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RETALIATORY LITIGATION TACTICS: The Chilling Effects of “After-Acquired Evidence”

Melissa Hart†

Even a victim of the most egregious discrimination may recover little monetary relief if the defendant discovers, after firing the employee, that she committed some firable offense. Yet the case in which the Supreme Court so held, McKennon v. Nashville Banner Publishing Co., was widely viewed as a victory rather than a defeat for plaintiffs. This surprising perception flowed from the Court’s holding that such “after-acquired evidence” of misconduct merely limited remedies but did not completely eliminate plaintiffs’ rights to sue for discrimination. Given that McKennon could be portrayed either as a victory for plaintiffs or an unjust denial of relief for plaintiffs, it is surprising that there has been little academic inquiry into the actual effects of McKennon on discrimination claims.

This Article documents how the after-acquired evidence doctrine of McKennon plays a troubling role in civil rights litigation: It shifts the focus of the discussion off the employer’s illegal acts and onto the worthiness of the plaintiff and it chills full enforcement of discrimination laws. Using both an empirical analysis of judicial decisions and a series of interviews with attorneys, this Article uncovers new evidence that employers most often seek to limit a plaintiff’s remedies based on evidence of relatively minor transgressions, most commonly resume fraud, that would not likely have been discovered had the plaintiff not sued to challenge employment discrimination. Further, both the data from judicial opinions and the evidence from practicing attorneys suggest that the potential for disclosure of negative personal and professional information dissuades plaintiffs from pursuing even meritorious claims of discrimination.

From its inception, the after-acquired evidence defense has prompted concern from a small number of critical voices that it carried potential as a

† Associate Professor of Law, University of Colorado Law School. I am most grateful to Rachel Arnow-Richman, Emily Calhoun, Jonathan Fineman, Martin J. Katz, Viva Moffat, Scott Moss, Nantiya Ruan, Catherine Smith, Kevin Traskos, Phil Weiser, and Mimi Wesson for their feedback and support on this paper. I received helpful comments on early drafts from participants in a Houston Law Center Works-in-Progress Seminar and a workshop at the University of Colorado Law School. Jonathan Friesen, Chris Larson, Tricia Leakey and Grant Sullivan provided truly invaluable research assistance.
tool for abuse of employees seeking to vindicate their rights. The evidence offered in this Article substantiates these concerns, which raise serious doubts about the continued existence of the doctrine. Acknowledging how unlikely the defense is to be abolished, this Article concludes that these concerns should alternatively prompt litigants and courts to recognize claims of illegal retaliation when employers misuse the after-acquired evidence doctrine by asserting the defense frivolously to deter plaintiffs from pursuing discrimination claims.

I. INTRODUCTION

Even a victim of the most egregious discrimination may recover little monetary relief if the defendant discovers, after illegally firing the employee, that she had once committed some firable offense. The Supreme Court reached that conclusion unanimously in McKennon v. Nashville Banner Publishing Co.\(^1\) in 1995, and the “after-acquired evidence” doctrine has been used since to limit damages for victims of discrimination and to justify wide-ranging discovery into plaintiffs’ personal and professional backgrounds.\(^2\) As a result of the McKennon decision, a woman who suffered years of egregious sexual harassment on the job could be denied substantial recovery because her employer learned in the discovery process that her application, filled out years earlier, had not disclosed that she had been fired from her previous place of employment.\(^3\) Hispanic employees facing rampant discrimination at a factory could face searching investigation into their family and personal backgrounds as their employer seeks to establish that they misrepresented their immigration status on employment forms.\(^4\) Older employees pushed out of jobs given to younger replacements may end up debating the strictness of their company’s personal computer use restrictions rather than the negative social and personal consequences of age discrimination.\(^5\)

And yet McKennon was widely viewed as a victory for employment discrimination plaintiffs because it did not destroy as many discrimination claims as the rule it rejected.\(^6\) Before the Court’s decision, employers were

\(^{1}\) 513 U.S. 352 (1995).


\(^{3}\) See Rose Casual Dining, 2004 U.S. Dist. LEXIS 4335, at *31–33.

\(^{4}\) See Rivera, 204 F.R.D. at 651.


\(^{6}\) See, e.g., Robert F. Thompson III, McKennon v. Nashville Banner Publishing Co.: The Masquerading Doctor, The “Greatest Treason,” and After-Acquired Evidence in
successfully arguing that an employee was not entitled to any remedy under Title VII if the employer could uncover some evidence, unknown at the time of the adverse action, that would have provided a justification for the decision. The Court rejected the notion that this type of after-acquired justification for an adverse employment action could eliminate liability for discrimination. Instead, the Court concluded, this previously unknown evidence of employee misconduct should not be excluded entirely, but should be used only to limit the plaintiff's remedies. While there was no dissent on the Court from this approach, a very small number of critical commentators predicted that the doctrine as framed would discourage meritorious cases and give employers incentives to conduct aggressive and intrusive background investigations in response to discrimination claims. As it turns out, those critics were correct.

This Article takes a closer look at after-acquired evidence and its consequences. This assessment involves first an empirical analysis of all available judicial decisions for the two decades from the first appearance of the doctrine to year-end 2006. This analysis gives a clear picture of the doctrine's impact at the stages of litigation that are captured in judicial decisions. But so many disputes arise and are disposed of before any formal opinion is ever issued that examining legal opinions can only tell part of the story. The full effect of a legal doctrine can only be appreciated by considering what role it plays in decisions made before a lawsuit ever begins, and in the early—often dispositive—stages of formal litigation. Thus, this Article goes beyond the limited body of judicial decisions to incorporate interviews with practicing lawyers from around the country.

Employment Discrimination Suits, 49 ARK. L. REV. 625, 630 (1996) (noting that in early reaction to the decision, plaintiffs' groups saw it as a victory).

7. See id.
9. Id. at 360–62.
10. See 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 (1996); William R. Corbett, The “Fall” of Summers, the Rise of “Pretext Plus,” and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from McKennon and Hicks, 30 GA. L. REV. 305, 382 (1996) (“In short, the Court’s half-hearted attempt to address the ‘not . . . insubstantial [concern]’ regarding employer exploitation of the Court’s treatment of after-acquired evidence does not begin to address the practical, day-to-day subordination of federal employment discrimination law.”).
11. See infra Part II.
12. See Peter Siegelman & John J. Donohue III, Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases, 24 LAW & SOC’Y REV. 1133, 1137 (1990) (describing results of a study of 4,310 cases, of which eighty percent did not produce a published district court opinion).
13. See infra Part III.C.
discussing how the doctrine affects the realities of discrimination litigation. Based on both the empirical study and the interviews, this Article argues that the after-acquired evidence defense chills civil rights litigation and shifts the focus of these cases from the discriminatory conduct of the defendant to the unrelated, often trivial misconduct of the plaintiff.\(^\text{14}\)

From the moment the Supreme Court endorsed the doctrine in \textit{McKennon}, both the Equal Employment Opportunity Commission ("EEOC") and a few courts recognized the possibility that the defense might be employed to coerce and intimidate employees.\(^\text{15}\) In the years since \textit{McKennon}, however, the argument that a defendant's use of after-acquired evidence might constitute illegal retaliatory action under federal law has

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\(^{14}\) The doctrine and its implications are not unique to federal discrimination litigation. The most hotly debated recent example of the doctrine in action is one that pits academic freedom against academic misconduct. In 2005, a University of Colorado professor named Ward Churchill made national headlines with an essay he had written referring to the victims of the September 11, 2001 attacks as "Little Eichmanns." See Ward Churchill, "Some People Push Back": \textit{On the Justice of Roosting Chickens}, \url{http://web.archive.org/web/20070203133327/http://www.darknightpress.org/index.php?i=news&c=recent&view=9} (last visited Feb. 23, 2008). The public outcry led to calls for his dismissal from the University. In response, the University pointed to Churchill's status as a tenured professor and observed that academic freedom protected him from dismissal based on his opinions. See Thomas Brown, \textit{Is Ward Churchill the New Michael Bellesiles?}, HNN, Mar. 14, 2005, \url{http://www.hnn.us/articles/10633.html}. Fairly quickly, however, the sustained attention on Churchill uncovered allegations of plagiarism and other academic misconduct. \textit{Id.} The University established a committee to review the allegations, and in 2006, the committee recommended to the University administration that Churchill be disciplined for serious academic misconduct. See \textit{Joseph Rosse} et al., \textit{Report and Recommendations of the Standing Committee on Research Misconduct Concerning Allegations of Research Misconduct by Professor Ward Churchill} 16 (2006), available at \url{http://www.colorado.edu/news/reports/churchill/download/ChurchillStandingCmteReport.pdf}. The review revealed that Churchill had likely engaged in resume fraud, that he had exaggerated his military record, that he described himself as Native American despite having no such ancestry, and, most significantly, that he had plagiarized and engaged in other academic misconduct on several occasions. See Brown, \textit{supra}; see also \textit{Rosse} et al., \textit{supra}, at 7. The President of the University ultimately recommended that Churchill be dismissed and, in July 2007, the Regents of the University adopted that recommendation. See Hank Brown, The Churchill Firing—I, \textit{Inside Higher Ed}, July 30, 2007, \url{http://www.insidehighered.com/views/2007/07/30/brown}. While the case is not a Title VII suit, it raises precisely the same questions that the cases studied here present. Just as the discrimination plaintiff is entitled to pursue litigation to vindicate her rights, Churchill was entitled to express his views, however objectionable. The ensuing investigation, like investigations undertaken after an employee has claimed discrimination, had an appearance of improper motive. But there is no question that the misconduct the investigation uncovered was real and serious. What should the consequences of that misconduct now be?

never gained any traction in the courts. The idea that an employer might use the defense to punish a plaintiff for challenging discrimination, and that this punitive conduct might violate the law, is in tension with the general notion that litigants are entitled to make all available arguments as part of a right to petition the courts for relief. But even conduct that is generally permissible may violate the prohibition on retaliating against discrimination claimants if it is undertaken for the purpose of deterring civil rights claims. Thus, for example, courts have permitted claims of illegal retaliation when defendants assert counterclaims in response to the filing of a discrimination lawsuit. The Supreme Court's 2006 liberalization of the standards for proving retaliation—declaring unlawful any action tending to deter discrimination complaints—has the potential to increase the number of successful claims like these. It should also prompt litigants and courts to consider more seriously the possibility of a challenge to retaliatory abuses of the after-acquired evidence defense.

Part II briefly introduces the after-acquired evidence doctrine as it was framed by McKennon, and then examines how the doctrine has been applied by the courts with an empirical analysis of the surprisingly sparse two decades of case law (274 reported decisions). Part III considers some possible explanations for the relatively small number of after-acquired evidence cases and then explores how after-acquired evidence influences the earliest stages of litigation—well before any judicial opinion would record the progress of a case—by detailing the results of interviews with practicing employment lawyers from several major cities. Part IV begins by arguing that, in light of the evidence offered in both the interviews and the empirical analysis, the after-acquired evidence doctrine should be abolished and explaining why that is unlikely to happen. As an alternative to simply eliminating the doctrine, Part IV suggests that courts should construe retaliation law as a tool to prevent misuse of the doctrine.

