

No. A06-0966

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State of Minnesota  
In Court of Appeals

Charles E. Meads,

*Plaintiff-Appellant,*

vs.

Best Oil Company d/b/a The  
Little Stores and Linda Wiita,

*Defendants-Respondents*

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BRIEF OF AMICUS CURIAE  
AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA

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## Interest of Amicus

The American Civil Liberties Union of Minnesota (“ACLU-MN”) is a not-for-profit, non-partisan, membership-supported organization dedicated to the protection of civil liberties. It is the statewide affiliate of the American Civil Liberties Union and has more than 8,000 members in the state of Minnesota. Its purpose is to protect the rights and liberties guaranteed to all Minnesotans by the state and federal constitutions and state and federal laws. Among those rights is the right to be free from discrimination based on race. In addition to affecting the individual Petitioner, the outcome of this case will have a significant impact on the rights of other individuals who have experienced illegal discrimination in the State of Minnesota.

The ACLU-MN believes that the District Court should not have granted summary judgment for the Defendants in this case. The District Court, relying on Frey v. Ramsey County Community Human Services, 517 N.W.2d 591 (Minn. Ct. App. 1994), concluded that Appellant’s claim was barred by after-acquired information that would have disqualified the plaintiff from employment. Appellant argued that the continued validity of Frey was questionable in light of the U.S. Supreme Court’s decision in McKennon v. Nashville Banner Pub. Co., 513 U.S. 352 (1995). The McKennon Court refused to allow after-acquired evidence to be a complete bar to recovery for unlawful discrimination. The Court reasoned that the remedial nature of discrimination laws should serve as a deterrence to motivate employers to eliminate discrimination. Allowing the use of after-acquired information as a justification for a challenged action does not advance the goal of preventing discriminatory conduct.

The ACLU-MN believes that the reasoning applied in McKennon should be applied in discrimination cases brought in the State of Minnesota. Because of the remedial purposes of our anti-discrimination laws, the focus should remain on the employer's actual motive for the challenged action. A complete bar to recovery based on after-acquired information would reward the discriminatory conduct of employers. The ACLU-MN believes that Frey should be carefully revisited by the Court of Appeals in light of McKennon and in light of the important policy reasons behind our remedial anti-discrimination laws.

## **Introduction**

The trial court erred when it granted summary judgment for the Defendants because it was improper to allow the after-acquired evidence of a felony conviction to completely bar Mr. Meads' claim of discrimination. Such a complete bar to a discrimination claim undermines the purposes of anti-discrimination laws and rewards employers for discriminatory conduct. Moreover, the Defendant's purported policy with regard to felony convictions is questionable at best and is likely discriminatory in its own right, and Defendants should not be allowed to rely on it to prove that Mr. Meads was disqualified from employment. Finally, even if the after-acquired evidence rule is applicable in this case, summary judgment was inappropriate because there is a genuine issue of material fact regarding whether a conviction actually would have disqualified Mr. Meads from employment, and the Defendants have not shown that their rule is nondiscriminatory.

## **Argument**

### **I. SOUND PUBLIC POLICY DEMANDS THAT DISCRIMINATION CLAIMS SHOULD NOT BE COMPLETELY BARRED BASED ON AFTER-ACQUIRED EVIDENCE.**

#### **A. Allowing After-Acquired Evidence to Bar Discrimination Claims Subverts Enforcement of Remedial Anti-Discrimination Laws and Rewards Discriminatory Conduct.**

Nearly fifty years after passage of the Minnesota Human Rights Act (MHRA) and forty years after passage of the federal Civil Rights Act, employment discrimination is still prevalent in Minnesota and nationwide. Occupational fields are segregated by gender, and women earn less on average than men in similar jobs. U.S. Census Bureau, *Occupations: 2000:*

*Census 2000 Brief*, 2-4 (2003).<sup>1</sup> African Americans, Hispanics, and Pacific Islanders are underrepresented in managerial and professional positions. *Id.* at 6, T5. African Americans, women, and other minorities are less represented in professional positions and earn less than white males of comparable qualifications. U.S. Glass Ceiling Comm'n., *Good for Business: Making Full Use of the Nation's Human Capital* 62, T4 (1995).<sup>2</sup> Forty-seven percent of Black workers report that they have faced racial discrimination in the workforce. AFL-CIO, *Workers' Rights in America: What Workers Think about their Jobs and Employers* 23 (2001).<sup>3</sup>

