EMPLOYERS' SECRET WEAPON: HOW THE AFTER-ACQUIRED EVIDENCE DOCTRINE ALLOWS EMPLOYERS TO GET AWAY WITH DISABILITY DISCRIMINATION

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TABLE OF CONTENTS

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INTRODUCTION

On July 26, 1990, at the signing of the Americans with Disabilities Act (ADA), President George H.W. Bush hailed the landmark legislation as a "declaration of independence" for people with disabilities.[1] However, in the thirty years that have followed the bill's passage, researchers, activists, and scholars alike have questioned whether the ADA has succeeded in its broad aspirations, particularly in the provisions aimed at improving employment opportunities for individuals with disabilities.[2] In 2020, the U.S. Department of Labor reported that only 17.9% of people with disabilities were employed, as compared to an employment rate of 61.8% for people without disabilities.[3] Additionally, the unemployment rate for people with disabilities in 2020 was 12.6%.[4] Although the Department of Labor believes the data reflect the impact of the COVID-19 pandemic on employment, the unemployment rate for people with disabilities remained higher than the national average, which sat at 8.1% for the

1 Opinion, *A Law for Every American*, N.Y. TIMES, July 27, 1990, at A26.

2 *See generally* Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915 (2001) (concluding that the authors could not find direct empirical support for the theory that the ADA provided employment protection for the disabled in the years immediately following the bill's passage). *See also* Julie L. Hotchkiss, *A Closer Look at the Employment Impact of the Americans with Disabilities Act*, 39 J. HUM. RES. 887, 909 (2004) (using empirical data analysis to note that the ADA did not appear to produce any "substantial improvements" for employment outcomes for people with disabilities); Rebecca R. Hastings, *Has the Americans with Disabilities Act Made a Difference?*, SHRM (July 9, 2010), https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/hastheadamadeadifference.aspx [https://perma.cc/SQ4R-BWX7]; Melanie D. Winegar, *Big Talk, Broken Promises: How Title I of the Americans with Disabilities Act Failed Disabled Workers*, 34 HOFSTRA L. REV. 1267 (2006).

3 Press Release, U.S. Dep't of Lab., Persons with a Disability: Labor Force Characteristics—2020 (Feb. 24, 2021, 10:00 AM) https://www.bls.gov/news.release/pdf/disabl.pdf [https://perma.cc/74JB-KVCR].

4 *Disability Employment Statistics*, U.S. DEP'T OF LAB. https://www.dol.gov/agencies/odep/research-evaluation/statistics [https://perma.cc/X5CT-DX2U].

same year.[5] To some disability-rights activists, these numbers paint a troubling picture.[6]

Coupled with these concerning statistics is the high number of reported claims of disability discrimination in the workplace.[7] In February 2021, the U.S. Equal Employment Opportunity Commission (EEOC) released a detailed breakdown of the 67,448 complaints of workplace discrimination that the agency received in 2020.[8] Disability discrimination comprised 36.1% of claims filed, the second most common type of discrimination alleged, preceded only by reported retaliation claims.[9] Additionally, although only a fraction of these claims resulted in relief for the claimant,[10] huge backlogs and resource limitations faced by the EEOC have resulted in the Commission closing a large number of cases without investigation, thus forcing complainants to file a lawsuit on their own dime.[11]

Such employment access and discrimination hardships for people with disabilities have only been exacerbated by the COVID-19 pandemic, as it has been reported that nearly one million workers with

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5 Press Release, U.S. Dep't of Lab., Regional and State Unemployment—2020 Annual Averages (Mar. 3, 2021, 10:00 AM), https://www.bls.gov/news.release/pdf/srgune.pdf [https://perma.cc/D4MR-PCS4]; *see also* Karina Hernandez, *People with Disabilities Are Still Struggling to Find Employment—Here Are the Obstacles They Face*, CNBC (Mar. 3, 2020, 9:01 AM), https://www.cnbc.com/2020/03/02/unemployment-rate-among-people-with-disabilities-is-still-high.html [https://perma.cc/5RRQ-RYH8].

6 Philip Pauli, *Ten-Fold Decrease in Job Gains for People with Disabilities*, RESPECTABILITY (Feb. 24, 2020), https://www.respectability.org/2020/02/best-states-2020 [https://perma.cc/5FX5-6CWV] ("New statistics show that job gains among Americans with disabilities have dramatically fallen compared to previous years of sustain[ed] growth."); *see also 20 Years After the ADA, Is Life Better for Those with Disabilities?*, PBS NEWS HOUR (July 26, 2010, 3:55 PM), https://www.pbs.org/newshour/politics/on-anniversary-of-ada-is-life-better-for-those-with-disabilities [https://perma.cc/8PUT-EXFM].

7 Press Release, Equal Emp. Opportunity Comm'n, EEOC Releases Fiscal Year 2020 Enforcement and Litigation Data (Feb. 26, 2021) https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2020-enforcement-and-litigation-data [https://perma.cc/L6MV-76CX].

8 *Id.*

9 *Id.*

10 *Americans with Disabilities Act of 1990 (ADA) Charges (Charges Filed with EEOC) (Includes Concurrent Charges with Title VII, ADEA, EPA, and GINA) FY 1997–FY 2020*, EEOC https://www.eeoc.gov/statistics/americans-disabilities-act-1990-ada-charges-charges-filed-eeoc-includes-concurrent [https://perma.cc/DFC6-82GU].

11 Maryam Jameel, *More and More Workplace Discrimination Cases Are Closed Before They're Even Investigated.*, CTR. FOR PUB. INTEGRITY (June 14, 2019), https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/workplace-inequities/injustice-at-work/more-and-more-workplace-discrimination-cases-being-closed-before-theyre-even-investigated [https://perma.cc/2BE8-UD54] (noting that since 2008 the EEOC has been steadily increasing the number of cases it places on the "lowest-priority track," which are typically cases involving companies or local government agencies, and which result in no investigation, mediation, or other efforts by the Commission).

disabilities lost their jobs in the immediate months following the start of the pandemic.[12] Furthermore, the long-term effects of a coronavirus infection, such as extreme fatigue, organ damage, and trouble breathing, may result in an increased number of individuals with a legally-recognized disability, which would have major implications for disability and discrimination law.[13] In sum, this evidence underscores the fact that, in the thirty years that have followed the passage of the ADA, people with disabilities are still fighting for improved employment access and opportunity, and they continue to face instances of overt discrimination in the workplace.[14]

The ADA was designed to serve a variety of purposes all aimed at eliminating barriers imposed upon people with disabilities that have kept them excluded from gainful employment and, more broadly, full and fair participation in American society.[15] One method of guaranteeing such integration was to provide individuals with disabilities the right to file suit against infringing employers.[16] This served the purpose of protecting the civil rights of people with disabilities while simultaneously ensuring that instances of disability discrimination were rooted out.[17] However, as employment discrimination claims proliferated, employer defenses developed too.[18]

One such defense used by defendants facing an employment discrimination suit is the after-acquired evidence rule.[19] Initially, if the defendant-employer had discovered evidence of the plaintiff-employee's misconduct after the employee had been wrongfully discharged, and could prove that such evidence would have served as a legitimate basis for firing said employee, the defense could be used to

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12 Press Release, Kessler Found., nTIDE April 2020 Jobs Report: COVID Recession Hits Workers with Disabilities Harder (May 8, 2020), https://kesslerfoundation.org/press-release/ntide-april-2020-jobs-report-covid-recession-hits-workers-disabilities-harder [https://perma.cc/KN2Z-HCD2].

13 *See* Tom Spiggle, *Are Long-Term Coronavirus Complications Considered Disabilities Under the ADA?*, FORBES (Aug. 28, 2020, 2:49 PM), https://www.forbes.com/sites/tomspiggle/2020/08/28/are-long-term-coronavirus-complications-disabilities-under-the-ada [https://perma.cc/U4WD-9PS6].

14 Abigail Abrams, *30 Years After a Landmark Disability Law, the Fight for Access and Equality Continues*, TIME (July 23, 2020, 9:03 AM), https://time.com/5870468/americans-with-disabilities-act-coronavirus [https://perma.cc/ZQN7-FKQ6].

15 *See infra* Section I.A.

16 *See infra* Section I.A.

17 *See infra* Section I.A.

18 PRAC. L. LAB. & EMP., DEFENDING A DISABILITY DISCRIMINATION CLAIM CHECKLIST (2021), Westlaw 2-523-7355.

19 *See infra* Section I.C.

defeat the discrimination suit in its entirety.[20] However, following the Supreme Court's ruling in *McKennon v. Nashville Banner Publ'g Co.*, discrimination suits would no longer be completely barred if the defendant-employer adequately pleaded the after-acquired evidence defense.[21] The plaintiff's damage award, however, would be limited.[22] Nevertheless, defendant-employers still assert the after-acquired evidence defense in attempts to defeat claims of discrimination, and recently, a split in the federal circuit courts has emerged regarding the applicability of the defense to disability discrimination suits brought under Title I of the ADA.[23]

Unlike other antidiscrimination statutes, such as Title VII of the Civil Rights Act, plaintiffs asserting violations of the ADA must show that they fall under the statutorily-defined category of a "qualified individual."[24] In light of this additional requirement, defendant-employers have argued that after-acquired evidence that contradicts the plaintiff's status as a qualified individual, rather than just serving as blanket evidence of wrongdoing, is enough to bar disability discrimination suits brought under the ADA, thus circumventing the holding in *McKennon*.[25] Some circuit courts have granted outright dismissal of suits when facing after-acquired evidence that the plaintiff was not a qualified individual; others have followed the ruling in *McKennon* and allowed the claim to proceed.[26]

This Note will argue that the federal courts should not allow after-acquired evidence, bearing on a plaintiff's status as a qualified individual, to defeat ADA employment discrimination suits, as allowing such suits to proceed vindicates the purpose and function of the ADA and is in line with the Supreme Court's precedent set in *McKennon*. Part I will explore the history and purpose of the ADA, consulting both the statute's text and legislative history.[27] It will also discuss the function and purpose of the qualified individual prong and briefly explore how the EEOC and the courts have come to understand and define the requirement.[28] Part I will then turn to the development of the after-

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20 *After-Acquired Evidence*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/after-acquired_evidence [https://perma.cc/4QGM-W48Z].