II. WHAT COURTS SAY ABOUT AFTER-ACQUIRED EVIDENCE

The after-acquired evidence doctrine became a matter of regular litigation in employment discrimination disputes in the late 1980s, when courts around the country began accepting defendants' arguments that a plaintiff who had engaged in conduct that would have lost him the job even absent discrimination had essentially not been discriminated against in the

17. See infra Part IV.B.2.
eyes of the law. These courts concluded that after-acquired evidence would operate as a complete bar to liability. The doctrine thus framed was a very powerful tool for defendants. As one lawyer put it at the time, "It was a goldmine or a godsend. All you have to do is take an employee and find out something that they have done wrong, some misconduct that you never knew about and, boom, there goes their civil rights claim."

Defense lawyers pounced on the new defense, advising their clients on policies and practices that would maximize the potential utility of the doctrine. As one court noted, expressing reservations about endorsing the defense:

[T]he efficacy of the after-acquired evidence tactic has not escaped the attention of defense counsel, some of whom have recommended that . . . counsel's first step . . . should be thoroughly to investigate the plaintiff's background and job performance. Indeed, many have instructed employers on specific policies . . . , and, if recognized, one can anticipate the extensive and effective use of the after-acquired evidence doctrine.

Along these lines, lawyers advised their clients that "applications and employee manuals [should] expressly state that resume fraud or application misrepresentations will result in suspension pending discharge." Others observed that "[m]anagement . . . should respond to this favorable development by routinely searching for pre-employment misrepresentations as a potential defense in all discharge litigation. Employers in turn should maximize the probability that 'after-acquired' evidence is available as a defense by revising employment applications to elicit even more specific

information.” And some counseled that employers “should leave no stone unturned in ferreting out any evidence” of resume or application fraud.

The Supreme Court’s decision in McKennon took some of the teeth out of the defense by holding that it could not eliminate liability entirely. But the Court endorsed the doctrine as a tool to significantly limit a discrimination plaintiff’s damages where it applies. The doctrine continues to play an important role in employment discrimination litigation, yet one that has gone largely unexamined. This Part will consider the current use of the after-acquired evidence doctrine as it appears in judicial opinions. It will begin with a brief description of the doctrine as developed in McKennon, and will then explore the results of an empirical analysis of the lower courts’ discussions of after-acquired evidence in employment discrimination cases over the past two decades.

A. The Doctrine as Conceived: The McKennon Rule

The after-acquired evidence doctrine came to the Supreme Court after simmering in the lower courts for about a decade. In that time, a deep divide had developed between those courts that viewed the defense as an absolute bar to liability and those that were concerned about permitting discriminatory actions to go unsanctioned because of essentially unrelated conduct by the plaintiff.

The dispute arrived at the Court through the employment history of Christine McKennon, a thirty-year employee of the Nashville Banner who lost her job in a reduction in force at the newspaper. Ms. McKennon, who was sixty-two years old at the time, believed that her dismissal was actually motivated by her age and she filed suit, alleging a violation of the Age Discrimination in Employment Act (“ADEA”). During her deposition, Ms. McKennon acknowledged that she had certain confidential company

27. Id. at 360–63.
28. See id. at 355–56.
30. McKennon, 513 U.S. at 354.
31. Id. at 354–55.
documents in her possession. She had taken the documents, she explained, when she became concerned that she was going to lose her job and decided to copy company financial records for "insurance" and "protection." Immediately after learning of the improperly removed documents, Nashville Banner's attorney sent Ms. McKennon a letter informing her that she had, once again, been fired—this time for violating company policy. The district court dismissed Ms. McKennon's claim of age discrimination, concluding that the after-acquired evidence of misconduct that would have been sufficient grounds for termination eliminated the defendant's liability for age discrimination.

As the case came to the Supreme Court, the defendant conceded age discrimination. The only question before the Court was the effect on a discrimination claim of after-acquired evidence of wrongdoing that would have resulted in discharge in any event. A unanimous Court rejected the rule that such evidence should operate as a bar to all forms of relief. The Court observed that federal antidiscrimination law "reflects a societal condemnation of invidious bias in employment decisions," and that the absolute bar did not accord with congressional desire to have private litigants vindicate important statutory goals. The Court noted that the statutes are structured both to prompt changes in the workplace and to compensate for injuries already caused by prohibited discrimination. The remedies available to private litigants are a central element of this structure.

2. Id. at 355.
3. Id.
4. Id.
7. Id. at 356.
8. Id.
9. Id. at 357.
10. Id. at 358. Although McKennon was an ADEA case, courts have not paused in applying the after-acquired evidence rule to cases under other federal statutes. See, e.g., Throneberry v. McGehee Desha County Hosp., 403 F.3d 972, 980-81 (8th Cir. 2005) (Family and Maternity Leave Act); Crapp v. City of Miami Beach, 242 F.3d 1017, 1021 (11th Cir. 2001) (Title VII race discrimination); Wallace v. Dunn Constr. Co., 62 F.3d 374, 378 (11th Cir. 1995) (Title VII and Equal Pay Act).
11. McKennon, 513 U.S. at 358.
12. Id.; see also id. at 362 ("An absolute rule barring any recovery of backpay, however, would undermine the ADEA's objective of forcing employers to consider and examine their motivations, and of penalizing them for employment decisions that spring from age discrimination.").
The error made by courts that had treated after-acquired evidence as eliminating an employer's liability entirely was that they had considered the problem as though it were one of "mixed motives."43 In doing so, lower courts had relied on a line of cases holding that, where an employer was motivated by both a lawful and an unlawful reason in making its decision, the employee could not prevail in litigation if the lawful reason would alone have justified the decision.44 As the Court noted in McKennon, however, the mixed-motive circumstance is fundamentally different from the one presented by after-acquired evidence because, in a mixed motive case, the legitimate reason actually did play some part in the defendant's decision.45 By contrast, evidence that was acquired only after the adverse action could not have played any role in the decision.46 "The employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason."47

After rejecting an absolute bar to liability, the Court went on to say that in determining the plaintiff's remedies, "[t]he employee's wrongdoing must be taken into account, . . . lest the employer's legitimate concerns be ignored."48 Federal antidiscrimination law prohibits employers from taking actions based on particular characteristics;49 however, the law leaves the employer considerable discretion outside of those specific prohibitions. "In determining appropriate remedial action, the employee's wrongdoing becomes relevant not to punish the employee, or out of concern 'for the relative moral worth of the parties,' but to take due account of the lawful prerogatives of the employer . . . ."50 Given these concerns, the Court held that "as a general rule in cases of this type," an employment discrimination plaintiff would lose her right to reinstatement and front pay in the face of after-acquired evidence,51 because "[i]t would be both inequitable and pointless to order the reinstatement of someone the employer would have

43. Id. at 359-60.
44. Id. at 359; see White & Brussack, supra note 19, at 64-71; Zemelman, supra note 19, at 182-88. This version of the mixed-motive rule has been supplanted in the meantime by the Civil Rights Act of 1991, which amended Title VII to make clear that even in a case of mixed motives, the employer will be responsible for the role the discriminatory motive played in the decision. See 42 U.S.C. § 2000e-2(m) (2000).
45. McKennon, 513 U.S. at 359-60.
46. Id. at 360.
47. Id.
48. Id. at 361.
50. McKennon, 513 U.S. at 361 (quoting Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139 (1968)).
51. Id. at 361-62.
terminated, and will terminate, in any event and upon lawful grounds."  

The Court acknowledged that a determination of appropriate backpay was more difficult, but concluded that "[t]he beginning point" should be a backpay calculation that ends on the day the new evidence was discovered. Beyond these basic contours, the Court was openly hesitant to specify remedies, noting that "[t]he proper boundaries of remedial relief . . . must be addressed . . . in the ordinary course of further decisions, for the factual permutations and the equitable considerations they raise will vary from case to case."  

Attorneys litigating on behalf of Ms. McKennon raised the concern that permitting after-acquired evidence to limit a defendant's liability would encourage defendants to use discovery as an aggressive fishing expedition for such evidence just as the more severe version of the rule had done. While acknowledging this concern, the Court concluded:

Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit.

The Court expressed casual faith in lower courts to limit overly-aggressive efforts to invoke the doctrine:

The concern that employers might as a routine matter undertake extensive discovery into an employee's background or performance on the job to resist claims under [federal antidiscrimination laws] is not an insubstantial one, but we think the authority of the courts to award attorney's fees . . . and to invoke the appropriate provisions of the Federal Rules of Civil Procedure will deter most abuses.

Unfortunately, the Court's confidence in the authority of lower courts to deter abuses of the defense failed to properly consider the impact the defense might have in contexts that courts cannot monitor. All of the tools the Court considered—whether Rule 11 sanctions, oversight of the discovery process, or awards of attorney's fees for assertion of frivolous defenses—require that litigation be fully underway, and that the choices the

52. Id. at 362.
53. Id.
54. Id. at 361.
56. McKennon, 513 U.S. at 362.
57. Id. at 363.
parties are making be articulated and open to scrutiny. But most litigation strategy takes place outside of the courtroom. In weighing the potential effects of a doctrine like the after-acquired evidence defense, the Court should have given more thought to the consequences it would have for the choices parties make in the earliest stages of litigation. A more careful evaluation of the doctrine's impact might have prompted the Court to strike a different balance between the interests of the employer in controlling the workplace and the interests of discrimination victims in pursuing their claims and exposing illegal conduct to the public eye.

B. The Doctrine as Applied: After-Acquired Evidence in the Courts

While the balance the Court struck in McKennon between the employees' civil rights and employers' business prerogatives may not have been the right one, it is clear that the Court was trying to strike some kind of balance, and that it was counting on the lower courts, in considering particular cases, to help define the precise contours of this compromise. This Part will explore how the lower courts have exercised the discretion authorized in the Court's opinion. To this end, I have reviewed all reported opinions through December 31, 2006 that have included mention of the after-acquired evidence defense in the context of a claim brought under a federal employment discrimination statute. After briefly describing the methodology used to analyze this data, this part will discuss a number of noteworthy aspects of the way after-acquired evidence is deployed and discussed in judicial opinions.