Minority workers face even greater adversity in employment in Minnesota. In 1999 an estimated 11,553 minority workers and 17,272 women were adversely affected by intentional discrimination by large, private sector employers. Alfred Blumrosen and Ruth Blumrosen, *Minnesota 1999 Intentional Job Discrimination in Metropolitan Areas* 10 (1999).<sup>4</sup> More than 5,000 of these workers were African American. *Id.* Black workers in Minnesota face a 40% chance of discrimination when seeking employment opportunities, compared with a 34% chance of discrimination for Black workers nationwide. *Id.* at 10, 53. Over 2,000 of these adversely affected workers are service industry workers, representing 44% of the Black service worker population. *Id.* at 14, T4.

The MHRA and the Duluth Human Rights Ordinance are both intended to remedy discrimination. The first version of the MHRA was passed nearly ten years before the U.S. Congress passed the Civil Rights Act of 1964. 1955 Minn. Laws c. 516 § 1. The original

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<sup>1</sup> Available online at <http://www.census.gov/prod/2003pubs/c2kbr-25.pdf>.

<sup>2</sup> Available online at [http://digitalcommons.ilr.cornell.edu/key\\_workplace/116](http://digitalcommons.ilr.cornell.edu/key_workplace/116).

<sup>3</sup> Available online at <http://www.aflcio.org/mediacenter/resources/upload/2001LaborDayWorkersRightsinAmerica.pdf>.

<sup>4</sup> Available online at [http://www.eeo1.com/1999\\_NR/MN1999.pdf](http://www.eeo1.com/1999_NR/MN1999.pdf).

text of the Act, called the Minnesota State Act For Fair Employment Practice, set forth its

Declaration of Policy as follows:

Declaration of policy. As a guide to the interpretation and application of this act, be it enacted that the public policy of this state is to foster the employment of all individuals in this state in accordance with their fullest capacities, regardless of their race, color, creed, religion, or national origin, and to safeguard their rights to obtain and hold employment without discrimination. **Such discrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy.** It is also the public policy of this state to protect employers, labor organizations and employment agencies from wholly unfounded charges of discrimination.

Id. (emphasis added).

The current version of the Act contains a similar declaration of public policy including the legislative conclusion that discrimination “threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy.” Minn. Stat. § 363A.02 (2006). To effectuate the important goals of eliminating discrimination, the Legislature included the exhortation that “[t]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof.” Minn. Stat. § 363A.04 (2006). The Duluth Human Rights Ordinance sets forth a similar declaration of policy. Most notably, the Duluth City Council found that discrimination “adversely affects the welfare of persons in the city of Duluth,” and that “[s]uch discrimination detracts from the dignity and morale of persons in the city and adversely affects the functioning of democracy in the city.” Duluth City Code § 29C-1.

Recognizing the important policy goals behind anti-discrimination laws - namely “the elimination of discrimination in the workplace” - the U.S. Supreme Court ruled in

McKennon v. Nashville Banner Publishing Co. that the after-acquired evidence cannot be used to completely bar relief for discrimination under the Age Discrimination in Employment Act. 513 U.S. 352, 357-8 (1995). The McKennon Court reasoned that Congress intended the statutory remedies included in anti-discrimination laws to “serve as a ‘spur or catalyst’ to cause employers ‘to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges’ of discrimination.” Id. at 358 (citation omitted). The Court noted that deterrence and compensation for injuries were the two principal objects of anti-discrimination laws and that the private litigants who seek redress for their injuries vindicate both of these objectives. The Court concluded that “[i]t would not accord with this scheme if after-acquired evidence of wrongdoing that would have resulted in termination operates, in every instance, to bar all relief for an earlier violation of the Act.” Id.

The application of a complete bar to recovery based on after-acquired evidence as set forth in Frey v. Ramsey County Community Human Services, runs squarely up against the important policy considerations articulated in McKennon. 517 N.W.2d 597 (Minn. Ct. App. 1994). In Frey, which was decided before McKennon, the Minnesota Court of Appeals allowed after-acquired evidence that would have disqualified the plaintiff for employment could be used to completely bar a discrimination claim. While the Court in Frey recognized the “mischief that may occur if an employer, having discriminatorily discharged a once-qualified employee, is permitted to rummage through employment records to uncover a ‘nondiscriminatory’ reason for discharge,” the Court failed to appreciate the impact their

holding would have on the identification and remediation of illegal discrimination. Id. at 599.