21 McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 355–57 (1995).

22 *Id.* at 360–63.

23 *See infra* Section I.E.

24 42 U.S.C. § 12111(8) (defining a "qualified individual" as a person "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires").

25 *See infra* Section I.E.

26 *See infra* Section I.E.

27 *See infra* Section I.A.

28 *See infra* Section I.B.

acquired evidence rule, beginning by examining its use prior to the ruling in *McKennon*,[29] then analyzing the *McKennon* holding itself,[30] and finally discussing the consequences of *McKennon* and the subsequent use of the after-acquired evidence rule.[31] Part II will analyze the general problems that plague the use of after-acquired evidence in discrimination suits, highlighting the chilling effect it plays on potential meritorious discrimination claims and its shifting of focus away from the employer's discriminatory actions onto the plaintiff's integrity.[32] It will then examine the after-acquired evidence rule in relation to employment discrimination suits involving the ADA's qualified individual prong. Part II will argue that after-acquired evidence, used to prove that a plaintiff is not a qualified individual, should not be allowed to defeat an employment discrimination lawsuit. Dismissing such lawsuits would defeat the deterrence and legal recourse purposes of the ADA and allow employers to avoid having to provide reasonable accommodation to employees with disabilities.[33] Additionally, Part II will consider the *McKennon* reasoning and assert that the holding must apply to all ADA suits in the same manner it does to other antidiscrimination statutes.[34] Lastly, Part III will argue for broader deference to the EEOC in order to avoid the problems arising from the use of after-acquired evidence in ADA cases.[35] Part III will also argue that the use of after-acquired evidence by defendant-employers be viewed under the lens of retaliation, thus leaving plaintiffs some options for legal recourse if their discrimination suit is thrown out.[36]

I. BACKGROUND

A. *The Americans with Disabilities Act of 1990*

Following the passage of the Rehabilitation Act of 1973, which banned discrimination on the basis of disability for individuals receiving federal funds,[37] there was—thanks to the massive organizing efforts of disability-rights activists—a shift in disability public policy, in

29 *See infra* Section I.C.

30 *See infra* Section I.D.

31 *See infra* Section I.E.

32 *See infra* Section II.A.

33 *See infra* Section II.B.

34 *See infra* Section II.C.

35 *See infra* Section III.A.

36 *See infra* Section III.B.

37 Rehabilitation Act of 1973, 29 U.S.C. § 794.

which the exclusion of people with disabilities from all aspects of society came to be viewed as unlawful discrimination.[38] Disability-rights activists channeled much of the same language and strategies as the Civil Rights Movement of the 1950s and 1960s, fighting to end the segregation of disabled people from society and the "out of sight, out of mind" mentality that accompanied it.[39] This action culminated in the introduction of the ADA[40] in 1988, and its passage and signage by President Bush in 1990.[41]

Prior to the ADA's passage, Congress made numerous findings regarding the status of people with disabilities in American society. These findings were then included in the text of the statute.[42] Most notably, Congress determined that many individuals with physical or mental disabilities have been prevented from fully participating in all aspects of society due to disability discrimination.[43] Additionally, Congress found that discrimination occurs in critical areas, such as employment and housing, and that individuals who have experienced disability discrimination often do not have any legal recourse.[44] Therefore, it became Congress's goal to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency," for individuals living with a disability.[45] The stated purpose of the ADA was to: (1) eliminate discrimination against people with disabilities; (2) provide enforceable standards aimed at this elimination; (3) ensure that the federal government "plays a central role" in enforcing the statute's standards; and (4) "invoke the sweep of congressional authority," to address issues of disability discrimination.[46]

The ADA's prohibitions on discrimination apply broadly to practically all areas of public life including employment, schools, transportation, and public and private areas open to the general

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38 Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITY RTS. EDUC. & DEF. FUND (1992), https://dredf.org/about-us/publications/the-history-of-the-ada [https://perma.cc/U7NN-YYPV].

39 *Id.*

40 Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213.

41 *Timeline of the Americans with Disabilities Act*, ADA NAT'L NETWORK, https://adata.org/ada-timeline [https://perma.cc/WXF8-BEN9].

42 42 U.S.C. § 12101.

43 *Id.* § 12101(a)(1)–(8) (noting that American society has "tended to isolate and segregate individuals with disabilities," and people with disabilities often "occupy an inferior status" in American society).

44 *Id.* § 12101(a)(3)–(4).

45 *Id.* § 12101(a)(7).

46 *Id.* § 12101(b)(1)–(4).

public.[47] Title I of the ADA deals specifically with employment, barring discrimination against individuals with disabilities in the workplace and, in some instances, requiring employers to make reasonable accommodations to workers with disabilities.[48] Covered employers, which includes private and public employers with fifteen or more employees,[49] are prohibited from discriminating against "qualified individuals" on the basis of disability with respect to job application procedures, hiring, firing, compensation, training, advancement, and "other terms, conditions, and privileges of employment."[50] Disability discrimination can manifest in a number of ways such as classifying an employee or applicant, based on their disability, in a manner that harms their employment opportunities, or denying such individuals equal benefits due to their disability.[51] Importantly, unlike the other antidiscrimination statutes, the ADA states that an employer's failure to make a reasonable accommodation to an otherwise qualified applicant or employee, or denying such individuals employment based upon their need for a reasonable accommodation, is also unlawful.[52]

Although the statute's text provides insight into the purpose and function of the ADA, a review of the ADA's legislative history further clarifies Congress's intent in drafting and passing the bill. Ultimately, it is apparent that one of Congress's primary goals was to eliminate barriers imposed on persons with disabilities that have kept them excluded from full and fair participation in American society.[53] Particularly, in relation to employment discrimination, Congress intended to send a message to employers that discrimination on the

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47 *What Is the Americans with Disabilities Act (ADA)?*, ADA NAT'L NETWORK, https://adata.org/learn-about-ada [https://perma.cc/6FXF-2D8A].

48 42 U.S.C. § 12111.

49 *Employment (Title I)*, ADA.GOV, https://www.ada.gov/ada_title_I.htm [https://perma.cc/TWN5-8TEN].

50 42 U.S.C. § 12112(a).

51 Another example of discrimination includes "utilizing standards, criteria, or methods of administration[] that have the effect of discrimination on the basis of disability." *Id.* § 12112(b)(1), (b)(3)(A), (b)(4).

52 *Id.* § 12112(b)(5).

53 H.R. REP. NO. 101-485, pt. 2, at 22 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 304 ("The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life."); H.R. REP. NO. 101-485, pt. 3, at 26 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 449 ("The ADA is a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation.").

basis of disability would not be tolerated[54] and to assure people with disabilities that they would be able to turn to the federal government for protection against such discrimination and to secure their civil rights.[55]

In support of this stated purpose, Congress cited statistics that purported to show that people with disabilities, although desiring to work, faced high rates of unemployment, with many such individuals citing discrimination as a huge obstacle to employment.[56] Furthermore, during congressional debate, the drafters often invoked the Civil Rights Act of 1964, stating that they wanted to extend the relevant protections of the Civil Rights Act to those with disabilities.[57] In sum, the ADA's text, combined with its extensive legislative history, provides strong evidence that one important manner in which Congress aimed to eradicate disability discrimination was allowing people with disabilities access to the judicial system in order to vindicate their rights.[58]

The ADA was amended once, in 2008, with the signage of the Americans with Disabilities Act Amendments Act (ADAAA).[59] Notably, Congress re-emphasized that the ADA was intended to "provide broad coverage" and that Congress was explicitly rejecting several Supreme Court cases that had worked to narrow the broad coverage intended to be afforded to persons with disabilities under the

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54 135 CONG. REC. 8505, 8506 (1989) (statement of Sen. Tom Harkin) ("The ADA also sends a clear message to employers . . . that the full force of the Federal law will come down on anyone who continues to subject persons with disabilities to discrimination by segregating them, by excluding them, or by denying them . . . meaningful opportunity to benefit from all aspects of life in America.").

55 *Id.* at 8507 ("[T]he purposes of the ADA include providing clear, strong, consistent, enforceable standards . . . . This means that discrimination on the basis of disability in any form will not be tolerated and people with disabilities will be able to hold their Federal Government accountable for ensuring enforcement of their rights.").