1. Methodology

This analysis started with an examination of all reported opinions that discussed the after-acquired evidence doctrine in a claim for violation of federal employment discrimination laws. I chose to focus on federal

58. Id. at 361–63.
59. By reported opinions, I mean cases available on the LexisNexis database, including both published and unpublished decisions. A search for “after-acquired evidence” with a date restriction of before December 31, 2006 in the Federal & State Cases, Combined database on Lexis yielded 877 cases. I consulted the ALLCASES database on Westlaw, conducting the same search, and retrieved 833 documents. I chose to use Lexis as the primary source for this research because the Lexis search retrieved the larger number of cases. The reason for the different results is not clear; representatives from Lexis and Westlaw suggested that the explanation could be connected with proprietary databases, different search algorithms, and differences in the definition of when a case is “reported.” “After-acquired evidence” is a term of art, generally used both by courts and litigants. I was fairly confident that a search with that term would
employment discrimination laws—including Title VII, the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), the Family and Medical Leave Act ("FMLA") and 42 U.S.C. § 1981—because similar policy concerns underlie each of these laws and the courts tend to analogize among the statutes in evaluating procedural and remedial issues. I eliminated cases that raised only state discrimination claims, as well as federal claims under the National Labor Relations Act, the Constitution, and other federal laws because of the likelihood that the competing policy concerns in those various laws might differ in ways that could affect the scope and applicability of the after-acquired evidence doctrine. I coded the remaining cases for the type of employee misconduct that formed the basis for the defense, the procedural stage of litigation in which the defense arose, and the identity of the winning party on the issue.

After narrowing the search results appropriately, I was left with 273 judicial opinions—1 Supreme Court opinion, 61 federal appellate decisions, 196 federal district court decisions, and 15 state court decisions. Of this capture the entire set of cases I wanted to study, but in order to ensure that the data set did not exclude opinions using slightly different terminology, I also searched the same databases for "later acquired evidence," "evidence acquired after," and "evidence acquired later." These searches yielded a relatively small number of cases, all of which were either repeated in the original search or irrelevant to employment discrimination.

61. Id. §§ 12101–12213.
63. Id. §§ 2601–2654.
64. 42 U.S.C. § 1981, Title VII and the ADEA were all amended in significant ways by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. In particular, the 1991 Act amended certain damages provisions of the statutes, and therefore is also an important part of the policy background against which the scope of the after-acquired evidence doctrine must be considered. Id.
66. The data set was substantially narrowed by eliminating cases that had nothing to do with employment discrimination (mostly criminal, social security, and contract cases). When the data was limited to cases presenting at least one claim under a federal employment discrimination statute, it included about 323 cases. I further refined the data set to eliminate cases in which the concept of "after-acquired evidence" was raised to make an argument entirely distinct from that presented in McKennon. A small number of cases were removed because the opinion included only a passing reference to or definition of after-acquired evidence, with no further discussion. See, e.g., Rooney v. Koch Air, LLC, 410 F.3d 376, 382 (7th Cir. 2005); Marx v. Schnuck Mks., Inc., 76 F.3d 324, 329 n.5 (10th Cir. 1996); Border v. City of Crystal Lake, 75 F.3d 270, 271 n.1 (7th Cir. 1996). In some instances, a single litigation produced more than one judicial opinion—either a district court decision and an appellate
number, the after-acquired evidence defense was entirely tangential to fifty-five of the opinions. In most of these cases, the employer won a summary judgment motion on the merits of the claim, obviating the need for any discussion of the doctrine. Thus, the analysis relied primarily on a set of 218 cases that addressed the scope and application of the after-acquired evidence doctrine in varying levels of detail.

One of the immediately noteworthy points about the data is the fact that this number is so small. By some estimates, roughly one of every seven or eight federal cases arises under a federal labor or employment statute. Further, federal employment discrimination law—particularly Title VII—provides the allegedly discriminating employer with relatively few defenses beyond the assertion that discrimination did not motivate the challenged action. In fact, the after-acquired evidence defense is one of only a handful of specific defenses available either by statute or judicial opinion. Under these circumstances, one might expect the after-acquired evidence doctrine to figure in a large number of employment discrimination opinions. And yet it does not. Some sense of the limited presence of after-acquired evidence in judicial opinions might be gleaned from the fact that, in the twelve-month period ending September 30, 2006, federal district courts terminated 11,809 civil rights employment cases through some court action, while fewer than 300 judicial opinions discussed after-acquired evidence in any detail during the twenty-year period from 1986 to 2006. I will return to the question of decision or a discovery order and a summary judgment ruling, for example. I have included each judicial opinion as a separate data point in this analysis.

67. Of course, in many of these cases, the courts nonetheless expressed some view on the merits of the after-acquired evidence claim. In six federal district court cases in which the employer won summary judgment on entirely unrelated grounds the courts opined that the employer would also have won on the after-acquired evidence defense, had the case otherwise had merit. See, e.g., Kalkhorst v. United Parcel Serv., Inc., 375 F. Supp. 2d 1079, 1083 (D. Colo. 2005).

68. See Ann C. Hodges, Mediation and the Transformation of American Labor Unions, 69 Mo. L. Rev. 365, 369 n.27 (2004) (noting that labor and employment cases are reported to be about twelve to fourteen percent of the civil cases on the federal docket).

69. For example, Title VII includes specific statutory defenses for bona fide occupational qualifications, see 42 U.S.C. § 2000e-2(e)(1) (2000); bona fide seniority or merit systems, see id. § 2000e-2(h); professionally developed ability tests, see id. § 2000e-2(h); compliance with other laws giving preference to veterans, see id. § 2000e-11; and religious discrimination by purely religious organizations, see id. § 2000e-1. The statute also allows employers to limit their damages where they can show that they would have made the same decision absent the discriminatory motivation. See id. § 2000e-5(g). The ADEA includes similarly specific and similarly limited statutory defenses. See 29 U.S.C. § 623(f) (2000).

why this number is so small and what it might tell us about employment discrimination litigation in Part III of this Article.

2. Findings

A few patterns are notable in these judicial discussions of after-acquired evidence. First, in a substantial majority of cases, the type of employee misconduct used to assert the defense is resume or application fraud uncovered during the discovery process. In these cases, it seems quite likely that the employee’s misconduct would never have been discovered if she had not filed a lawsuit challenging discrimination. Second, courts most often consider the after-acquired evidence defense during arguments for summary judgment. At this stage, defendants lose more often than they win, and employers seem willing to assert the defense even in cases where it seems unlikely to succeed. The defense can also arise in the course of litigation over the scope of the pleadings, the appropriateness of discovery, or the admissibility of evidence. In these latter contexts, one can see particularly how rarely judges exercise their discretion to limit the use of the doctrine. Finally, despite the doctrine’s relatively clear terms, defendants regularly seek to expand its boundaries. As a consequence, the relevance of a plaintiff’s misconduct that was entirely unknown at the time of the adverse employment decision is debated throughout the litigation, rather than exclusively at the remedial stage of the dispute.

a. The Most Common Misconduct at Issue Is Resume Fraud, Not Confidentiality Breaches or Criminality

After-acquired evidence will only limit the remedies available to a plaintiff when the employer can “establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.” In McKennon, the Court accepted as a fact that the plaintiff’s conduct would have warranted her dismissal. In later cases, however, this question has been the central focus of the after-acquired evidence debate.

number of the cases terminated do not involve a written opinion. Nevertheless, the difference is dramatic.

71. See infra Part II.B.2.a.
72. See infra Part II.B.2.b.
73. See infra Part II.B.2.b.
75. Id. at 356.
76. See infra notes 82–84.
Discussions of after-acquired evidence thus focus attention on two questions: what was the employee's alleged misconduct and what were the employer's policies or practices in response to that type of misconduct.

One of the clearest patterns in these cases is that the type of misconduct alleged is more likely to involve resume or application fraud than any other employee behavior. As the following table details, falsified documents—applications, resumes, and other statements of qualification—constituted at least one ground for assertion of the defense in 146 out of 293 instances.77

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<td><strong>FALSIFICATION OF APPLICATION</strong></td>
<td><strong>146</strong></td>
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<td><strong>DOCUMENTS</strong></td>
<td><strong>101</strong></td>
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<tr>
<td>Unauthorized removal of documents</td>
<td><strong>20</strong></td>
</tr>
<tr>
<td>Violation of confidentiality</td>
<td><strong>10</strong></td>
</tr>
<tr>
<td>Abuse of leave</td>
<td><strong>9</strong></td>
</tr>
<tr>
<td>Violation of policy</td>
<td><strong>8</strong></td>
</tr>
<tr>
<td>Lying</td>
<td><strong>7</strong></td>
</tr>
<tr>
<td>Other</td>
<td><strong>47</strong></td>
</tr>
<tr>
<td><strong>EMPLOYEE PERFORMANCE</strong></td>
<td><strong>5</strong></td>
</tr>
<tr>
<td><strong>EMPLOYEE STATUS</strong></td>
<td><strong>8</strong></td>
</tr>
<tr>
<td><strong>OTHER</strong></td>
<td><strong>33</strong></td>
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<tr>
<td><strong>TOTAL</strong></td>
<td><strong>293</strong></td>
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Only a relatively small group of twenty cases have involved the type of employee misconduct—unauthorized removal of company documents—at issue in McKennon.82 A number of others have involved conduct that, while not described in detail in the opinions, is likely similar. For

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77. The number of grounds for assertion of the after-acquired evidence doctrine is slightly higher than the total number of judicial opinions discussed in this analysis because a number of cases involved allegations of more than one type of misconduct by the plaintiff.

78. This category includes alleged dishonesty on applications, resumes, and other statements of qualification.

79. The variety of on-the-job misconduct asserted in this category spans a wide range of behavior including moonlighting, sexual harassment, making illicit recordings, theft, involvement with competitors, plagiarism, and insubordinate behavior, among others. Only a few specific practices are alleged with any frequency. These practices are included specifically in the Table.

80. This category includes employer discovery of a plaintiff's medical condition, immigration status, or employment-related certification.

81. This number includes primarily cases in which the alleged misconduct was never specified in the opinion.

example, ten cases involved violations of "confidentiality," and three discussed alleged "document tampering." Even under this expansive view of the conduct at issue in McKennon, it represents a fairly small number of the total allegations.

In the immediate aftermath of the McKennon decision, a number of courts considered whether there was any justification for treating resume or application fraud differently than workplace misconduct in the evaluation of the appropriateness of the after-acquired evidence defense. While some courts seem to struggle with possible distinctions between the two contexts, the universal conclusion has been that the after-acquired evidence doctrine should apply the same way in both. A key difference between the two, however, has been noted by a number of courts: resume and application fraud are unlikely ever to be discovered after the initial hiring decision except through the civil discovery process. If an employer did not discover application misstatements at the time of hiring, the costs of going back and looking for them are sufficiently high that employers generally do not do this kind of after-the-fact background investigation. The fact that the plaintiff filed a suit claiming discrimination will thus be the catalyst for the discovery of her alleged misconduct. By contrast, in the context of on-the-job malfeasance, it is somewhat more likely that the employer might have discovered the behavior independent of the discrimination claims.


86. Interestingly, one of the distinctions most frequently urged on the courts was defendants’ argument that in cases of resume fraud the doctrine should be applied with a looser standard, requiring only that the employer demonstrate that it would not have hired the employee had it known at the time of application of the misrepresentation. See infra Part II.B.2.c.