In Frey, the Court distinguished cases involving after-acquired evidence of employee misconduct from cases involving after-acquired evidence that would disqualify a plaintiff from employment. But the impact is the same in either cases because underlying remedial purposes of the MHRA are undermined when employers are allowed to escape liability for its discriminatory actions simply because they were able to later “uncover a ‘nondiscriminatory’ reason” for their actions. In either case, the discrimination is allowed to go without sanction, there is no deterrence of future discriminatory conduct, the victims of discrimination have no redress and will be discouraged from enforcing their rights, and employers are encouraged to engage in reprehensible post-hoc rationalizations for their actions.

Equally troubling, the Court in Frey erroneously reasoned that the plaintiff had not been damaged by her termination. Id. at 598. The Court simply ignored the harm that occurs from the discriminatory act itself, harms to the individual and society that are identified in the MHRA and DHRA policy declarations such as harm to “the dignity and morale of persons in the city.” Duluth City Code § 29C-1. Indeed, the U.S. Equal Employment Opportunity Commission (EEOC) “Enforcement Guidelines On After-Acquired Evidence” recognize the fact that the principles set forth in McKennon apply equally to cases in other contexts including failure-to-hire cases such as the case at bar. “Further, although the adverse action challenged in McKennon was termination, the analysis

is applicable to any alleged unlawful adverse action, such as refusal to hire, demotion or failure to promote.” EEOC Notice 915.022, December 12, 1995.<sup>5</sup>

The reasoning set forth in Frey suggesting that the employee had no standing because she did not suffer any injury from the discrimination is also problematic because it lays the groundwork for invalidating the work of discrimination “testers”. For example, in Kyles v. J.K. Guardian Sec. Services, Inc. an employer’s discriminatory conduct was brought to light through the use of two testers, one black applicant and one white applicant who had been given similar qualifications except that the black applicant’s qualifications were slightly better than those of the white applicant. 222 F.3d 289 (7<sup>th</sup> Cir., 2000). The employer argued that, because neither applicant had any intention of accepting a job offer, and because their qualifications were fabricated, they had no standing to challenge discriminatory conduct. The Seventh Circuit rejected that argument and concluded that Congress intended to extend standing “to the outermost limits of Article III” in order to effectuate the purposes of Title VII. Id. at 295. The same principle should apply to the MHRA.

In the eleven years since the Supreme Court decided McKennon, Minnesota courts have examined its principles in an employment discrimination case only once. In an unpublished opinion entitled Bichsel v. State of Minnesota, the Minnesota Court of Appeals adopted McKennon and held that after-acquired evidence was not a bar to the plaintiff’s wrongful discharge claim. No. C1-95-240, 1995 WL 434444 (Minn. Ct. App. 1995). In Dare v. Wal-Mart Stores, Inc., the Federal District Court for the District of Minnesota recognized that, after McKennon, after-acquired evidence of application fraud and a medical condition

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<sup>5</sup> Available online at <http://www.eeoc.gov/policy/docs/mckennon.html>.

that would have disqualified the plaintiff from employment could not be used to bar her MHRA discrimination claim and was only relevant as to damages. No. Civ. 02-0001 2003 WL21147657 (D. Minn. 2003). In so holding, the court noted that a bar based on after-acquired evidence would undermine the purpose behind the MHRA.

**B. The Minnesota Supreme Court Specifically Rejected Analysis of Discrimination Claims that Would Result in Denying Victims the Full Panoply of Civil Remedies Granted by the MHRA.**

In deciding how to apply McKennon under the MHRA, this Court is not without guidance from the Minnesota Supreme Court. On numerous occasions, the Minnesota Supreme Court has generally applied federal court interpretations of Title VII to the MHRA. Sigurdson v. Isanti County, 386 N.W.2d 715, 719-20 (Minn. 1986). *See also* Ray v. Miller Meester Advertising, Inc., 684 N.W.2d 404, 408.