56 *Id.* at 8506 ("[T]wo-thirds of all disabled Americans between the age of 16 and 64 are not working at all; but, a large majority of those not working say that they want to work."); H.R. REP. NO. 101-485, pt. 3, at 25 ("Gradually, public policy affecting persons with disabilities recognized that many of the problems faced by disabled people are not inevitable, but instead are the result of discriminatory policies based on . . . deeply imbedded prejudices toward people with disabilities.").

57 H.R. REP. NO. 101-485, pt. 2, at 23 ("The ADA incorporates by reference the enforcement provisions under title VII of the Civil Rights Act of 1964 (including injunctive relief and back pay).").

58 "On April 28 of this year, several Senators and Representatives introduced the Americans with Disabilities Act of 1988 and took the first step in opening up the courthouse door to Americans with disabilities." *Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the S. Comm. on Lab. & Hum. Res. and the Subcomm. on Select Educ. of the H. Comm. on Educ. & Lab.*, 100th Cong. 8 (1988) (statement of Sen. Harkin, Chairman, S. Subcomm. on the Handicapped).

59 *The Americans with Disabilities Act Amendments Act of 2008*, EEOC, https://www.eeoc.gov/statutes/americans-disabilities-act-amendments-act-2008 [https://perma.cc/B5HB-RHFM].

ADA.[60] In particular, Congress expanded the definition of "disability" in order to ensure that applicable individuals were covered by the text "to the maximum extent permitted."[61]

Like several other antidiscrimination statutes, enforcement of Title I of the ADA falls under the purview of the EEOC.[62] A plaintiff must first file an administrative complaint with either the EEOC or the requisite state or local fair employment practice agency.[63] Plaintiffs can only file in federal court once the EEOC has issued a "right-to-sue" letter, and plaintiffs can request a letter if the EEOC has not acted within 180 days of filing.[64] In order for a plaintiff to establish a prima facie case under the ADA, courts have generally held that the plaintiff must show that they have a disability within the meaning of the ADA, are a qualified individual, and were discriminated against or suffered adverse employment action because of their disability.[65]

B. *Who Is a Qualified Individual Under the ADA?*

One major difference between the ADA and other antidiscrimination and federal civil rights statutes is the requirement that, for an individual to fall under the protection of the ADA, they must be classified as a "qualified individual."[66] The ADA defines a qualified individual as a person "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[67] Since Congress wanted the ADA to apply broadly, the text of the statute provides little guidance as to the specific definitions of "qualified individual," "reasonable accommodation," and "essential functions of

60 42 U.S.C § 12101 note (2008).

61 *The Americans with Disabilities Act Amendments Act of 2008*, *supra* note 59; 42 U.S.C. § 12102(4).

62 *Americans with Disabilities Act*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topic/disability/ada [https://perma.cc/D7EJ-C2W7].

63 U.S. Dep't of Just., *A Guide to Disability Rights Laws*, ADA.GOV (Feb. 2020), https://www.ada.gov/cguide.htm [https://perma.cc/BNE8-FU4H].

64 *Id.*; *Filing a Lawsuit*, EEOC, https://www.eeoc.gov/filing-lawsuit [https://perma.cc/RZ2P-Q4P2]

65 *See, e.g.*, Aubrey v. Koppes, 975 F.3d 995, 1005–06 (10th Cir. 2020); Kurtzhals v. County of Dunn, 969 F.3d 725, 728 (7th Cir. 2020); Eshleman v. Patrick Indus., 961 F.3d 242, 245 (3d Cir. 2020).

66 42 U.S.C. § 12111(8).

67 *Id.*

employment."[68] Therefore, to determine the congressional purpose behind the qualified individual language and explain its inclusion in the statute's text, one must turn to the ADA's legislative history.

The qualified individual language was primarily borrowed from Section 504 of the Rehabilitation Act, which states that no recipients of federal financial assistance shall discriminate against an "otherwise qualified individual with a disability."[69] The legislative history surrounding the qualified individual prong of the ADA notes that the underlying premise of Title I, in light of the pervasive misconceptions surrounding the abilities of persons with disabilities, is to ensure that such individuals are not excluded from employment opportunities unless they truly cannot perform the job at hand, even when a reasonable accommodation is provided.[70]

Much of the relevant legislative history is dedicated to discussing the inclusion of the phrase "essential function" in the definition of qualified individual.[71] Particularly, the legislators emphasized that the point of the phrase's inclusion was to guarantee that employers could still require that all employees, including employees with disabilities, be able to perform the necessary, namely the "non-marginal," functions of the job.[72] Therefore, the legislative history shows that Congress intended to uphold the employer's freedom to select applicants, based upon their relevant qualifications, so long as the selection is not grounded on an individual's disability or need for a reasonable accommodation.[73] Ultimately, if the employee is able to perform the

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68 Reasonable accommodation is defined as "making existing facilities used by employees readily accessible to and usable by individuals with disabilities," and the statute provides some specific examples of accommodations such as job restructuring, modified schedules, reassignment, training materials, obtaining qualified readers or interpreters, "and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9).

69 Rehabilitation Act of 1973, 29 U.S.C. § 794(a); *see also* Eric Wade Richardson, *Who Is a Qualified Individual with a Disability Under the Americans with Disabilities Act*, 64 U. CIN. L. REV. 189, 189–90 (1995).

70 H.R. REP. NO. 101-485, pt. 3, at 31 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 454 ("The requirement that job criteria actually measure skills required by the job is a critical protection, because stereotypes and misconceptions about the abilities and inabilities of persons with disabilities continue to be pervasive. Discrimination occurs against persons with disabilities because of stereotypes, discomfort, misconceptions, and fears about increased costs and decreased productivity.").

71 H.R. REP. NO. 101-485, pt. 2, at 55 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 337.

72 *Id.* ("The phrase 'essential functions' means job tasks that are fundamental and not marginal."); H.R. REP. NO. 101-485, pt. 3, at 33 ("[H]andicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job.").

73 H.R. REP NO. 101-485, pt. 3, at 31 ("The underlying premise of this title is that persons with disabilities should not be excluded from job opportunities unless they are actually unable to do the job.").

non-marginal functions of the position, even if a reasonable accommodation is needed, that person is a qualified individual under the ADA and cannot be turned away from the position solely due to their disability or need for an accommodation.[74]

Although the ADA's text and legislative history provide some insight into who may be classed as a qualified individual, the federal courts and the EEOC have further elaborated upon the requirement. The EEOC and several courts agree that, to establish that an employee is a qualified individual, said employee must satisfy the requisite job-related requirements and show that they can perform the essential functions of the position, with or without reasonable accommodation.[75] Such job-related requirements may dictate that the individual possess related skills, experience, education, or other capabilities needed to adequately perform the essential functions of the job.[76] Many courts have utilized a two-step inquiry when deciding whether an employee is a qualified individual, with the court first determining that the individual satisfies the pre-requisites of the position—for example, possessing the relevant education or training—then finding that they can perform the essential functions of the job.[77] Essential function has ultimately been defined as the position's fundamental duties, excluding any marginal responsibilities.[78]

C. *Development of the After-Acquired Evidence Rule*

The use of after-acquired evidence to rebut claims of employment discrimination initially arose in the case *Summers v. State Farm Mutual Automobile Insurance Co.*[79] Following *Summers*, the use of after-acquired evidence in discrimination cases proliferated, resulting in extensive debate about the defense's applicability to employment discrimination cases and thus a host of conflicting decisions by the

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74 *Id.* at 31–32.

75 29 C.F.R. § 1630.2(m) (2020); Skerski v. Time Warner Cable Co., 257 F.3d 273 (3d Cir. 2001); Weber v. Strippit, Inc., 186 F.3d 907 (8th Cir. 1999); Rodrigo v. Carle Found. Hosp., 879 F.3d 236 (7th Cir. 2018); Richardson v. Friendly Ice Cream Corp., 594 F.3d 69 (1st Cir. 2010).

76 29 C.F.R. § 1630.2(m).

77 Johnson v. Bd. of Trs., 666 F.3d 561, 564–65 (9th Cir. 2011).

78 29 C.F.R. § 1630.2(n)(1); *Skerski*, 257 F.3d at 279; *see also* 29 C.F.R. § 1630.2(n)(2)–(3) (laying out examples of job functions that may be deemed essential and appliable evidence that may shed light on whether or not a particular function is essential).

79 Summers v. State Farm Mut. Auto. Ins., 864 F.2d 700, 704 (10th Cir. 1988); *see also* Kenneth A. Sprang, *After-Acquired Evidence: Tonic for an Employer's Cognitive Dissonance*, 60 MO. L. REV. 89, 102 (1995).

circuit courts.[80] After-acquired evidence is generally defined as evidence of employee misconduct, that would have served as a legitimate basis for firing said employee, discovered *after* the employee has been wrongfully discharged and has brought a wrongful termination or employment discrimination lawsuit.[81]

Prior to the Supreme Court's decision in *McKennon v. Nashville Banner Publishing Co.*, the federal courts dealt with the after-acquired evidence defense in various ways.[82] Some courts upheld summary judgment in favor of the employer,[83] while others denied summary judgment but allowed the evidence to limit potential relief.[84] Some state courts, such as the California Court of Appeals for the Second Division, refused to adopt a blanket rule one way or the other.[85] The disagreement throughout the courts ultimately resulted in the Supreme Court granting certiorari to resolve the split in *McKennon v. Nashville Banner Publishing Co.*[86]

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80 Sharona Hoffman, *The After-Acquired Evidence Rule: The Best of All Possible Worlds?*, 22 EMP. RELS. L.J. 79, 80 (1996).