87. See, e.g., Wehr, 1996 U.S. App. LEXIS 26766, at *2; Wallace v. Dunn Constr. Co., 62 F.3d 374, 377 (11th Cir. 1995); Mardell, 65 F.3d at 1073 n.1; Shattuck v. Kinetic Concepts, Inc., 49 F.3d 1106, 1108 (5th Cir. 1995).
Whatever the employee misconduct at issue, a defendant is unlikely to be successful at summary judgment with the after-acquired evidence defense except where the employer’s policies against particular conduct are documented and enforced. Some courts have held that even explicit policies cannot establish the defense as a matter of law if there is any suggestion that the employer’s actual practices differ from its stated policies. And in cases involving allegations of application fraud, a number of courts require that the alleged misrepresentation have been “material, directly related to measuring a candidate for employment, and . . . relied upon by the employer in making the hiring decision.” These standards make summary judgment the exception rather than the rule in after-acquired evidence cases. Of 132 summary judgment opinions in this study, only thirty-six cases saw the court granting the defendant’s motion for summary judgment as to the damages-limiting defense. In these cases, the courts concluded that the employers’ policies were sufficiently clear, and the plaintiffs’ misconduct sufficiently serious, that the defense was established as a matter of law. By contrast, in sixty-five of the cases courts denied summary judgment on this issue because the employer could not unequivocally show that it would have fired the employee for the particular conduct in question. These cases involve employers’ policies that were stated in ambiguous terms, were inconsistently enforced, or raised a question of whether the employee’s conduct rose to a sufficiently serious level to violate the policy.

The frequency with which employers assert the defense despite these serious questions about its applicability suggests that the defense is being raised in cases in which arguments supporting it are at least weak, if not frivolous. Moreover, almost half of the after-acquired evidence cases in the

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89. See, e.g., O’Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 759 (9th Cir. 1996) (“The inquiry focuses on the employer’s actual employment practices, not just the standards established in its employee manuals, and reflects a recognition that employers often say they will discharge employees for certain misconduct while in practice they do not.”); accord Sheehan v. Donlen Corp., 173 F.3d 1039, 1048 (7th Cir. 1999).
91. In thirty-one cases, the courts dismissed the plaintiffs’ claims at summary judgment without requiring any ruling on the after-acquired evidence question.
92. See, e.g., Predzik v. Shelter Corp., No. 05-1063 (JRT/FLN), 2006 U.S. Dist. LEXIS 70250, at *17 (D. Minn. Sept. 27, 2006) (finding that the employee handbook stated that employee “may” be terminated; this equivocal language was insufficient to satisfy the burden of establishing a “settled” company policy).
courts involve resume fraud that would likely have remained undiscovered if the employee had not made a claim under federal law. These facts together raise precisely the concern that the Supreme Court described as “not insubstantial” in McKennon—that the doctrine would be abused by employers seeking to deter the assertion of civil rights claims. The Court’s proposed solution to this potential problem was to rely on the discretion of the district courts to deter abuse.

b. Courts Rarely Exercise Discretion to Limit the Use of the Defense

There is little suggestion in reported opinions that many courts are exercising discretion to limit the reach of after-acquired evidence. The defense is considered primarily in three procedural contexts: at summary judgment, in motions to amend the pleadings, and in disputes over the scope of discovery and the admissibility of evidence. While judges inevitably exercise some discretion, particularly in the latter two contexts, it is used more to permit the defense than to limit it.

Of the 196 federal district court decisions included in this study, 132 are on motions for summary judgment. This high proportion of summary judgment decisions may be explained by a number of factors. Courts are more likely to publish decisions at summary judgment than at other stages of litigation. Summary judgment also presents, in many cases, the first point at which the parties make all of their legal arguments to the court; thus, in a substantial number of disputes, this may be the first stage at which the court is presented with the after-acquired evidence question. Before the Supreme Court’s decision in McKennon, after-acquired evidence appeared almost exclusively as an argument at summary judgment, where defendants asserted it as a ground for dismissing plaintiffs’ suits in their entirety. Post-McKennon defendants still raise the defense at summary judgment, but now as one of several arguments, in the hopes that if the court denies a

94. Id.
95. The doctrine does occasionally arise in other contexts, but these are the only procedural postures in which it appears more than once or twice.
96. See, e.g., Catherine Albiston, The Rule of Law and the Litigation Process: The Paradox of Losing by Winning, 33 LAW & SOC’Y REV. 869, 883 (1999); Siegelman & Donohue, supra note 12, at 1146 (noting that opinions that dispose of a case are more likely to be published than those that do not).
motion to dismiss the case entirely it will at least grant partial summary judgment on the damages-limiting defense.

<table>
<thead>
<tr>
<th>After-Acquired Evidence and Summary Judgment</th>
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<tr>
<td>Summary judgment denied on after-acquired evidence</td>
<td>65</td>
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<tr>
<td>Summary judgment granted on after-acquired evidence</td>
<td>36</td>
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<tr>
<td>Summary judgment granted on other grounds</td>
<td>31</td>
</tr>
<tr>
<td>Total</td>
<td>132</td>
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</table>

As noted earlier, in the sixty-five opinions where courts have denied defendants’ motions for summary judgment on the after-acquired evidence issue, it has generally been because issues of fact remained as to whether the alleged violation was sufficiently serious that the employer unquestionably would have fired the employee as a result. Because the after-acquired evidence doctrine presents courts with a purely hypothetical question—whether the employer would have fired the plaintiff for the challenged conduct—it creates by its own terms a material question of fact over which some dispute is very likely. It is thus the kind of question where it would be harder to prevail on summary judgment. The significantly higher number of defendant losses on the question reflects this procedural standard, but it may also suggest that employers are willing to assert the defense even in fairly borderline cases.

The fact questions keep the defense in play throughout the litigation and allow continuing focus on the plaintiff’s misconduct. This shift in focus may benefit the defendant by putting the pressure of embarrassment and exposure on the plaintiff and by influencing the court, and potentially the jury, in its assessment of the true harm done to the plaintiff. Thus, losing a summary judgment motion on after-acquired evidence is not as detrimental to a defendant as it might initially appear. Courts denying these motions are not significantly limiting the ultimate availability of the defense or its impact on the course of litigation; they are simply requiring the defendant to overcome the plaintiff’s factual refutations.

When courts have considered whether to allow defendants to amend their answers to assert the defense they have been more likely than not to permit inclusion of the defense. Courts confronting this issue are addressing the most basic, and still unsettled, procedural questions about the doctrine: what is it and when should it be raised? In many respects, after-acquired evidence

98. See supra Part II.B.2.a.
99. See FED. R. CIV. P. 56(c) (stating that summary judgment is appropriate when there is no disputed question of material fact and the moving party is entitled to judgment as a matter of law).
looks like a fairly typical affirmative defense. If that is what it is, Federal Rule of Civil Procedure 8(c) requires that the defense be included in the defendant's answer or be considered as waived. A few courts have treated it exactly this way, and have rejected defendants' efforts to raise the defense later in the proceedings. Most, however, have allowed defendants to assert the defense despite lack of compliance with pleading requirements. Among these courts, some have concluded that, although defendants have an affirmative burden to prove the defense, the unusual fact that its application may only become apparent during the discovery process distinguishes it from a traditional affirmative defense. Others have found that the discretion granted by McKennon and by Federal Rule of Civil Procedure 15 (governing amendments to pleadings) warrants permitting the defendant to amend its answer to include the defense, even fairly late in the proceedings.

100. Like other affirmative defenses, the after-acquired evidence doctrine more or less admits to the general complaint of discrimination and yet suggests a tangential argument—on which the defendant rather than the plaintiff bears the burden of proof—for why there is no right to full compensation. See, e.g., 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1270 (3d ed. 2004).


By their nature, these disputes invite the exercise of discretion by the courts, and this set of opinions certainly treats them that way. The decision whether to permit amendment in many of the cases, for example, seems to turn on the specificity and seriousness of the alleged misconduct,\(^{105}\) the extent of the defendant’s delay in asserting the defense,\(^ {106}\) or the possibility of conducting additional discovery to allow the plaintiff to respond to the allegations.\(^ {107}\) Significantly, though, most of the cases (twelve as compared to four) involve discretion exercised to expand the availability of the defense, not to limit it.

In discovery disputes as well, it is most typical for courts to permit broad discovery directed at uncovering evidence of plaintiff misconduct that might support the defense.\(^ {108}\) In fifteen reported decisions, courts have refused to limit discovery or exclude evidence supporting the defense, while only eight opinions involve any limitation on defendants’ requested discovery.\(^ {109}\) Because courts are more likely to permit discovery than to limit it, and also more likely to write opinions when they take the less typical course and impose limitations,\(^ {110}\) these numbers probably understate the regularity with which courts deny plaintiffs’ efforts to limit expansive discovery. Of course, some courts have cast a very critical eye upon the scope of defendants’ requested discovery and have imposed limitations on

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105. See, e.g., Hickman, 2006 U.S. Dist. LEXIS 68890, at *3–5 (refusing to permit an amendment of the defendant’s answer to assert some unspecified conduct as after-acquired evidence).


110. See, e.g., Fed. R. Civ. P. 26(b) advisory committee’s note to the 1983 amendment (observing that “[o]n the whole . . . district judges have been reluctant to limit the use of discovery devices”). When judges do impose limits, they generally do so through protective orders, which are memorialized in writing. See id. 26(c).
overly aggressive requests. Protective orders may be necessary, one court explained, where defendants’ discovery requests “look like nothing more than a fishing expedition, or, more accurately, an exercise in swamp-drudging and muck-racking.” Additionally, two courts have taken the position that the after-acquired evidence defense “should not be used as an independent basis to initiate discovery.” However, these cases are exceptions to a generally permissive approach to discovery into a plaintiff’s background.

Examining this range of procedural contexts in which the after-acquired evidence defense arises, there is little evidence that courts are in any significant way limiting defendants’ use of the doctrine. Moreover, as discussed further in Part III, much of the impact of the doctrine occurs either early in a dispute, or in the development of litigation strategies by the parties, and thus would not appear in opinions or be subject to any exercise of discretion by the court. Thus, the Supreme Court’s assurance that abuse of the doctrine could be managed through judicial control over litigation conduct may have reflected an excess of confidence in managerial judging.

c. Defendants Seek to Expand the Doctrine

A final significant trend in the cases is the tendency for defendants to make arguments that would expand the after-acquired evidence doctrine or permit use of after-acquired evidence in other contexts, thus increasing its role in the litigation. In some instances, information obtained during


112. Graham, 206 F.R.D. at 255 (internal quotation omitted); see also Allender, 220 F.R.D. at 664–65.

113. Premer v. Corestaff Servs., L.P., 232 F.R.D. 692, 693 (M.D. Fla. 2005); see also Maxwell, 2006 U.S. Dist. LEXIS 36774, at *14 (“The Court finds that Defendant has failed to assert any pre-existing basis for the belief that after-acquired evidence of Plaintiff’s wrongdoing exists. As such, [Defendant] cannot use this doctrine to initiate discovery that is otherwise not relevant.”).

