and the evidence submitted. Because the court's ruling on equitable relief violated these principles, Jeffrey Kapche respectfully asks this Court to reverse the district court's ruling on equitable relief and remand the case for a determination of the amount of equitable relief and whether he will at long last be made an FBI agent.

Respectfully submitted,
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Certificate of Compliance

I hereby certify that this opening brief complies with the type-volume limitation set out in Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 13.0, and contains 10, 145 words.

/s/ Katherine L. Butler

Certificate of Service

I certify that a true and correct copy of this document has been served upon counsel for the appellee via the court's electronic filing system and by email (at her request) on August 8, 2011.

/s/ Katherine L. Butler