81 *After-Acquired Evidence*, *supra* note 20. A clear example of after-acquired evidence being used by a defendant is in the recent Ninth Circuit case, *Anthony v. Trax International Corp.* In that case, the employer found evidence that the plaintiff had lied about possessing a bachelor's degree, which was a requirement for the job she held as a technical writer, and the employer attempted to use such evidence as grounds for dismissal of the disability discrimination lawsuit that she had brought against the employer. *See* Anthony v. Trax Int'l Corp., 955 F.3d 1123 (9th Cir. 2020).

82 Sprang, *supra* note 79, 105–16 (summarizing the various ways in which courts dealt with after-acquired evidence in employment discrimination lawsuits).

83 *See, e.g.*, *Summers*, 864 F.2d 700 (involving a case in which plaintiff filed suit alleging age and religious discrimination following the termination of his employment, and defendant used after-acquired evidence of widespread document falsification to defeat the suit); Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409 (6th Cir. 1992), *abrogated by* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995) (involving a case in which plaintiff brought a retaliation suit against her employer, and defendant provided after-acquired evidence of the plaintiff having falsified her employment application to defeat the suit).

84 Smith v. Gen. Scanning, Inc., 876 F.2d 1315 (7th Cir. 1989) (holding that defendant's after-acquired evidence of plaintiff's resume fraud would prevent reinstatement and back pay but could not serve as a total bar to plaintiff's recovery in an age discrimination claim brought under the ADEA); Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992) (holding that although reinstatement, front pay, and injunctive relief could not be awarded, the court would not bar all relief after defendant provided after-acquired evidence of plaintiff's omission of a prior conviction from her job application in response to alleged violations of Title VII and the Equal Pay Act).

85 Cooper v. Rykoff-Sexton, Inc., 29 Cal. Rptr. 2d 642 (Ct. App. 1994) (holding that the after-acquired evidence that plaintiff had made misrepresentations on his employment application was no defense to a claim of wrongful discharge based on age discrimination).

86 *McKennon*, 513 U.S. 352.

D. McKennon v. Nashville Banner Publishing Co.

McKennon stemmed from an employment discrimination lawsuit brought by Christine McKennon against her employer, Nashville Banner Publishing Company.[87] McKennon was sixty-two years old when she was fired from her position as a secretary, prompting her to bring an age discrimination suit under the Age Discrimination Employment Act of 1967 (ADEA).[88] In a deposition taken by defendant in preparation for the case, McKennon admitted that she had impermissibly copied several of the company's confidential documents and showed them to her husband.[89] Nashville Banner initially alleged that her dismissal was part of a workforce reduction plan in order for the company to cut costs.[90] However, in light of McKennon's deposition, Nashville Banner moved for summary judgment, conceding that it had discriminated against McKennon, but arguing that the after-acquired evidence of McKennon's misconduct barred all relief.[91] The district court granted the motion for summary judgment,[92] and the Sixth Circuit affirmed, stating that the after-acquired evidence doctrine barred all relief.[93]

Ultimately, however, the Supreme Court reversed the granting of the motion for summary judgment.[94] The Court held that after-acquired evidence of employee wrongdoing, which would have served as grounds for lawful termination had it been discovered during the employee's active employment, did not bar the employee's age discrimination lawsuit brought under the ADEA.[95] Justice Kennedy, speaking for a unanimous court, recognized that the ADEA was enacted as part of a wider statutory scheme aimed at ending discrimination in the workplace.[96] This scheme also included Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the National Labor

87 *Id.*

88 *Id.* at 354. Although this case was brought under the ADEA, *McKennon*'s holding has been expanded and applied to cases brought under other antidiscrimination statutes such as the ADA. *See infra* Section II.C.

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

90 *Id.* at 354.

91 McKennon v. Nashville Banner Publ'g Co., 797 F. Supp. 604, 605 (M.D. Tenn. 1992), *aff'd*, 9 F.3d 539 (6th Cir. 1993), *rev'd*, 513 U.S. 352 (1995); *McKennon*, 513 U.S. at 355.

92 *McKennon*, 797 F. Supp. at 608.

93 McKennon v. Nashville Banner Publ'g Co., 9 F.3d 539 (6th Cir. 1993), *rev'd*, 513 U.S. 352 (1995).

94 *McKennon*, 513 U.S. 352.

95 *Id.* at 355–57 (noting that the plaintiff-employee may be entitled to back pay up to the moment the employer learned of the plaintiff's misconduct).

96 *Id.* at 357–58.

Relations Act, and the Equal Pay Act of 1963.[97] The Court also highlighted that deterrence against discriminatory employer practices and compensation for victims of discrimination are two of the main goals of the statutory scheme.[98] The Court then reasoned that an employee who files a workplace discrimination lawsuit against their employer serves both of these objectives, and it would not fit with the antidiscrimination scheme, created by the federal civil rights laws, if after-acquired evidence was able to defeat discrimination lawsuits in every such instance.[99]

Although the Court did not allow after-acquired evidence to defeat the employment discrimination suit, it noted that such evidence could be used to limit damages recoverable by the plaintiff.[100] The Court held that the employee's wrongdoing becomes relevant, not in order to punish them or to prevent them from benefitting from their own wrongful acts, but to preserve the employer's freedom of choice.[101] Therefore, although after-acquired evidence may not be used to bar a plaintiff's suit, once an employer has proven that the employee's wrongdoing would have been severe enough to warrant their termination, neither front pay nor reinstatement is an appropriate remedy, and an award of back pay should be calculated up to the point the employer learned of the wrongdoing.[102]

Following *McKennon*, the EEOC released limited enforcement guidelines on the use of after-acquired evidence in order to analyze the Court's holding and its impact on future employment discrimination lawsuits and to instruct EEOC investigators on how to proceed.[103]

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97 *Id.* at 357.

98 *Id.* at 358.

99 *Id.* at 358–59 ("The objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her. The disclosure through litigation of incidents or practices that violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of the Act's operation or entrenched resistance to its commands, either of which can be of industry-wide significance.").

100 *Id.* at 360–62.

101 *Id.* ("We have rejected the unclean hands defense 'where a private suit serves important public purposes.' That does not mean, however, the employee's own misconduct is irrelevant to all the remedies . . . . The employee's wrongdoing must be taken into account, we conclude, lest the employer's legitimate concerns be ignored.").

102 *Id.* at 361–63. Additionally, in calculating the proper relief, the court can take into account "extraordinary equitable circumstances that affect the legitimate interests of either party." *Id.* at 362.

103 *Enforcement Guidance on After-Acquired Evidence and* McKennon v. Nashville Banner Publishing Co, EEOC (Dec. 14, 1995) [hereinafter *Enforcement Guidance*], https://www.eeoc.gov/laws/guidance/enforcement-guidance-after-acquired-evidence-and-mckennon-v-nashville-banner [https://perma.cc/VMG6-S9KY].

Ultimately, the EEOC noted that the *McKennon* Court "essentially endorsed" the EEOC's position that an employer will and should be held liable for their discriminatory actions, regardless of the employee's alleged misconduct.[104] The EEOC instructed investigators, when examining discrimination cases involving after-acquired evidence, to look into the severity of the misconduct and the employer's response to similar transgressions to determine whether the employee's conduct would have otherwise served as sufficient grounds for termination.[105]

E. *The Consequences of the* McKennon *Ruling and Further Circuit Splits*

Although the *McKennon* ruling limited how after-acquired evidence could be used in discrimination suits, it left the door open for defendant-employers to assert the defense, and the practice remains used today.[106] The portion of the Court's holding in *McKennon* that allows the evidence to limit potential damage awards has resulted in defendants continuing to plead after-acquired evidence when facing employment discrimination lawsuits.[107] Consequently, employers have asserted a host of evidence as alleged proof of employee misconduct, ranging from misrepresentations on the employee's resume to purported sexual harassment.[108] Additionally, although the *McKennon* Court only directly addressed after-acquired evidence used to combat ADEA suits,[109] the ruling has been applied by the federal courts to cases

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104 *Id.* ("McKennon essentially endorsed the Commission's longstanding position that a respondent will be held liable for its unlawfully discriminatory acts whether or not the employer subsequently discovers that the affected employee or applicant engaged in misdeeds.").

105 *Id.*

106 *See* Williams v. United Airlines, No. C 19-02988, 2021 WL 77932, at *2 (N.D. Cal. Jan. 8, 2021); Konczal v. Zim Tim, LLC, No. 19-12275, 2021 WL 222358, at *2 (E.D. Mich. Jan. 22, 2021).

107 Following *McKennon*, in order for plaintiff's damages to be limited, the defendant-employer has the burden of showing that, had it been aware of the employee misconduct while they were still employed, it would have discharged the employee. *See* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1072 (9th Cir. 2004).

108 *See* Russell v. Microdyne Corp., 65 F.3d 1229, 1234 (4th Cir. 1995) (involving after-acquired evidence of misrepresentations made on employee's resume); Cuff v. Trans States Holdings, Inc., 816 F. Supp. 2d 556, 568 (N.D. Ill. 2011) (involving after-acquired evidence of the violation of the employer policy on sexual harassment when it was discovered that plaintiff lied about an alleged sexual relationship with a subordinate); Risk v. Burgettstown Borough, 364 F. App'x 725, 728–29 (3d Cir. 2010) (involving after-acquired evidence of the erroneous issuance of a required certification, discovered two years after the employee had been fired).