114. Occasionally, plaintiffs also try to shoehorn other kinds of arguments into an after-acquired evidence frame. A significant group of these cases involved a dispute over whether particular employee conduct constituted after-acquired evidence or a legitimate nondiscriminatory reason for the employment decision. In these instances, the debate between the employee and the employer is over the point-in-time at which the employer learned of the misconduct. In these disputes, it is usually the employee who argues that the evidence was “after-acquired” in an attempt to dispute its legitimacy as a non-discriminatory explanation for the employer’s decision. See, e.g., Conroy v. Abrahm Chevrolet-Tampa, Inc., 375 F.3d 1228, 1232 (11th Cir. 2004); Dvorak v. Mostardi Platt Assocs., 289 F.3d 479, 487 (7th Cir. 2002);
discovery, but unknown before the litigation commenced, is used to challenge not just a plaintiff’s damages, but also the core of her claim. Several courts, for example, agreed with the defendants’ arguments that after-acquired evidence should be available to disprove the plaintiffs’ coverage under the relevant statute. In these cases, the dispute is not about the defendants’ reasons for taking action against the plaintiffs, but whether federal law should apply to the case at all. After-acquired evidence is also sometimes used to rebut elements of a plaintiff’s prima facie case; for example, where a plaintiff claims to have been well-respected by peers, an employer might seek to rebut that argument with information acquired after termination that demonstrates lack of that respect. While the information played no role in the employer’s challenged decision, it thus becomes pivotal to the lawsuit.

While these examples involved defendants’ efforts to bring in evidence of employee behavior or reputation learned during discovery to support a variety of arguments about the legitimacy of the original decision, another group of cases demonstrates defendants’ efforts to expand the reach of the doctrine itself. One recurring question is whether employee misconduct that occurs after termination by the defendant employer should be relevant to the defense. Employers argue that, because the theory underlying the remedies limitation is that the employee would no longer be employable at the particular workplace, post-termination conduct is clearly relevant to the possibility of reinstatement. A few courts have accepted this argument and extended the doctrine to cover post-termination conduct. Other courts have been unwilling to expand the doctrine, noting that “[e]quity may require that some effect be given to the employee’s wrongdoing during employment, even if it was not known to the employer. However, when the after-acquired evidence involve[d] misconduct that occurred only after


115. See, e.g., Bauer v. Varity Dayton-Walther Corp., 118 F.3d 1109, 1112 (6th Cir. 1997) (permitting after-acquired evidence to determine whether termination of the defendant’s employment was valid under the FMLA).


118. See Sellers, 358 F.3d at 1063; Medlock, 164 F.3d at 554–55.
employment terminated, that misconduct is even more distant from the employer’s decision-making process.”

In another distinct group of cases, employers have sought a looser standard for the after-acquired evidence defense in cases of resume fraud than in cases of on-the-job misconduct. In these cases, defendants argue, they should not have to prove that they would have fired the plaintiff had they known of the resume fraud at the time of termination. Instead, they should be able to make use of the defense if they can demonstrate that, had they known at the time of hiring of the misrepresentations, they would not have hired the plaintiff. The “would-not-have-hired” standard is generally recognized as a more lenient standard for defendants, as it permits the counterfactual assumption that the entire course of the relationship between employer and employee had not existed. Employers will often overlook conduct in a current employee that they would not tolerate in an applicant. Courts have, for the most part, rejected the “would-not-have-hired” standard.

The common trait among this range of efforts to expand the doctrine is that all of the arguments reflect a tendency to shift attention away from the reasons the employer had for making its decision at a particular point in time and onto the qualifications or worth of the plaintiff at other points in time. Therefore all are, in one way or another, unrelated to whether the employer’s actions were taken for discriminatory reasons. These efforts to


121. See cases cited supra note 120.


123. See, e.g., Shattuck v. Kinetic Concepts, Inc., 49 F.3d 1106, 1108 (5th Cir. 1995); Thompson, supra note 6, at 657–58.

124. See, e.g., Washington v. Lake County, Ill., 969 F.2d 250, 254 (7th Cir. 1992).

125. See Thompson, supra note 6, at 656–59.
move the doctrine into other contexts are not unexpected; it is part of the nature of legal argument in a system that develops law by analogy that litigators will argue for novel applications of principles like that established in *McKennon.* Their presence is nonetheless important, as it reminds us that the ability of litigants to expand the doctrine is real and that potential is an essential aspect of the doctrine's impact on employment discrimination litigation.

The 274 reported cases that have discussed after-acquired evidence in the past two decades tell some interesting stories. They reveal a litigation tool that defendants are permitted to raise even after the early pleadings stages of litigation, and about which courts generally allow broad discovery. The defense thus gives defendants broad warrant to investigate the backgrounds of employment discrimination claimants. And much of the evidence uncovered in this search—in particular instances of resume and application fraud—would not likely have come to light had it not been for the plaintiffs' claims of discrimination. The picture that this data presents of how after-acquired evidence operates in employment discrimination cases, though informative, is only part of the story. Only a small percentage of cases stay active long enough to generate a judicial opinion. Moreover, judges often resolve discovery and other pretrial matters without a written opinion, so any dispute that is likely to arise in discovery—as this is—may be captured only partially by a study of legal opinions. In Part III, therefore, this Article will consider some of the reasons that the defense might not show up in published judicial text and will explore the impact the after-acquired evidence doctrine may have at earlier stages of litigation.

III. WHAT COURTS DON'T SAY (AND MIGHT NOT KNOW) ABOUT AFTER-ACQUIRED EVIDENCE

There are several plausible practical and strategic explanations for the small number of judicial opinions discussing after-acquired evidence. It could be that the defense is rarely asserted because very few potential plaintiffs engage in conduct that defendants might use to assert the defense. Evidence from human resource experts suggests, however, that quite the opposite is true. The kind of conduct that most frequently supports the defense is reportedly common. It may be, however, that employer policies are not as rigidly enforced as courts require for an early application of the defense. Another possible explanation is that the evidence of employee

126. See, e.g., Albiston, supra note 96, at 893–94.
127. See infra Part III.A.
misconduct that would support an after-acquired evidence defense comes into litigation in other ways, for example as impeachment material or in support of counterclaims; these uses of the information may provide defendants many of the same benefits without the costs and burdens of asserting an affirmative defense. Yet another explanation might be found in the early conduct of litigation: potential plaintiffs whose conduct would support an after-acquired evidence defense might not be getting far enough into litigation for their cases to appear in reported opinions with any frequency. Interviews with both plaintiffs’ and defendants’ lawyers suggest that this is, indeed, part of the story.

This Part will evaluate these various explanations. It will first consider the available data on the frequency of employee misconduct that might support an after-acquired evidence defense and will explore what incentives defendants might have to avoid the after-acquired evidence defense itself, while making use of the same evidence in other ways. It will then present the results of interviews with practicing attorneys to describe how after-acquired evidence affects the earliest stages of a potential plaintiff’s efforts to vindicate the rights granted by the federal laws prohibiting discrimination.

A. The Frequency of Employee Misconduct and the Flexibility of Employer Policies

Employee misconduct is not especially unusual. In particular, the type of misconduct that is most frequently asserted in support of the after-acquired evidence defense—application and resume fraud—is quite prevalent. Thus, the incidence of misconduct cannot alone explain the relatively small number of after-acquired evidence cases.

A precise assessment of the number of resumes or job applications that contain some inaccuracies is impossible to make and any estimates are likely to be low, given the number of misrepresentations that go unnoticed. Some recent studies by human resource experts, however, suggest that between a quarter and half of all resumes contain misstatements.128

Websites offering fake diplomas, resumes, and other credentials tout the ease with which clients can use their products.\textsuperscript{129} And high profile cases of padded resumes and falsified qualifications are regular fodder for the press.\textsuperscript{130}

Other types of workplace misconduct are also reported to occur with some frequency. Like resume fraud, on-the-job misconduct of varying degrees of seriousness almost certainly goes under-detected and under-reported. But employee theft is widely viewed as costing businesses millions of dollars each year. In one recent online survey, ten percent of respondents admitted to stealing from their employers.\textsuperscript{131} Likewise, a 2005 study by the Ethics Resource Center found that more than half of American workers have observed unethical or illegal conduct at work.\textsuperscript{132} Nineteen percent of those responding said they had observed co-workers lying; sixteen percent observed violations of safety regulations; sixteen percent observed misreporting of time worked; eleven percent saw co-workers steal from the workplace; and nine percent reported that they had observed one co-worker engage in sexual harassment of another.\textsuperscript{133} A recent study by the Substance Abuse and Mental Health Services Administration found that one in twelve employees admitted to using illegal substances within the

\textsuperscript{129} See, e.g., Fake Resume, http://www.fakeresume.com (last visited Feb. 23, 2008); see also Creola Johnson, Credentialism and the Proliferation of Fake Degrees: The Employer Pretends to Need a Degree; the Employee Pretends to Have One, 23 HOFSTRA LAB. & EMP. L.J. 269, 271 (2006).

\textsuperscript{130} See Matejkovic & Matejkovic, supra note 128, at 827 (describing how the man chosen to be poet laureate of California instead lost his career when his misrepresentations about his education were revealed); Patricia Sabatini, Experts Say Many Resumes Contain Fibs, Some Big, Some Small, PITTSBURGH POST-GAZETTE, Feb. 24, 2006, at E1, available at http://www.post-gazette.com/pg/06055/660332.stm (describing resume fraud by CEOs of RadioShack and Veritas and by Notre Dame football coach George Leary); Zak Sos & Richard Davis, MIT Dean Resigns in Lying Scandal, CNN.com, Apr. 29, 2007, http://www.cnn.com/2007/WORLD/americas/04/27/mit.dean/index.html (recounting the resignation of MIT’s Dean of Admissions because of revelations that she had misrepresented her education).


\textsuperscript{133} Id.
Given this level of reported on-the-job misconduct and resume misrepresentation, it seems likely that extensive discovery into the backgrounds and work records of a very high percentage of employees would uncover some past inconsistencies or violations.

Of course, not all of this misconduct would clearly violate established workplace policies or practices. For example, while resume fraud as a general matter is likely to violate the stated policies of most employers, there is almost certainly a spectrum of conduct, with some (like lying about degrees or required certification) providing clear grounds for termination and some (like misstating dates of prior employment) more apt to be overlooked. Similarly, abuse of work internet access for personal purposes by an employee is more likely to lead to dismissal if the employee is purchasing pornography than if he is emailing his parents. The discretionary element in employer policies that permits these kinds of distinctions is one of the significant limitations of the after-acquired evidence doctrine as a defense litigation tool. Employer discretion often interferes with employer success in asserting the defense; even more often it precludes partial summary judgment. The factual questions inherent in the defense mean that it is unlikely to lead even to partial summary judgment in most cases. Employers are probably not going to make their workplace policies more concrete solely to improve the effectiveness of this defense for curtailing damages. Various countervailing concerns—like the need for flexibility and the desire to avoid the unintended creation of contractual obligations—give employers incentives to avoid overly specific policies. Thus, while the small number of after-acquired evidence cases cannot be explained by an argument that only a small number of employees engage in misconduct, it may in part be attributed to the fact that many employers do not have policies that unambiguously prohibit a wide range of common employee conduct.