On occasion though, they have departed from federal court interpretations to make the MHRA more protective of the right to be free from discrimination. The court's analysis in Anderson v. Hunger, Keith, Marshall & Co. Inc., is instructive. 417 N.W.2d 619 (Minn. 1988). The Anderson Court rejected a more employer-deferential analysis utilized by federal courts in mixed-motive discrimination cases whereby an employer can avoid liability in cases where an unlawful motive played some part in the adverse employment decision by proving that it would have made the "same decision" in the absence of the unlawful discriminatory motive. Id. at 624-5. The Court wisely reasoned that:

By denying a victim, who admittedly has received disparate treatment based upon unlawful discrimination, from the full panoply of civil remedies granted in the statute, less incentive exists for victims to prosecute discrimination claims to the end that the public policy of eradicating discrimination, as embodied by the Human Rights Act, may well be frustrated.

Id. at 625.

The Court went on to conclude that:

Thus, under the *Mt. Healthy* analysis, if the employer can meet the burden of proving the discharge would have occurred in the absence of discrimination, claimant would have no recovery – not even injunctive relief, costs, or attorney fees. We agree with respondent Anderson that not only is the *Mt. Healthy* test at odds with our cases holding the *McDonnell Douglas* analysis is the appropriate one for application in disparity treatment cases alleging illegal discrimination, but also that its adoption for use in disparate treatment cases would defeat the broad remedial purposes of the Minnesota Human Rights Act by permitting employers, definitionally guilty of prohibited employment discrimination, to avoid all liability for the discrimination provided they can prove that other legitimate reasons may coincidentally exist that could have justified the discharge. ... We are certain that result could not have been within the contemplation of the legislature when it enacted the Minnesota Human Rights Act.

Id. at 626 (*citations omitted*).

More recently, the Minnesota Supreme Court held in Ray v. Miller Meester Advertising, Inc. that under the MHRA, front pay constitutes actual damages that are subject to multiplication under the Act. 684 N.W.2d 404 (Minn. 2004). The court rejected the analysis used by federal courts to interpret Title VII in which front pay is considered an equitable remedy that is not subject to multiplication. The Court rested its decision partly on the fact that “the scope of discrimination liability, and its consequences, is more onerous under our state laws than under Title VII.” Id. at 408-9.

The Anderson Court’s explicit rejection of Mt. Healthy City Bd. of Ed. V. Doyle, 429 U.S. 274 (1977), is especially instructive in light of McKennon’s discussion of the same case. In McKennon, the U.S. Supreme Court distinguished Mt. Healthy by noting that the result

was “controlled by the difficulty, and what we thought was the lack of necessity, of disentangling the proper motive from the improper one where both played a part in the termination and the former motive would suffice to sustain the employer's action.”

McKennon at 359. But in cases involving after-acquired evidence, there is no such difficulty because the information was not available to the employer at the time it made the decision.

Id. The Minnesota Supreme Court rejected Mt. Healthy because it wanted to ensure that improper motives were punished regardless of whether the employer would have made the same decision absent that improper motive. The Frey Court recognized that the after-acquired evidence doctrine takes the reasoning articulated in Mt. Healthy one step further, yet the court completely ignored the fact that Mt. Healthy was rejected by the Minnesota Supreme Court. Frey at 596-7. It would be a peculiar outcome for the Court of Appeals to part from federal court interpretations in a manner that results in less protection for Minnesota victims of discrimination in the face of Minnesota Supreme Court decisions that have departed from federal court interpretations for the purpose of providing more protections for Minnesota discrimination victims.

**C. Allowing After-Acquired Evidence of a Criminal Conviction Rewards Employers for a Rule that is Arguably Discriminatory.**

Under the principles set forth in McKennon, the Defendants in the case at bar should not be rewarded for their discriminatory conduct based on information they did not have when they made their discriminatory hiring decision. The District Court also rewarded the Defendants for an arguably discriminatory policy when it considered their inchoate and subjective policy regarding felony convictions to be a legitimate disqualifier.

Federal Courts and the EEOC have long recognized that the use of criminal convictions in employment decisions can have a discriminatory impact on minorities. *See EEOC Compliance Manual, Section 15: Race & Color Discrimination, Subdivision VI (B)* (April 19, 2006).<sup>6</sup> The EEOC guidelines note that it is unlawful to disqualify a person of one race for having a conviction while not disqualifying a person of another race who has a similar record. The guidelines go on to state that where an employer's policy has a disparate impact, they must be able to justify their rule as a business necessity and show that they considered "(1) the nature and gravity of the offense(s); (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought." *Id.*

In *Green v. Missouri Pacific Railroad Co.*, the Eighth Circuit held that the employer's policy of rejecting applicants with criminal convictions was discriminatory because statistically, black applicants were disqualified at a rate of two and one half times that of the white applicants. 523 F.2d 1290, 1295 (8<sup>th</sup> Cir. 1975). Because the employer could not justify the policy as a business necessity, the court found the policy was discriminatory. *Id.* at 1298-99. The Court reasoned that "[t]o deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden." *Id.* at 1298.