109 Merritt B. Chastain III, *The Guiding Light or Simply More Disarray?: A Principled Analysis of the After-Acquired Evidence Doctrine After* McKennon v. Nashville Banner Publishing Co., 36 S. TEX. L. REV. 1107, 1166–67 (1995).

arising under Title VII of the Civil Rights Act,[110] the Equal Pay Act,[111] and other federal and state discrimination laws.[112]

Nevertheless, although the Supreme Court restricted the use of after-acquired evidence to a limitation on damage awards, employers have sought workarounds. In particular, when fighting disability discrimination cases brought under the ADA, employers have strategically attempted to use late-discovered information that the plaintiff is not a qualified individual, and thus does not fall under the protection of the ADA,[113] in order to defeat disability discrimination suits in their entirety.[114] Therefore, if the particular court allows the after-acquired evidence to be used in such a manner, the defendant may be able to defeat the discrimination lawsuit without reaching a decision on the merits of the suit, a circumvention of the holding in *McKennon*.[115] For example, in the recent Ninth Circuit case *Anthony v. Trax International Corp.*, the defendant successfully used after-acquired evidence that the plaintiff had lied on her resume about possessing a bachelor's degree, which was required for the position she had held, to prove that the plaintiff was not a qualified individual under the ADA.[116] Instead of using the late-discovered information as evidence of employee misconduct—which would have led to a limitation on the plaintiff's potential damage award but would have otherwise allowed the suit to proceed[117]—the defendants used it to prove that she did not satisfy the job prerequisites, which would have prevented her from being classified as a qualified individual under the ADA altogether.[118]

Thus, a new split in the federal courts has emerged as to whether after-acquired evidence, bearing on the plaintiff's status as a qualified individual, can completely defeat a disability discrimination suit, rather

110 *See* Sellers v. Mineta, 358 F.3d 1058, 1063 (8th Cir. 2004).

111 *See* Wallace v. Dunn Constr. Co., 62 F.3d 374, 378 (11th Cir. 1995).

112 Barbara Ryniker Evans & Robert E. McKnight, Jr., *Splitting the Baby on After-Acquired Evidence in Employment Discrimination*, 19 AM. J. TRIAL ADVOC. 241, 257–59 (1995).

113 42 U.S.C. § 12111(8).

114 *See* Anthony v. Trax Int'l Corp., 955 F.3d 1123 (9th Cir. 2020).

115 *Id.*

116 *Id.*

117 *Id.* at 1133.

118 *Id.* at 1134. As noted, to be a qualified individual under the ADA, the employee with a disability must satisfy the requisite job-related requirements, which includes possessing the necessary education, skills, and experience required to hold the position. 29 C.F.R. § 1630.2(m) (2020); Johnson v. Bd. of Trs. 666 F.3d 561, 565 (9th Cir. 2011).

than serving solely as a limitation on damages. The Fifth,[119] Sixth,[120] and Ninth[121] Circuits have each held that *McKennon*'s limitation on after-acquired evidence does not extend to evidence used to show that a plaintiff is not a qualified individual and thus can serve as the basis for a suit's dismissal. The courts in these cases generally argued that since the text of the ADA protects only qualified individuals, the plaintiff carries the initial burden of establishing that they are a qualified individual when asserting their prima facie case.[122] If their status as a qualified individual can be rebutted by the employer's after-acquired evidence, their case may be dismissed.[123]

Alternatively, the Seventh Circuit has held that after-acquired evidence would not completely bar relief in such qualified individual cases, as the court could not find a distinction between cases arising under the ADA and the ADEA claim brought in *McKennon*.[124] Therefore, the court reasoned that the limitations placed on after-acquired evidence in *McKennon* should apply to qualified individual suits as well, and the case should be allowed to proceed.[125] The Third Circuit has also ruled on this issue in two separate cases, however, with seemingly inconsistent results.[126] In one instance, the court held that after-acquired evidence bearing on plaintiff's status as a qualified

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119 McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558 (5th Cir. 1998).

120 Bauer v. Varity Dayton-Walther Corp., 118 F.3d 1109 (6th Cir. 1997). This case arose under the FMLA rather than the ADA, however it still involved the plaintiff's status as a qualified individual and is thus related. *Id.*

121 *Trax Int'l Corp.*, 955 F.3d 1123.

122 *Id.* at 1127; *Bauer*, 118 F.3d at 1112; *McConathy*, 131 F.3d at 562–63.

123 In *McConathy*, the after-acquired evidence presented by the defendant was plaintiff's disability benefits application that had stated that she could not hold any position, even on a part-time basis. This was able to defeat plaintiff's suit alleging discriminatory discharge and failure to reasonably accommodate, as it was evidence that the plaintiff could not perform the essential functions of the job and thus did not qualify as a qualified individual under the ADA. *McConathy*, 131 F.3d at 562–63.

124 Rooney v. Koch Air, LLC, 410 F.3d 376 (7th Cir. 2005) (involving a suit filed under the ADA in which the plaintiff claimed that his employer had discriminatorily discharged him on account of his disability, the court held that after-acquired evidence of plaintiff's lack of the requisite driver's license, a prerequisite for the position he had held, cannot be used to bar relief).

125 *Id.* at 382 ("We know from *McKennon v. Nashville Banner Pub. Co.*, that after-acquired evidence like this does not bar all relief, although it can limit recoverable damages. (We see no distinction for this purpose between an age discrimination claim . . . and an ADA claim.)" (citations omitted)).

126 *Compare* Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524 (3d Cir. 2007) (applying *McKennon*, the court held that the defendant could not use after-acquired evidence of plaintiff's drug use to show that the plaintiff was not a qualified individual under the ADA), *with* McNemar v. Disney Store, Inc., 91 F.3d 610, 620–21 (3d Cir. 1996) (holding that employers may use after-acquired evidence of plaintiff's sworn statements that he was totally and permanently disabled and unable to work to rebut plaintiff's prima facie case of discrimination under the ADA by showing that the plaintiff was not a qualified individual).

individual could be used to defeat the lawsuit, and in the other, held that such evidence could only be used to limit damages.[127] The district courts are similarly split on the issue, with some holding that after-acquired evidence may be fatal to discrimination suits,[128] and others asserting that the evidence may only be used to limit damages, in line with *McKennon*.[129] Ultimately, in light of this recent circuit split, the issue is ripe for adjudication by the Supreme Court. However, seeing as the Supreme Court only grants certiorari to a select number of cases,[130] the lower courts should proceed—when confronted with a disability discrimination lawsuit involving after-acquired evidence relating to the plaintiff's status as a qualified individual—by following the precedent set in *McKennon v. Nashville Banner Publishing Co.* and only allowing the evidence to serve as a limitation on damages.

II. ANALYSIS

A. The General Problems with the Role of After-Acquired Evidence

Although the *McKennon* Court attempted to provide some clarity on the role after-acquired evidence should play in discrimination lawsuits, by refusing to ban it outright, after-acquired evidence is still used by defendant-employers, and debate over its applicability continues today.[131] In *McKennon*, the Supreme Court recognized that allowing employers to assert the after-acquired evidence defense preserved the employer's important right to control business matters

127 *Bowers*, 475 F.3d 524; *McNemar*, 91 F.3d at 620–21.

128 Colin v. Guilford Cnty. Bd. of Educ., No. 109CV365, 2010 WL 3911426 (M.D.N.C. Oct. 5, 2010); Matewski v. Orkin Exterminating Co., No. Civ. 02–233–P–C, 2003 WL 21516577 (D. Me. July 1, 2003); E.E.O.C. v. Fargo Assembly Co., 142 F. Supp. 2d 1160 (D. N.D. 2000).

129 Burkhart v. Intuit, Inc., No. CV–07–675–TUC–CKJ, 2009 WL 528603 (D. Ariz. Mar. 2, 2009); Seegert v. Monson Trucking, Inc., 717 F. Supp. 2d 863 (D. Minn. 2010); Penn v. Aerospace Corp., No. 08cv620, 2009 WL 585839 (E.D. Va. Mar. 6, 2009).

130 The Supreme Court only grants certiorari for 100–150 out of the 7,000 cases that it is asked to review each year. *See Supreme Court Procedures*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 [https://perma.cc/XZB2-HKUE].

131 *See generally* Melissa Hart, *Retaliatory Litigation Tactics: The Chilling Effects of "After-Acquired Evidence,"* 40 ARIZ. ST. L.J. 401 (2008) (analyzing the full effect of after-acquired evidence, its consequences, and ultimately arguing that it chills civil rights litigation and shifts the focus from the discriminating employer to the plaintiff's misconduct); Joseph Spadola, *An Ad Hoc Rationalization of Employer Wrongdoing: The Dangers of the After-Acquired Evidence Defense*, 102 CALIF. L. REV. 691 (2014) (arguing that the after-acquired evidence doctrine is bad legal policy and should ultimately be abolished).

related to its workplace.[132] However, in striking this balance, the Court may have inadvertently harmed the ability of employees to bring meritorious discrimination lawsuits.