135. See supra notes 98–99 and accompanying text.

136. See Interview with Denver management attorney (Apr. 2007). (“Employers loathe having written policies—the more they have, the more trouble they get into. If written policies are the test, then employers will not benefit much from after-acquired evidence.”); see also infra note 141.
B. Employer Litigation Strategy and the Many Uses of Plaintiff Misconduct

Some of the value of the after-acquired evidence defense is that it lets defendants tell the jury about unseemly behavior by the plaintiff, and employers do not necessarily need to assert the defense to get the same damaging evidence into court. There are other opportunities to bring employee misconduct to the court’s attention without having to meet the burden established in McKennon of demonstrating that the conduct was sufficiently severe, and the policy sufficiently clear, that it would have resulted in termination. In many instances, information that will support the defense will also support an attack on the plaintiff’s credibility as a witness. Thus, in a case where the employer’s policies and practices may not be clear-cut enough to make the defense a useful tool for curtailing litigation, the acts of employee misconduct may still serve a valuable purpose by discrediting the plaintiff in the eyes of the judge and jury. Of course, this is going to be a less certain route for the employer. With impeachment testimony, the court will balance the probative value of the evidence against its prejudicial effect and may not permit the defendant to introduce particularly damaging evidence. The after-acquired evidence doctrine is thus useful to defendants because the admission of evidence being used to support the defense is much less discretionary.

Employee misconduct may be used in other ways as well. In circumstances where the misconduct is particularly serious, an employer may use it as the basis for asserting counterclaims against a former employee. This strategy only works where the misconduct would in fact support a claim, but recent cases have seen counterclaims for breach of fiduciary duty and breach of contract in which the evidence underlying the counterclaim is also argued to support an after-acquired evidence defense.

Perhaps even more importantly, where there is ambiguity about when the employer discovered the misconduct, it may be possible for the employer to
include the plaintiff’s malfeasance as a legitimate non-discriminatory reason for the termination. Success in this defense is certainly preferable to limiting damages, as it gives the defendant a complete victory in the suit. In a sizable group of cases in the data set discussed in Part II, the after-acquired evidence argument was raised by the plaintiff, who was asserting that the defendant was trying to use evidence acquired after termination as a legitimate non-discriminatory reason for the decision.\textsuperscript{140} Given the burdens the employer bears in proving the after-acquired evidence defense, the employer may find more appealing litigation options in taking advantage of the employee’s misconduct for impeachment purposes or to support a counterclaim or a broader defense.

So, while incidents of employee misconduct that could be used in asserting the defense may actually be fairly common, the defense incentives may push toward other ways to use that misconduct in litigation. This dynamic offers another explanation for the small number of after-acquired evidence cases.

C. Early Outs: The Impact of Employee Misconduct at the Initial Stages of Litigation

Another possible reason that judges rarely write about after-acquired evidence is that potential lawsuits by plaintiffs who have engaged in significant misconduct do not make it far enough through the litigation process to appear in judicial opinions. This Section reports the results of interviews with ten plaintiffs’ lawyers and ten defendants’ lawyers in major metropolitan areas around the country. All of the lawyers handle exclusively or primarily employment litigation. The interviews were conducted between February 2007 and July 2007 and included lawyers from Atlanta, Boston, Chicago, Denver, Los Angeles, Minneapolis, New York, San Francisco, and Washington D.C.\textsuperscript{141} These interviews reveal that

\begin{itemize}
  \item \textsuperscript{140} See, e.g., Conroy v. Abraham Chevrolet-Tampa, Inc., 375 F.3d 1228, 1232 (11th Cir. 2004); Fulkerson v. AmeriTitle, Inc., 64 F. App’x 63, 65 (9th Cir. 2003); Dvorak v. Mostardi Platt Assocs., 289 F.3d 479, 487 (7th Cir. 2002). In total, this group included ten cases, both district court and appellate. Plaintiffs were consistently unsuccessful in countering a legitimate nondiscriminatory reason by challenging the timing of the defendant’s knowledge of misconduct.
  \item \textsuperscript{141} This summary includes both direct quotes from lawyers and some paraphrasing of the interviews. The interviews were conducted by phone, with some follow-up email communication. None of the interviews were taped, but notes from each of them are on file with the author. In order to encourage candor, the individual lawyers were told they would not be specifically named. Where direct quotes are included in the Article, they are attributed by geography and practice type.
\end{itemize}
the after-acquired evidence doctrine, and the kinds of employee misconduct that undergird it, have a significant impact on potential suits, both before litigation ever occurs and in the early stages of litigation.

The interviews confirm that the lines between after-acquired evidence and other doctrines are very blurred in the framing of a case and a discovery plan. Evidence that could support the after-acquired evidence defense might also present a serious challenge to the plaintiff’s credibility or to the plaintiff’s performance on the job. Where there is a question as to whether evidence will rise to the level to support after-acquired evidence, some defendants’ lawyers report that they make a judgment early on to structure their inquiries more on the misconduct’s relationship to the plaintiff’s performance or qualifications. Some lawyers who regularly work with defendants report that if employers really care about resume fraud, they will catch it early; and if they do not care that much, it becomes extremely difficult to prove that the plaintiff would have been fired for the dishonesty. In this circumstance, focusing on the resume or application fraud for impeachment purposes will clearly be more effective than trying to assert the defense.

Further, the interviews confirm that it is not always clear when an employer knew of the misconduct. Thus, employers may often want to frame the discussion as an “either/or situation: it was a non-discriminatory reason for the firing at the time, or, in the alternative, it was after-acquired evidence.” So, someone in an organization might have known about the employee’s misconduct before the firing, but it might be unclear whether that information reached the supervisor who made the firing decision. Sometimes employers will try to “beef it up” so that the misconduct can become the legitimate non-discriminatory reason for the decision—which would preclude liability altogether, rather than simply limit damages.

Plaintiffs’ attorneys who regularly take employment discrimination claims generally use some form of an early client screening process. Lawyers report that they take fewer than five percent of the clients who

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142. Interview with Denver management attorney (Apr. 2007).
143. Interview with Boston management attorney (May 2007); interview with Denver management attorney (Apr. 2007).
144. Interview with Denver management attorney (Apr. 2007).
145. Id. A New York attorney described similar blurring in his practice experience and said that he will generally “make every legitimate effort to cast the evidence as the non-discriminatory reason for the decision, rather than falling back on after-acquired evidence.” Interview with New York management attorney (June 2007).
146. Interview with New York plaintiffs’ attorney (Feb. 2007).
initially approach them with potential claims. The screening process that precedes taking on a client could involve, for example, asking what the employer might say about the employee, if there are co-workers who would be willing to discuss the potential plaintiff’s reputation, if there is anything missing or inaccurate on the potential plaintiff’s resume, or if the plaintiff has any past criminal convictions. The screening is focused on the merits of the case, and also on the plaintiff’s credibility generally. These screening interviews will eliminate potential clients for many reasons; one is the client’s admission of some serious misconduct that, in the lawyer’s judgment, is likely to undermine her credibility as a plaintiff. In some instances the misconduct is of the sort that might support a successful after-acquired evidence defense. Even if the lawyer does not decline representation, several of the attorneys interviewed had had at least one client decide on her own not to pursue a case because some past misconduct might come to light in the course of the litigation.

Although most plaintiffs’ lawyers report that evidence of misconduct comes up during the client screening process, not all potential after-acquired evidence will lead lawyers to turn a client away. In some cases, the reported misconduct will be minor enough that the plaintiff’s lawyer believes it will not support the defense. Even in those cases, some lawyers report that they debate whether to take the case, given that the after-acquired evidence arguments are likely to “sidetrack” or “derail” the litigation off of the employer’s discriminatory actions and onto the question of whether the employee would have been fired even absent the discrimination. Several plaintiffs’ lawyers noted that the place to fight about this kind of issue is during discovery; you have to “pick your battles carefully and not allow the employer to probe into areas that are completely irrelevant.”

147. Interview with Chicago plaintiffs’ attorney (Feb. 2007); interview with Denver plaintiffs’ attorney (Feb. 2007); interview with New York plaintiffs’ attorney (Feb. 2007).
148. One lawyer reported that she always asks a potential client, “What is the first thing people would say about you?” Interview with California plaintiffs’ attorney (Apr. 2007).
149. Interview with California plaintiffs’ attorney (Mar. 2007).
150. Interview with New York plaintiffs’ attorney (Feb. 2007).
151. Interview with Minneapolis plaintiffs’ attorney (Feb. 2007).
152. Interview with California plaintiffs’ attorney (Mar. 2007).
153. Interview with Denver plaintiffs’ attorney (Apr. 2007); interview with New York plaintiffs’ attorney (Feb. 2007).
154. Interview with New York plaintiffs’ attorney (Feb. 2007).
155. Interview with Los Angeles plaintiffs’ attorney (Apr. 2007); interview with Minneapolis plaintiffs’ attorney (Feb. 2007).
156. Interview with Colorado plaintiffs’ attorney (Apr. 2007); see also McNamara & James, supra note 117, at 31 (suggesting that plaintiffs’ lawyers conduct careful screening interviews and discovery in order to prepare themselves for the possible assertion of the after-acquired evidence defense).
plaintiffs' attorney with more than twenty years of experience litigating employment discrimination claims put it:

Employers . . . right away start trying to find anything and everything they can about the employee. Generally they will find something if they look hard enough. A recent common one is personal email use. People use email at work, and they often do it in violation of company policy against doing personal email. So all an employer has to do is get the IT person to give them a list of all emails ever sent. Then the employer can derail the discussion about discrimination and start talking about whether company policy was violated.¹⁵⁷

Of course, when an employer claims the employee would have been fired for something like personal email use, the employee’s litigation strategy is clear and, likely, will be successful: demand records of whether any other employees ever were terminated for the same misconduct; ask employees at depositions whether they ever sent personal emails; and take the deposition of an IT staff member to prove how common personal emails are. But beating back the employer’s argument comes at a real cost in dollars (attorney time plus thousands of dollars of out-of-pocket costs for transcribed depositions) and time—especially given the presumptive limit of ten seven-hour depositions,¹⁵⁸ which means time and money spent discussing personal emails diminishes the resources available to litigate the discrimination claims. Thus, even a relatively weak after-acquired evidence defense can, by imposing costs and distractions, do significant harm to the plaintiff’s ability to litigate her allegations of discrimination.

Some plaintiffs’ lawyers report that “employers try to push the envelope” in order to get broader discovery.¹⁵⁹ The response to that concern from defendants’ attorneys is generally that the defense permits broad discovery, and that employment discrimination claims even without the defense are going to lead to a lot of discovery into the plaintiff’s background and conduct. Attorneys who work with employers say that they do structure their discovery requests with an eye to discovering information that could support an after-acquired evidence defense. The availability of the defense makes discovery into a plaintiff’s background essential. As one lawyer explained, that kind of discovery may be a fishing expedition, but he “ha[s] a fishing license.”¹⁶⁰

¹⁵⁷. Interview with Los Angeles plaintiffs’ attorney (Apr. 2007).
¹⁵⁸. See FED. R. CIV. P. 30.
¹⁵⁹. Interview with Chicago plaintiffs’ attorney (Feb. 2007).
¹⁶⁰. Interview with California management attorney (Mar. 2007).
Both plaintiffs’ and defendants’ lawyers report that after-acquired evidence increases the chances that a case will settle and that it will settle at a lower value than it would have absent the after-acquired evidence. A number of plaintiffs’ lawyers said that they had turned down or recommended early settlement on cases that involved serious instances of discrimination, but in which the employee’s own conduct seemed likely to interfere with successful litigation.