While *Green* dealt with a rule barring employment of anybody convicted of a crime other than a traffic offense, the purported policy put forth by Defendants in the case at bar is equally troubling. In the thirty years since *Green* was decided, statistical research has identified significant disparities in the incarceration rates for minorities compared to whites.

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<sup>6</sup> Available online at <http://www.eeoc.gov/policy/docs/race-color.html>.

According to a fact sheet published by the Council on Crime and Justice, the ratio of incarceration rates for blacks and whites in Minnesota is nearly 20 to 1. *See CCJ Racial Disparity Initiative Fact Sheet: Minnesota Prison Statistics By Race and Ethnicity.*<sup>7</sup> Nationwide statistics also point to gross racial disparities in incarceration rates. According to incarceration rates calculated by the Bureau of Justice Statistics in 2000, young black men were incarcerated at a national rate of nearly 10%, while white men in the same age group were only incarcerated at a rate slightly over 1%. Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 939 (March 2003). The likelihood that a young black man will face incarceration during his lifetime is 28%. *Id.* at 939.

A study conducted in Milwaukee, WI in 2001 found that the impact of a criminal record on employment prospects is more severe for blacks than it is for whites. *Id.* at 959. The study found that while whites without a criminal background received callbacks at a rate of 34%, blacks without a criminal record only had a 14% callback rate. Whites with a criminal record had a higher call back rate (17%) than blacks without a criminal record. Most telling, though, was that blacks with a criminal record had a callback rate of only 5%. *Id.* at 958. “While the ratio of callbacks for nonoffenders relative to ex-offenders for whites is 2:1, this same ratio for blacks is nearly 3:1. The effect of a criminal record is thus 49% larger for blacks than for whites.” *Id.* Based on the statistics gathered in the study, Pager noted that a criminal conviction was an added stigma for black applicants, leading to

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<sup>7</sup> Statistics based on 2000 Minnesota Department of Corrections data and 2000 U.S. Census Bureau data. Fact Sheet available online at <http://www.crimeandjustice.org/Pages/Projects/RDI/MN%20prison%20rate%20and%20ratio%20fact%20sheet2%20021802.pdf>.

additional discrimination over and above what is faced by black applicants without a criminal conviction:

This evidence is suggestive of the way in which associations between race and crime affect interpersonal evaluations. Employers already reluctant to hire blacks, appear even more wary of blacks with proven criminal involvement. Despite the face (sic) that these testers were bright articulate college students with effective styles of self-presentation, the cursory review of entry-level applicants leaves little room for those qualities to be noticed. Instead, the employment barriers of minority status and criminal record are compounded, intensifying the stigma toward the group.

Id.

In the case at bar, even if the Defendants had known of Mr. Meads' prior conviction and offered that as their legitimate non-discriminatory reason for not hiring him, there is a strong inference that such a proffered reason would be a pretext for discrimination. The Defendants can point only to their own self-serving testimony that they have a policy barring employment for some individuals with felony convictions. Yet they have not produced any formal policy to guide managers in making decisions about what factors to consider when deciding whether a conviction will actually disqualify an applicant. Defendant Wiita was not even aware that felony convictions should be used as a factor in screening applicants. Dep. of Linda Wiita p. 30-31 (Appellant's Appx. 65). Indeed they didn't even undertake the simple act of running a background check by using the easily available and inexpensive online Minnesota Criminal History search pursuant to Minn. Stat. § 13.87 to check on

applicants.<sup>8</sup> In fact, Defendants actually hired a white applicant with two burglary convictions despite their alleged policy.

Such a subjective and inchoate policy is exactly the type of policy that courts and the EEOC are concerned about because when combined with even subtle unconscious racial bias, it is more likely that minorities will be treated unfairly based on this purportedly “race-neutral” criteria. Moreover, the defendant’s reasoning is suspect. Defendant Wiita noted that the reasoning behind the policy was because “they were capable of doing it.” Wiita also testified that the passage of time since the conviction was not relevant. This clearly indicates that, even if Defendants truly have an articulable policy, they have utterly failed to consider factors including “(1) the nature and gravity of the offense(s); (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought.” *EEOC Compliance Manual*, supra § 15 Subd. VI(B).