First, allowing employers' continued use of the after-acquired evidence defense, even solely to limit plaintiffs' remedies, may have a chilling effect on employment discrimination litigation.[133] Plaintiffs may become hesitant to file suit for fear that employers will scour their record for evidence of misconduct, and attorneys become resistant to taking on clients who do not possess spotless backgrounds.[134] The after-acquired evidence defense has the potential to endorse invasive discovery practices by employers into the defendant's background for any evidence of misdeeds on, or prior to, the job.[135] This possibility has the potential to deter meritorious discrimination suits as plaintiffs fear that information regarding, for example, prior drug use, incarceration, or immigration status, may come to light.[136] Additionally, allowing defendants to assert the after-acquired evidence defense shifts the focus away from the employer's unlawful discriminatory conduct and onto the plaintiff's character and integrity.[137] After-acquired evidence places employment discrimination plaintiffs on the defensive, often forcing their attorneys to commit more time to combatting the misconduct allegations, thus taking time and resources away from the discriminatory conduct at the heart of the suit and imposing additional attorney's fees and costs.[138]

The chilling effects and focus-shifting issues outlined above are particularly problematic in the context of ADA cases. As noted previously, an important function of the ADA is to provide individuals with disabilities an opportunity for legal recourse against employers who fail to comply with the provisions of the statute.[139] Thus, if ADA plaintiffs fear that the defendant may find evidence of misconduct, even if it has no relation to the underlying discrimination claim, they may choose not to proceed with their legitimate disability discrimination suit, and, as a result, the employer's violation of the ADA may continue

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132 McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361–62 (1995); *see also* Hart, *supra* note 131, at 411.

133 *See* Hart, *supra* note 131.

134 *Id.* at 402–05.

135 *See* Spadola, *supra* note 131, at 720.

136 *Id.* at 718–20; Hart, *supra* note 131, at 402–05; Robert Brookins, *Policy Is the Lodestar When Two Wrongs Collide: After-Acquired Evidence Under the Age Discrimination in Employment Act*, 72 N.D. L. REV. 197, 199–200, 245 (1996).

137 Spadola, *supra* note 131, at 722–25; Hart, *supra* note 131, at 423.

138 Hart, *supra* note 131, at 433.

139 42 U.S.C. § 12101(b); *see supra* Section I.A.

unchecked.[140] These issues will be heightened further if additional federal courts allow after-acquired evidence, bearing on the plaintiff's status as a qualified individual, to defeat the suit in its entirety rather than just limit damages.

B. After-Acquired Evidence Defeats the Purpose of the ADA

Allowing after-acquired evidence to defeat an ADA plaintiff's suit solely because the late-discovered information—which was unknown to the employer at the moment they acted discriminatorily—discounts the plaintiff's status as a qualified individual, is at odds with the purpose of the ADA. According to both the text of the ADA[141] and the legislative history behind the statute,[142] a main purpose of the legislation was to ensure persons with disabilities were able to fully participate in American society and were on an equal playing field with those who were not disabled.[143] In order to achieve these vital goals, the ADA serves both a deterrence purpose,[144] to prevent further discriminatory actions by employers, and a legal recourse purpose,[145] to compensate victims of discrimination. Allowing after-acquired evidence to defeat ADA suits contravenes both of those purposes.

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140 One particular fear is that if after-acquired evidence does have a chilling effect on meritorious disability discrimination claims, violations of the ADA's reasonable accommodation requirements may continue. Lack of reasonable accommodation makes it even more difficult for individuals with disabilities to obtain and maintain employment, thus lending to the disproportionate rates of unemployment for persons with disabilities.

141 See *supra* Section I.A for a discussion on the text of the ADA.

142 See *supra* Section I.A for a discussion on the legislative history surrounding the ADA's enactment.

143 42 U.S.C. § 12101(a)(7) ("[T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency . . . .").

144 *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995) ("Deterrence is one object of [the antidiscrimination] statutes. Compensation for injuries caused by the prohibited discrimination is another.").

145 *See* 42 U.S.C. § 12101(a)(4) ("[I]ndividuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination.").

1. Deterrence Purpose

By providing victims of disability discrimination the opportunity to obtain compensatory and punitive damages from their employer,[146] the ADA works to root out, deter, and ultimately eliminate discriminatory practices.[147] The theory is that employers will avoid any conduct that risks a statutory violation out of fear of having to inevitably pay a potentially high damage award.[148] In particular, the addition of the punitive damage award for especially malicious violations[149] highlights the deterrence purpose of the ADA, as it seeks to prevent infringement by the individual defendant as well as any similar industry-wide violation.[150] However, this vital deterrence purpose is not served if an employer can escape liability by presenting evidence that, although rebuts the plaintiff's status as a qualified individual, is wholly unrelated to the underlying discriminatory action and did not serve as motive for the unlawful conduct.

By allowing after-acquired evidence to defeat a plaintiff's potentially valid claim of disability discrimination, the rule serves as a shield for employers, permitting them to avoid any and all liability for their wrongful conduct and to continue, undeterred, with their discriminatory employment practices.[151] It opens up the possibility for employers to hire an applicant without performing a deep dive into their background. Then, once the employee with a disability requests, for instance, a reasonable accommodation, the employer may deny the request, or outright dismiss the employee. If an ADA suit is then brought in response, the employer can search extensively into the individual's background, history, or resume for any information that may disqualify them as a qualified individual and use such information

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146 *Remedies for Employment Discrimination*, EEOC, https://www.eeoc.gov/remedies-employment-discrimination [https://perma.cc/TNH5-EMQ8]. "The ADA incorporates by reference the enforcement provisions under Title VII of the Civil Rights Act of 1964 (including injunctive relief and back pay)." *See* H.R. REP. NO. 101-485, pt. 2, at 23 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 304; 42 U.S.C. § 12117(a).

147 135 CONG. REC. 8505, 8506 (1989) (statement of Sen. Tom Harkin); *see* Craig Robert Senn, *Ending Discriminatory Damages*, 64 ALA. L. REV. 187, 193–202 (2012) (noting that one of the four main purposes for allowing compensatory and punitive damages for Title VII and ADA plaintiffs was to "deter discriminatory employers by more severely punishing unlawful conduct").

148 Senn, *supra* note 147.

149 *Remedies for Employment Discrimination*, *supra* note 146.

150 Sandra Sperino, *Judicial Preemption of Punitive Damages*, 78 U. CIN. L. REV. 227, 230 (2009) ("Punitive damages are likewise described as serving two deterrent functions: specific deterrence for the individual defendant involved in the litigation and general deterrence for other similarly situated potential wrongdoers.").

151 Spadola, *supra* note 131, at 692.

to then escape liability. Such "fishing expeditions" were an explicit concern of the Court in *McKennon*, but by allowing room for employers to escape liability from disability discrimination suits in qualified individual cases, some federal courts may have implicitly mandated such excursions.[152]

Furthermore, nearly half of all after-acquired evidence cases involve misrepresentations on employment application materials and resumes.[153] Misrepresentation on employment materials is a widespread phenomenon and is an occurrence well-documented by employers.[154] In light of this common practice, there is an even greater incentive for employers to, when faced with a disability discrimination suit, delve into the plaintiff's background for any information that may show that they do not possess the requisite job-related requirements or that they cannot perform the essential functions of the position.[155] Ultimately, if such evidence is found, employers may be able to escape liability, and thus can conceal their discriminatory actions, and their violations may continue unchecked.[156] Additionally, since the courts are instructed to defer to the employer's judgment in defining a job's essential functions—for purposes of determining whether an individual is qualified under the ADA—the employer is placed in a better position to argue that the after-acquired evidence presented shows that the plaintiff does not meet the requisite job-related requirements.[157]

In drafting the damage provisions of the ADA, Congress aimed to incentivize discrimination victims to file more claims so that the discriminatory conduct, which historically prevented people with disabilities from participating fully in society, could be brought to light and eliminated.[158] By allowing after-acquired evidence to defeat disability discrimination lawsuits, the federal courts contravene the

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152 McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 363 (1995); Hart, *supra* note 131, at 410, 433.

153 Spadola, *supra* note 131, at 718.

154 *See* Jennifer Liu, *78% of Job Seekers Lie During the Hiring Process—Here's What Happened to 4 of Them*, CNBC (Feb. 20, 2020, 9:01 AM), https://www.cnbc.com/2020/02/19/how-many-job-seekers-lie-on-their-job-application.html [https://perma.cc/BA8K-4UU4] (citing a survey that found that seventy-eight percent of individuals surveyed admitted that they did or would consider misrepresenting themselves on an employment application).

155 See 42 U.S.C. § 12111(8) for a definition of qualified individual under the ADA.

156 *See* Hart, *supra* note 131, at 428.

157 42 U.S.C. § 12111(8) ("For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential."); 29 C.F.R. § 1630.2(n)(3)(i) (2020).

158 *See* Senn, *supra* note 147, at 201; H.R. REP. NO. 101-485, pt. 2 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303.

deterrence purpose of the ADA and may inadvertently allow unlawful discrimination to proliferate.