These accounts suggest that the small number of reported opinions of after-acquired evidence is, at least in part, explained by the fact that a plaintiff with misconduct in her record that might support the defense is unlikely to proceed very far in litigation. Some certainly take the view that this is entirely appropriate—one defendant’s lawyer interviewed, for example, said the presence of after-acquired evidence of misconduct should “absolutely” affect a plaintiff’s right to remedies, as it “shows the plaintiff is dishonest.” Indeed, as one attorney put it, “an employee should be dissuaded from bringing suit if their conduct was such that they would have been fired.” But it may also be seen as raising a problem with the defense—if the possibility of discovery of after-acquired evidence is chilling legitimate claims of discrimination, is it interfering with full enforcement of laws prohibiting discrimination? In McKennon, the Court emphasized the public value of litigating these private discrimination suits, explaining:

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 . . . which can be of industry-wide significance. The efficacy of its enforcement mechanisms becomes one measure of the success of the Act.

If the after-acquired evidence defense is interfering with these important public goals, should courts reconsider the defense?

161. One management attorney said that after-acquired evidence can actually be a “double-edged sword” in the settlement context: “It may have been the case that the employer was ready to settle, but now because of AAE, they won’t.” Interview with Los Angeles management attorney (Mar. 2007).

162. Interview with California plaintiffs’ attorney (Apr. 2007); interview with Denver plaintiffs’ attorney (Apr. 2007); interview with Chicago plaintiffs’ attorney (Feb. 2007).

163. Interview with California management attorney (Mar. 2007).

164. Interview with Boston management attorney (May 2007). Another lawyer said that “after-acquired evidence is sometimes used to intimidate the employee, but if there is a legitimate reason for the discovery, then why not?” Interview with California management attorney (Mar. 2007).

IV. WHAT SHOULD BE DONE ABOUT AFTER-ACQUIRED EVIDENCE

The after-acquired evidence defense is a bad idea. It has a number of important negative consequences in employment discrimination litigation that are not sufficiently deterred by the check of judicial discretion. But the doctrine is not going anywhere. The after-acquired evidence defense has staying power, derived in part from skepticism about employment discrimination plaintiffs more generally and in part from assumptions about the purposes of remedies in discrimination lawsuits. While the doctrine is thus certain to remain a fixture of discrimination litigation, its effects could be moderated by providing plaintiffs a more powerful mechanism for challenging frivolous assertions of the defense. The prohibition on retaliation against a discrimination claimant could offer plaintiffs that tool, particularly in light of the Supreme Court’s expansive 2006 interpretation of the doctrine in *Burlington Northern & Santa Fe Railway Co. v. White*.\(^{166}\)

A. Why the Doctrine Should (but Won’t) Be Abolished

The most significant problem with after-acquired evidence is that the doctrine has a chilling effect on full enforcement of laws prohibiting discrimination in employment. The doctrine legitimizes expansive investigation into a plaintiff’s background and has been used by defendants to push the boundaries of discovery. As at least one court has recognized,

> the prospect of a defendant’s thorough inquiry into the details of a plaintiff’s pre- and post-hiring conduct . . . may chill the enthusiasm and frequency with which employment discrimination claims are pursued, even in cases where the victim of discrimination has nothing to hide, let alone cases where the potential plaintiff is not entirely blameless.\(^{167}\)

The doctrine raises the fear in potential civil rights plaintiffs that their character and conduct well beyond the boundaries of their job performance will be put on trial if they choose to pursue a claim. After-acquired evidence thus alters the assessment that both plaintiffs and their lawyers will make in evaluating whether to challenge discriminatory employment decisions. It does so not based on the seriousness of the employer’s bad conduct, but on the seriousness of the employee’s generally unrelated misconduct. The idea that “good” people deserve remedies against discrimination and “bad”

\(^{166}\) 126 S. Ct. 2405 (2006).
people do not should not be an element of the nation’s antidiscrimination policy.

The Supreme Court’s assumption that courts could exercise their discretion in controlling litigation to deter abuses of the doctrine has not been a sufficient response to these concerns. First, much of the impact of the doctrine is felt before courts ever get involved in a dispute. The attorney interviews described in Part III suggest that after-acquired evidence plays a role in screening plaintiffs out of representation as well as in early settlement of cases. Second, the reported cases suggest that courts very rarely use their discretion to impose limits on assertions of the defense. Instead, defendants are given a fair amount of leeway in asserting the defense, even in cases where either their policies or the employee’s alleged misconduct are ambiguous.

Moreover, the doctrine shifts the conversation in civil rights litigation away from the hard job of assessing whether the particular employer conduct was the kind of discriminatory action the law condemns as illegal. As commentators noted about the earliest after-acquired evidence cases, “[t]hose courts granting judgment to the defendant do so without resolving the discrimination claim. Their discussion of the employer’s conduct generally is limited to a conclusory recitation of the alleged discrimination; the opinions then proceed to describe with great specificity the misconduct with which the plaintiff is charged.”168 The resulting “rhetorical imbalance” masks what is truly important in discrimination law.169

In this respect, the after-acquired evidence doctrine fits into a more general, and troubling, trend in discrimination law. Courts are spending so much time on procedural requirements and other matters of litigation strategy in these civil rights cases that they are avoiding the core questions of discrimination that lay at the heart of the law. This pattern appears also in many of the cases the Supreme Court has considered in recent years. In the past five Terms, for example, the Court has considered nineteen federal employment discrimination cases. Eight of these cases have considered matters such as the timeliness of filing administrative complaints;170 what constitutes a charge for EEOC exhaustion purposes;171 whether the minimum number of employees required for coverage is a jurisdictional bar;172 and similar procedural questions that skirt the issues central to the purposes of the discrimination laws. Continuing this pattern, the Court has

168. White & Brussack, supra note 19, at 51.
169. Id. at 51–52.
granted certiorari in the October 2007 Term on another case raising a question entirely about EEOC filing procedures. These can certainly be important questions. But, like debates about whether an employee’s misconduct would have been sufficient for termination had the employer been aware of it at the time, they do not get us any closer to understanding when and why discrimination continues to be such a pervasive workplace problem. Nor do they confront the extremely difficult questions of what employer conduct is in fact illegal discrimination.

The trouble with after-acquired evidence, then, is that it turns the focus away from discrimination and deters plaintiffs based on matters entirely separate from the seriousness of their civil rights claims. Rather than aiding in the process of separating valid claims of discrimination from frivolous claims, the doctrine sorts claims by reference to the plaintiffs’ past conduct. As courts, litigators, and policymakers struggle to separate the wheat from the chaff of discrimination claims, the after-acquired evidence doctrine distracts from that effort.

Despite these significant negative consequences, the after-acquired evidence doctrine is not going to disappear anytime soon. The justification for the defense is tied directly to core assumptions about employment discrimination remedies. When the Supreme Court adopted the defense, it explained that the employee’s misconduct could not be ignored in assessing damages because courts had to acknowledge the legitimate business interests of employers not to reinstate employees who had engaged in workplace misconduct. The Court’s underlying assumption was that, absent the misconduct, reinstatement would be the appropriate remedy. And, in fact, it is a bedrock principle of discrimination law that reinstatement is the preferred remedy.

Front pay is described as simply a


175. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 n.12 (1975).
Once front pay is tied to reinstatement, then the exclusion of reinstatement due to employee misconduct leads logically to the conclusion that front pay, too, should be excluded as a remedy. The doctrine thus seems "only fair." If reinstatement were not the preferred remedy for discrimination, then the rationale for the after-acquired evidence doctrine would be less clear. And, in fact, the notion that reinstatement is the preferred remedy is nothing but a legal fiction. Neither the employee nor the employer, at the end of litigation over employment discrimination "prefers" reinstatement, and courts rarely require it. Because this assumption is a cornerstone in the rationale for the after-acquired evidence defense, pulling it apart would undercut the legitimacy of the defense and might prompt courts and commentators to agree that the doctrine's negative consequences far outweigh any real benefits. As a practical matter, though, unraveling these core remedial assumptions would require a judicial activism that seems unlikely at best. For the time, then, the after-acquired evidence doctrine is almost certainly here to stay.

B. A More Modest Proposal: Recognizing the Defense as Retaliation

An alternative to abolishing the doctrine might be to give plaintiffs a tool with similar power to equalize the litigation playing field. From nearly its first appearance in employment discrimination litigation, the after-acquired evidence doctrine has been criticized by a small number of courts as bearing "the stain of retaliation." Why, then, couldn't assertion of the after-acquired evidence defense, at least in some circumstances, constitute impermissible retaliatory conduct under federal discrimination laws? Evidence offered in Parts II and III, both about how courts treat after-acquired evidence claims and about the influence of the doctrine on litigation in its early stages, suggests that the after-acquired evidence doctrine may sometimes have precisely the chilling effect that the anti-retaliation provisions of federal law were designed to prevent. While no

178. See, e.g., Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1238 n.31 (3d Cir. 1994); Rivera, 204 F.R.D. at 650.
179. The anti-retaliation provisions are widely recognized as essential to securing the primary antidiscrimination objectives "by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the [law's] basic guarantees." Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2412 (2006); see also Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (stating that the "primary purpose" of the
case has yet permitted a plaintiff to bring a claim of retaliation against an employer for asserting the defense, closely analogous claims have been permitted and discussion about the relationship between the search for after-acquired evidence and retaliation persists. And yet the notion of treating this litigation strategy as actionable retaliatory conduct seems immediately problematic. This Section will consider the merits of permitting plaintiffs to challenge some or all assertions of the after-acquired evidence defense as impermissible retaliation. After a brief explanation of the Supreme Court's decision in Burlington Northern and its clarification of the retaliation standard, it will explore how courts have treated retaliation claims premised on the impermissible use of litigation strategy and what this treatment might mean for the relationship between retaliation and after-acquired evidence.

1. The Burlington Northern Retaliation Standard

Title VII's prohibition on retaliation provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the statute]. 180

Until 2006, the meaning of this provision was the subject of considerable debate, both as to what conduct was sufficiently adverse to constitute discrimination and as to whether that challenged conduct had to occur on the job to violate the statutes. 181 The Supreme Court provided some resolution to these debates in Burlington Northern, taking a generally expansive approach to claims of retaliation.

The circuit split that the Burlington Northern Court confronted over the scope and meaning of the retaliation provision of Title VII had several vying camps. Some circuits required that the allegedly retaliatory conduct had to affect the terms, conditions, or benefits of employment, essentially applying the same standard for retaliation that they applied for the underlying prohibition on discrimination; 182 in some circuits, this employment-related requirement was applied even more strictly to include

anti-retaliation provision is "[m]aintaining unfettered access to statutory remedial mechanisms").