Applying these factors to Mr. Meads’ conviction would likely have resulted in the conviction being disregarded. The conviction was for “aiding” a burglary, which suggests that the incident was not instigated by him. In addition, the conviction is about twelve years old and, given his current age, the actual crime appears to have occurred when he was in his late teens or early twenties. Since that time, he has held several jobs in which he was required to handle cash, with no reported problems. It is apparent from the record that Mr. Meads has been rehabilitated. The Minnesota Legislature has articulated a preference for encouraging the employment of criminal offenders by adopting the Minnesota Criminal

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<sup>8</sup> While such a search would not have identified Mr. Meads’ twelve-year-old conviction in Indiana, Defendants cannot even verify their policy by showing that they take this simple step, available to them since July 1, 2004, to weed out the felons that they say they will not hire.

Rehabilitation Act, applicable to occupational licensing and public employment. The Act's Policy Statement states that:

The legislature declares that it is the policy of the state of Minnesota to encourage and contribute to the rehabilitation of criminal offenders and to assist them in the resumption of the responsibilities of citizenship. The opportunity to secure employment or to pursue, practice, or engage in a meaningful and profitable trade, occupation, vocation, profession or business is essential to rehabilitation and the resumption of the responsibilities of citizenship.

Minn. Stat § 364.01 (2006).

**II. SUMMARY JUDGMENT WAS INAPPROPRIATE BECAUSE THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER MEADS WAS ACTUALLY DISQUALIFIED FROM EMPLOYMENT.**

Even if the Court of Appeals chooses to apply Frey in the instant case, summary judgment was not appropriate because there are significant fact issues that must be resolved including whether Mr. Meads would actually have been disqualified from employment based on his prior conviction, and whether Defendant's alleged policy was a legitimate, nondiscriminatory policy that could be relied upon to disqualify Mr. Meads.

**A. The Defendants Must Demonstrate that Meads Would Not Have Been Qualified for Employment.**

It is clear from Frey that, at a minimum, the Defendants must show that Mr. Meads would not have been qualified for employment had they known about his conviction. Yet the evidence they presented is murky at best. The District Court credited Wiita's self-serving testimony to find that there was no genuine issue of material fact on this issue. The court simply discounted numerous documents that indicate that a conviction does not necessarily disqualify an applicant.

In evaluating a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). Not only did the District Court fail to view the facts in the light most favorable to Mr. Meads, the Court impermissibly engaged in a factual determination rather than a determination as to whether there were genuine issues of fact in dispute. By crediting Wiita's testimony as a determinative fact, the District Court weighed the evidence and made a factual determination that was improper in the context of a summary judgment motion. See Fairview Hosp. & Health Care Servs. v. St. Paul Fire & Marine Ins. Co., 535 N.W.2d 337, 341 (Minn.1995).

**B. The Defendant Must Demonstrate that the Conviction Disqualification is Legitimate and Nondiscriminatory.**

Even if the Court were to find that the Defendant had a policy that clearly would have disqualified Mr. Meads from employment, it stands to reason that the disqualifier must be legitimate and nondiscriminatory. Put simply, a court would not allow an employer to assert that they learned after the fact that the employee was a homosexual, and that they do not hire homosexuals, to rebut a claim of race discrimination because sexual orientation discrimination is also prohibited by the MHRA. In the instant case, it is equally impermissible for the Defendants to rely on an arguably discriminatory felony conviction policy as a basis for refuting this discrimination claim. As discussed in more detail above, there is a strong inference that Defendant's policy, as articulated in the record, is a discriminatory policy that likely would not pass muster. Before Defendants are allowed to use this policy to rebut a discrimination charge, they should be required to demonstrate that the policy is not discriminatory.

## Conclusion

Amicus American Civil Liberties Union of Minnesota respectfully requests that this Court apply the important public policy reasoning found in the U.S. Supreme Court's decision in McKennon and hold that after-acquired evidence cannot be used as a complete bar to a claim of discrimination under the MHRA. Accordingly, this Court should reverse the District Court's summary judgment ruling and remand this case for a trial on the merits.

Dated: June 29, 2006

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF  
MINNESOTA

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