2. Legal Recourse Purpose

In drafting the ADA, Congress also intended to provide individuals with disabilities with legal recourse in order to adequately compensate them following instances of discrimination.[159] As noted, the drafters of the ADA incorporated "by reference" the enforcement provisions from Title VII of the Civil Rights Act into the ADA.[160] Thus, similar to the other antidiscrimination statutes, Congress designed the remedial measures to encourage employers to evaluate their employment practices and remove any discriminatory conduct that was barring people with disabilities from employment.[161] By providing disability discrimination plaintiffs the power to publicly litigate their claims in a court of law, employer non-compliance can be brought to light, and, if such non-compliance appears to be an industry-wide pattern, it can be properly remedied.[162] The ability to litigate one's claim is particularly relevant in the context of ADA violations as it has the potential to expose a lack of reasonable accommodation and widespread abuse that has historically kept persons with disabilities out of the workforce.[163] Allowing after-acquired evidence to defeat a qualified individual discrimination suit fails to effectuate the legal recourse purpose as plaintiffs will have no alternative ability to vindicate their rights, and the discriminatory employer action will continue to go unchecked.[164]

Additionally, it has been noted that the use of after-acquired evidence by defendants increases the chance that a case will settle and that it will settle at a value lower than what it would have had the late-

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159 *See* 42 U.S.C. § 12101(a)(4) ("[I]ndividuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination.").

160 H.R. REP. NO. 101-485, pt. 2, at 23; 42 U.S.C. § 12117(a).

161 McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995) ("Congress designed the remedial measures in [the antidiscrimination] statutes 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." (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975))).

162 Hart, *supra* note 131, at 434 (quoting *McKennon*, 513 U.S. at 358–59).

163 See *supra* Section I.A for a discussion on the purposes behind the drafting of the ADA.

164 Maureen C. Weston, *The Road Best Traveled: Removing Judicial Roadblocks that Prevent Workers from Obtaining Both Disability Benefits and ADA Civil Rights Protection*, 26 HOFSTRA L. REV. 377, 385–86 (1997).

discovered evidence not been presented.[165] Studies on the outcomes of discrimination suits have also revealed that defendant-employers appear to prevail in disability discrimination cases at much higher rates than in suits brought under other antidiscrimination statutes.[166] Discrimination plaintiffs are supposedly entitled to a remedy that places them in the position they would have been had the discrimination never occurred.[167] However, these settlement and litigation-outcome trends raise concerns about whether victims of disability discrimination are being adequately remedied. If after-acquired evidence is ultimately allowed to defeat potentially meritorious disability discrimination suits, such pro-defendant trends may be exacerbated, and the legal recourse purpose of the ADA further diminished. Lastly, if disability discrimination plaintiffs are pushed toward settlement, this decreases the likelihood that the employer's alleged wrongdoing will ever be revealed publicly and thus lowers the possibility that ADA violations will be exposed and remedied.[168]

3. Otherwise Qualified Implications

The "otherwise qualified" or "qualified individual" prong of the ADA allows the statute to differ from the other watershed civil rights legislation, but also has the potential to worsen the outcome for disability discrimination victims facing after-acquired evidence.[169] The qualified individual language partially stems from Congress's concern that the ADA would be construed by courts to require employers to hire individuals with disabilities, even if their disabilities make it impossible

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165 Hart, *supra* note 131, at 434.

166 Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1216 (2003) ("Professor Colker found that plaintiffs litigating cases under Title VII of the Civil Rights Act of 1964 . . . obtained reversals in 34% of the cases they appealed, a much higher rate than the 12% pro-plaintiff reversal rate under the ADA.").

167 *The ADA: Your Employment Rights as an Individual with a* Disability, EEOC, https://www.eeoc.gov/publications/ada-your-employment-rights-individual-disability [https://perma.cc/35SS-QLVN].

168 *See* Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 312 (2008) ("The vast majority of [ADA] cases, however, do not produce publicly available opinions either because they are settled or because the judges choose not to publish their rulings. . . . The study found that 40% to 60% of cases are resolved through settlement, and 20% to 50% disappear from public view with no available record.").

169 As noted, a "qualified individual" is a person "who, with or without reasonable accommodation, can perform the essential functions of the employment position" that they hold. 42 U.S.C. § 12111(8).

for them to do the job.[170] Ultimately, Congress wanted to protect employers who refuse to hire a person with a disability, not because they possess a disability, but because that disability prevents them from performing the job's critical tasks.[171]

These concerns, however, are not as prevalent in after-acquired evidence cases. The inherent definition of after-acquired evidence is that it is information discovered *after* an adverse employment action has been taken by the employer.[172] Therefore, in qualified individual cases, the late-discovered information obtained may reveal, for example, that the employee never possessed the requisite job requirements,[173] or that their disability benefits revealed that they could not hold any position.[174] However, it is information discovered well after the employee has begun working in the position and has faced the discriminatory employment action—in one instance, the information was discovered two years after the employee was discharged.[175] Therefore, the protection intended by the qualified individual prong of the ADA has no relation to these cases as, typically, the employee has begun working, has proven they could perform the essential functions of the job—even if they did not, on paper, possess the requisite job requirements—and was ultimately discharged for a reason entirely unrelated to their status as a qualified individual. Ultimately, Congress's fear that employers would be bound to hire applicants who truly cannot perform the functions of the job[176] has no bearing on these after-acquired evidence cases. Allowing employers to escape liability by presenting unrelated and late-discovered information about the plaintiff's status as a qualified individual will only work to block wrongdoing from coming to light and prevent discrimination victims from obtaining any recompense.[177]

Similar to the other antidiscrimination statutes, such as Title VII of the Civil Rights Act, the ADA makes discrimination unlawful based on a protected class status, in order to allow for equality of opportunity

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170 Timothy J. McFarlin, *If They Ask for a Stool . . . Recognizing Reasonable Accommodation for Employees "Regarded as" Disabled*, 49 ST. LOUIS U. L.J. 927, 944 (2005) ("This concept is succinctly summed up by the accepted maxim that an employer 'should not have to hire a blind bus driver.'").

171 *Id.*

172 *After-Acquired Evidence*, *supra* note 20.

173 *See* Anthony v. Trax Int'l Corp., 955 F.3d 1123 (9th Cir. 2020).

174 *See* McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558 (5th Cir. 1998).

175 *See* Risk v. Burgettstown Borough, 364 F. App'x 725 (3d Cir. 2010).

176 *See* McFarlin, *supra* note 170, at 944.

177 See *supra* Sections II.B.1–2 for a discussion on how allowing after-acquired evidence to defeat disability discrimination claims harms the deterrence and legal recourse purposes of the ADA.

and the integration of those formally excluded into society at large.[178] However, unlike the other antidiscrimination statutes, the ADA also promotes "distributive justice" by requiring employers to affirmatively provide reasonable accommodation to employees with disabilities.[179] The inclusion of the reasonable accommodation requirement, within the definition of qualified individual,[180] recognized that people with disabilities wanted to work, but were barred from doing so due to discrimination or lack of accommodation.[181] The purpose of the reasonable accommodation prong was to allow for active incorporation of individuals with disabilities into the workforce.[182] Therefore, allowing after-acquired evidence to defeat a reasonable accommodation lawsuit is particularly dangerous. Imagine a scenario where an employee brings a lawsuit against their employer for failure to provide reasonable accommodation. If that employer is then able to escape liability by presenting late-discovered evidence that the employee was not a qualified individual—even though that information was not known to the employer when they unlawfully denied the accommodation—that employer will have avoided having to provide an accommodation presently and in future instances.[183]

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178 Hoffman, *supra* note 166, at 1217.

179 *Id.*; *see also* John E. Rumel, *Toward an "Unqualified" Otherwise Qualified Standard: Job Prerequisites and Reasonable Accommodation Under the Americans with Disabilities Act*, 18 EMP. RTS. & EMP. POL'Y J. 35, 42 (2014) (quoting McDonald v. Menino, No. 96-10825-RGS, 1997 WL 106955, at * 3 (D. Mass. Jan. 3, 1997)); Mayerson, *supra* note 38 ("It was not enough to remove policy barriers—it was imperative that the regulations mandated affirmative conduct to remove architectural and communication barriers and provide accommodations.").

180 42 U.S.C. § 12111(8) (defining "qualified individual" as a person "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires").

181 *Americans with Disabilities Act of 1989: Hearing on S. 933 Before the Subcomm. on the Handicapped of the S Comm. on Lab. and Hum. Res.*, 101st Cong. 7 (1989) (statement of Rep. Coelho); Weston, *supra* note 164, at 380.

182 See *supra* Section I.B for a discussion on the purpose of the reasonable accommodation prong of the ADA.

183 People with disabilities have noted that one of the biggest bars to employment is lack of reasonable accommodation. *See* Marianne Eloise, *'We Still Need Accommodations,'* N.Y. MAG.: THE CUT (Feb. 4, 2021), https://www.thecut.com/2021/02/pandemic-work-disability-accommodations.html [https://perma.cc/UK5G-V4TK]. Additionally, employers have noted that a principal barrier preventing them from hiring workers with disabilities are accommodation issues and the concern over costs. H. Stephen Kaye, Lita H. Jans & Erica C. Jones, *Why Don't Employers Hire and Retain Workers with Disabilities?*, 21 J. OCCUPATIONAL REHAB. 526, 528–29 (2011).

C. *The* McKennon *Reasoning Applies to Qualified Individual ADA Suits*

The ADA is a part of a congressional legislative scheme that includes Title VII of the Civil Rights Act, the ADEA, the National Labor Relations Act, and the Equal Pay Act of 1963, all aimed at curbing discrimination in the workplace.[184] Therefore, although the Court in *McKennon* did not explicitly extend its holding to the ADA, it applies nonetheless.[185] It is likely that the *McKennon* Court granted certiorari to address after-acquired evidence with all of the civil rights statutes within the antidiscrimination framework in mind.[186] The Court noted that it granted certiorari to resolve the conflicting views among the various federal appeals courts on the question of after-acquired evidence[187] and grounded the ADEA within a wider statutory scheme as part of a congressional effort to eradicate workplace discrimination.[188] Additionally, in the years following *McKennon*, numerous circuit and district courts have applied the *McKennon* analysis in disability discrimination suits arising under the ADA, even though the Supreme Court in *McKennon* did not explicitly grant such an application.[189]

Since the courts have made clear that *McKennon*'s holding applies to suits brought under the ADA, the reasoning the Supreme Court supplied must similarly apply.[190] Thus, after-acquired evidence cannot be used to bar recovery in ADA discrimination suits, even if information proves that the plaintiff is not a qualified individual. The ruling in *McKennon* stands for the idea that evidence, of which the employer was unaware and thus not motivated by when it took the discriminatory employment action, cannot be used to bar relief in employment discrimination suits.[191] The Court's reasoning, in support of this holding, is that it is the remedial relief provided by the antidiscrimination statutes that furthers the legislation's purposes.[192] If

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184 *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995).

185 See *supra* Section I.E for a discussion on the extension of the *McKennon* holding to antidiscrimination statutes other than the ADEA.

186 David J. Willbrand, *Better Late Than Never? The Function and Role of After-Acquired Evidence in Employment Discrimination Litigation*, 64 U. CIN. L. REV. 617, 690–91 (1996) ("More likely, the Court's underlying objective in granting certiorari was to address the after-acquired evidence dilemma with regard to employment discrimination litigation in general.").

187 *McKennon*, 513 U.S. at 355–56.

188 *Id.* at 357.

189 See *supra* Section I.D for a discussion on after-acquired evidence cases involving the ADA.

190 See *supra* Section I.D for a discussion of the Court's holding and reasoning in *McKennon.*

191 *McKennon*, 513 U.S. at 359–60.

192 *Id.* at 359 ("The efficacy of [the ADEA's] enforcement mechanisms becomes one measure of the success of the Act.").

the courts allow employers to present late-discovered evidence, bearing on the plaintiff's status as a qualified individual, to warrant dismissal of ADA suits, they would be endorsing the operation of after-acquired evidence as an absolute bar to relief. Those courts would be acting in direct contradiction to the reasoning and holding outlined in *McKennon* and, ultimately, the purpose of antidiscrimination statutes such as the ADA.[193]

III. PROPOSAL

Since it is unlikely that the federal courts will outright ban the use of after-acquired evidence in discrimination lawsuits,[194] there are other options available to limit the harm that after-acquired evidence may have on disability discrimination plaintiffs. One potential option is for courts to give greater deference to the EEOC.[195] A second, although more difficult possibility, is to recognize the use of after-acquired evidence by defendants as potential retaliation, thus giving plaintiffs an alternative option to vindicate their rights.[196]

A. *Broader Deference to the EEOC*

The EEOC is the government agency tasked with enforcement of Title I of the ADA and often promulgates enforcement guidance documents that are intended to provide clarity to employers, employees, and the public at large.[197] The EEOC laid out a guidance document following the *McKennon* ruling, and, although the guidelines do not explicitly mention the effects of *McKennon* on qualified individual cases, they do note that the *McKennon* holding applies to the ADA and gives guidance for determining relief.[198] The Commission noted that the *McKennon* Court endorsed the EEOC's previously-held position that a defendant employer must still remain liable for any

193 Burkhart v. Intuit, Inc., No. CV–07–675–TUC–CKJ, 2009 WL 528603, at *12 (D. Ariz. Mar. 2, 2009); Seegert v. Monson Trucking, Inc., 717 F. Supp. 2d 863, 869 (D. Minn. 2010).

194 For a good analysis on why the after-acquired doctrine should, but ultimately will not, be abolished, see Hart, *supra* note 131, at 435–38.

195 *See* Jeffrey Koziar, Note, *Judicial Estoppel and the Americans with Disabilities Act: Should the Courts Defer to the EEOC?*, 50 RUTGERS L. REV. 2259 (1998).

196 *See* Hart, *supra* note 131, at 435–38; Spadola, *supra* note 131, at 721.

197 *Americans with Disabilities Act*, *supra* note 62; *EEOC Guidance*, EEOC, https://www.eeoc.gov/guidance [https://perma.cc/RPN7-7WZM].

198 *Enforcement Guidance*, *supra* note 103.

discriminatory acts regardless of whether the employer discovers employee misconduct.[199]

Additionally, in *Anthony v. Trax International Corp.*, in a brief written for the plaintiff-appellant, the EEOC laid out specific reasons why the after-acquired evidence—showing that the plaintiff was not a qualified individual—should not be used to defeat an ADA suit.[200] The EEOC argued that allowing after-acquired evidence to defeat the claim would not only violate the *McKennon* ruling, but would also let discriminatory employers off the hook without having to reform their practices.[201] In sum, the EEOC had endorsed a position that would prevent after-acquired evidence from being used to defeat a disability claim, regardless of whether the plaintiff is ultimately considered qualified or not.[202] However, courts vary on how much weight must be given to the EEOC's interpretive guidelines regarding the ADA.[203] In light of their long-standing opinion that violators of the antidiscrimination statutes must be held liable—regardless of late-discovered evidence of employee misconduct—and the Commission's vital work effectuating the provisions of the ADA, it is only natural that the courts defer in their opinion regarding after-acquired evidence to the EEOC.[204]

B. *Viewing the Use of After-Acquired Evidence as Retaliation*

Both the *McKennon* Court as well as the EEOC expressed concern that allowing defendant-employers the opportunity to present after-acquired evidence would bless extensive digging into the plaintiff's background.[205] One way to prevent such "fishing expeditions" may be to allow plaintiffs the opportunity to bring retaliation suits against such offending employers.[206] Additionally, even if the court allows the after-

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199 *Id.*

200 Brief of EEOC as Amicus Curiae in Support of Plaintiff-Appellant and in Favor of Reversal, Anthony v. Trax Int'l Corp., 955 F.3d 1123 (9th Cir. 2020) (No. 18-15662).

201 *Id.* at 19.

202 *Id.* at 11.

203 Koziar, *supra* note 195, at 2282.

204 *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.").

205 McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 363 (1995); *Enforcement Guidance*, *supra* note 103 (noting that plaintiff's damages in an after-acquired evidence suit may not be cut off if the late-discovered evidence was "unearthed during a retaliatory investigation," initiated by the employer in search for any "derogatory information" regarding the plaintiff).

206 Hart, *supra* note 131; Spadola, *supra* note 131.

acquired evidence to defeat the plaintiff's disability discrimination suit, they still retain some opportunity for legal recourse.[207]

In *Burlington Northern*, the Supreme Court held that an employee can bring a retaliation suit against an employer for actions taken that are not directly related to employment or that cause harm outside the workplace.[208] Therefore, anti-retaliation provisions in the non-discrimination statutes are not limited to actions or harms related solely to the workplace.[209] According to *Burlington Northern*, the purpose of an anti-retaliation provision is to ensure that employers cannot obstruct the enforcement of the broad anti-discriminatory aims of civil rights statutes such as the ADA and Title VII of the Civil Rights Act.[210] Therefore, allowing retaliation suits by disability discrimination plaintiffs facing dismissal in light of defendants' after-acquired evidence may serve to uphold the objectives of the ADA.

Furthermore, allowing disability discrimination plaintiffs to bring retaliation claims may even discourage the highly invasive discovery practices that the *McKennon* Court and the EEOC were so wary of. Defendants may fear that the courts will deem such discovery procedures as overzealous and beyond the scope of ordinary discovery, thus opening them up to retaliation suits and further litigation.[211] There has not yet been a case where the use of after-acquired evidence as a defense has been found to constitute illegal retaliation.[212] However, allowing ADA plaintiffs this opportunity may provide disability discrimination victims greater opportunities for recourse, particularly in instances where after-acquired evidence has prevented them from proceeding with their disability discrimination complaint.

CONCLUSION

People with disabilities continue to face extensive barriers to access to meaningful employment and, over thirty years since the passage of the ADA, are still nervous about disclosing their disabilities for fear of

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207 Hart, *supra* note 131.

208 Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

209 *Id.*

210 *Id.* at 63 ("The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." (citations omitted)).

211 Spadola, *supra* note 131, at 721–22.

212 *Id.*

discrimination.[213] These fears are not unfounded as evidence shows that employers today remain hesitant to hire workers with disabilities due to deeply rooted prejudice and unfounded concerns over the cost of reasonable accommodation or fear of legal liability.[214] Therefore, in order for the aims of the ADA to finally be realized, disability discrimination victims must be allowed access to the courts in order to vindicate their rights against discriminatory employers. The federal courts should no longer allow defendant-employers to assert after-acquired evidence, bearing on a plaintiff-employee's status as a qualified individual, to defeat a disability discrimination suit. By granting dismissal of such cases, particularly at the summary judgment phase, the merits of the underlying discrimination suit are never reached, and not only does the employer escape liability, but the principal goals of the ADA are also contravened, ultimately leaving the discrimination victim without recourse.

213 *See* Eloise, *supra* note 183.

214 *See* Kaye, Jans & Jones, *supra* note 183, at 528–29.