182. See, e.g., Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001).
only "ultimate employment decisions" such as firing or demotion.\(^{183}\) Other circuits did not require that the employer's conduct be related to employment in order to constitute prohibited retaliation.\(^{184}\) These courts concluded that any "adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity" would meet the statutory requirement.\(^{185}\) Yet a third group took a kind of middle ground, applying the retaliation provision to conduct on and off the job, but requiring the plaintiff to show that the "employer's challenged action would have been material to a reasonable employee."\(^{186}\) In *Burlington Northern*, the Supreme Court overruled the stricter standards applied in many circuits, holding that the provision "does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace" but that it does cover only those actions that would meet an objective standard of "materially adverse."\(^{187}\)

In reaching this conclusion, the Court observed that prohibiting only retaliation occurring on the job would not achieve the goal of preventing interference with an employee's exercise of civil rights, because "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace."\(^{188}\) A retaliation claim, the Court held, can therefore apply to any "employer actions that would have been materially adverse to a reasonable employee or applicant"—in other words, actions that are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."\(^{189}\) The facts of the *Burlington Northern* case itself involved on-the-job retaliatory conduct,\(^{190}\) and so the Court, while holding that challenged conduct could occur on or off the job, did not elaborate on what kinds of nonemployment actions might support claims of retaliation.

In addition to endorsing retaliation claims for employer conduct that occurs outside the workplace, the *Burlington Northern* opinion further

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185. Id.

186. Washington v. Ill. Dep’t of Revenue, 420 F.3d 658, 662 (7th Cir. 2005).


188. Id. at 2412.

189. Id. at 2409.

190. Id. Sheila White’s claim of retaliation challenged her employer’s reassignment of certain job duties and her suspension without pay pending an investigation for misconduct, which she alleged had been trumped up to punish her for challenging sex discrimination on the job. Id.
expanded the potential for retaliation claims with its definition of the kinds of employer conduct that might constitute materially adverse action. In adopting the "materially adverse" standard, the Court sought to "screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination." And yet the examples the Court gave—suggesting that changing an employee's schedule or excluding her from a weekly training lunch will, in some contexts, support a retaliation claim—leave ample room for arguing that normally acceptable conduct may in particular circumstances become illegal retaliatory action.

While the contours of the Court's retaliation standard will be further defined by fact-specific application in the lower courts, there is no question that it was received by courts and commentators as a "more expansive" standard than had previously applied. In the nearly two years since the Court's decision, the number of retaliation claims has increased, and, as one plaintiffs' lawyer explained, "if you can include any argument for retaliation—which you usually can—then you do." Most retaliation claims still challenge employer conduct at work. But a number of cases, both before Burlington Northern and in the time since the Court's decision, have considered claims of retaliation based on actions taken in the courtroom or otherwise in the litigation process. Could plaintiffs use such arguments to combat defendants' use of the after-acquired evidence defense?

191. Id. at 2416.
192. Id. at 2415.
195. Interview with Denver plaintiffs' attorney (May 2007).
2. Other Litigation Conduct as Retaliation

Even before Burlington Northern, numerous courts had recognized that "a lawsuit . . . may be used by an employer as a powerful instrument of coercion or retaliation and that such suits can create a 'chilling effect' on the pursuit of discrimination claims."196 While some circuits had rejected this type of claim because the challenged conduct was not employment related—a rationale now abrogated by Burlington Northern—many had concluded that malicious prosecution could constitute retaliatory action. In a case cited approvingly in Burlington Northern, for example, the Tenth Circuit held that a plaintiff had established a prima facie case of retaliation where he demonstrated that, following his filing of an EEOC complaint, his employer encouraged a co-worker to report an alleged forgery to the district attorney's office, prompting the pursuit of criminal charges against the plaintiff.198 In another case, a court found actionable retaliation when an employer filed a civil defamation suit in response to a former employee's filing of an EEOC sex discrimination charge.199 And, in a suit brought under the ADA and the ADEA, the defendant's decision to appeal a state award of unemployment benefits to a former employee following his filing of an EEOC claim was found to support a cause of action for retaliation.200 As the court in that case explained, "[p]ublic policy strongly dictates against allowing employers to bring groundless litigation in retaliation for an employee's exercise of protected rights."201 These decisions have appropriately recognized that the threats posed by a defendant employer's aggressive litigation can deter plaintiffs from pursuing claims of


198. Berry v. Stevinson Chevrolet, 74 F.3d 980, 985 (10th Cir. 1996); see also Beckham v. Grand Affair of N.C., Inc., 671 F. Supp. 415, 419-20 (W.D.N.C. 1987) (charging a former employee with criminal trespass after she had filed an EEOC complaint could constitute retaliation).


201. Id. at 1231.
discrimination and thus interfere with the full enforcement of federal discrimination laws.

Other courts have, however, sounded a note of caution about retaliation claims premised on litigation conduct. The concern raised in these decisions is that a defendant is entitled to employ the procedural and substantive tools offered by the civil litigation system, and that the best way to ensure these tools are not abused is for courts to exercise their authority to monitor and control litigation conduct. Even these courts have not tended to exclude litigation conduct per se from the scope of retaliation, but they have emphasized that “it will be the rare case in which conduct occurring within the scope of litigation constitutes retaliation.”

Within the range of litigation conduct that has been considered potentially retaliatory, the circumstance that has arisen most frequently has been the defendant’s filing of a counterclaim in response to a discrimination suit. In many cases, courts have allowed plaintiffs to amend their complaints to add claims of retaliation after the defendant files a counterclaim. Like malicious prosecution or appeal of an award of unemployment benefits, the filing of a counterclaim can have a dramatic impact on the plaintiff’s sense of security in exercising her rights under the discrimination laws. As one court explained:

If the defendant is permitted wide latitude in asserting counterclaims, it ups the ante considerably for the plaintiff and makes prosecution of the case more difficult. Moreover, such latitude would permit an employer to send to its other employees an implicit message that says “If you sue me, I’ll sue you back,

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203. See, e.g., Glass v. IDS Fin. Servs., Inc., 778 F. Supp. 1029, 1061 n.53 (D. Minn. 1991) (“[T]he anti-retaliation provisions of the ADEA and Title VII are designed principally to deal with retaliatory conduct that occurs outside the judicial system . . . Once a lawsuit has been filed, courts have the tools to deal with counterclaims that are truly retaliatory or made in bad faith.”).
and it will cost you dearly.” Needless to say, the message could have a considerable chilling effect...  

Of course, courts debate the likelihood of these chilling effects of defendant counterclaims in discrimination litigation. Some have concluded that, because a counterclaim will not be brought until the plaintiff has already filed a lawsuit, it cannot be said to have any chilling effect on the filing of that suit and is therefore not within the scope of retaliation covered by the statute. These courts also argue that there is less risk of deterring suits because the plaintiff would not be required to hire a lawyer to defend against a counterclaim, as he will already have hired a lawyer to bring the suit. But plaintiffs’ lawyers often are retained on a percentage contingency fee, whereas work defending against claims usually is performed for hourly rates (because there is no “percentage” to be obtained from successfully defending against a claim); accordingly, as at least one court has noted, plaintiffs’ lawyers might exclude the defense of counterclaims from their standard fee agreements, thus eliminating this economic argument. Furthermore, the fact that a counterclaim will not have deterred this particular plaintiff from this particular suit cannot eliminate the possibility of a broader chilling effect that might dissuade other potential plaintiffs or witnesses.

3. The After-Acquired Evidence Defense as Retaliation

Given the number of cases that have recognized retaliation claims premised on the assertion of a counterclaim by the defendant employer, it is surprising that only one court has had occasion to consider the merits of a claim of retaliation stemming from the assertion of the after-acquired evidence defense. This fact becomes even more surprising when one considers that both enforcement guidance from the EEOC and a number of judicial opinions have noted the retaliatory potential in assertion of the


defense. Moreover, a substantial number of cases in which defendants are asserting the defense have involved allegations that the plaintiff engaged in resume or application fraud. In these cases, it seems nearly certain that the at-issue conduct would not have come to light if the plaintiff had not asserted her statutory rights. And interviews with lawyers suggest that potential plaintiffs are sometimes dissuaded from bringing claims at all because of the possibility that evidence of misconduct will eviscerate their potential damages and will be damaging in other ways as well. All of these factors support the argument that at least in some sets of circumstances plaintiffs might have viable claims of retaliation for the assertion of the after-acquired evidence defense.

Not long after the Supreme Court decided McKennon, the EEOC published a detailed enforcement guideline, advising its field investigators what the Commission felt they should be looking for in investigating charges of discrimination. The enforcement guidance anticipated the possibility that some number of cases might involve after-acquired evidence that was obtained through a "retaliatory investigation, i.e., one initiated in response to a complaint of discrimination in an attempt to uncover derogatory information about the complaining party or discourage other charges or opposition." As an example of such a retaliatory investigation, the EEOC offered this hypothetical:

CP files a charge alleging that he was discriminatorily denied a promotion. R launches an extensive background investigation of CP and learns that he falsified his application. . . . [T]he Commission finds that R did not simply discover the information in the course of investigating the charge, but purposefully sought

212. See infra notes 215–216 and accompanying text.
213. See supra Part II.
214. An interesting analogy to after-acquired evidence arose in the age discrimination suit launched by the EEOC against the law firm Sidley Austin Brown & Wood. The Chicago-based law firm was sued for allegedly forcing senior partners to retire in violation of federal law. Anthony Lin, Some Sidley Partners Ask to be Dropped from EEOC Suit, N.Y.L.J., Nov. 9, 2005, http://www.law.com/jsp/article.jsp?id=1131457371689. While the lawsuit initially "focused widespread attention on firm retirement policies as well as the highly centralized management structure of today's large firms," once discovery had commenced in earnest "Sidley Austin and at least some of the partners who allegedly experienced age discrimination are now concerned that attention is shifting to the personnel records of individual lawyers." Id. In this instance, individual lawyers sought to be dropped from the case in order to avoid inspection of their files. Id. Because the suit was an action by the EEOC, only the government was actually a party to the case, so individual lawyers could not "opt out." The impulse to avoid litigation in order to avoid being subject to personal attack is much the same in this context as in assertion of the after-acquired evidence defense.
216. Id. at III.A.
derogatory information about CP in retaliation for his challenging the failure to promote. . . . [B]ecause the evidence of wrongdoing was not simply unearthed during an investigation of CP's complaint, but was deliberately sought to retaliate against CP and to discourage similar charges . . . this is the kind of "extraordinary equitable circumstance" that warrants extending backpay to the date the complaint is resolved.217

The EEOC guidance thus anticipates that some negative information about a plaintiff will be "simply discover[ed]"218 without retaliatory motive, while other information will be the result of retaliatory conduct by the defendant. The Commission does not provide any further suggestion as to how the one circumstance might be distinguished from the other.

Courts, too, have worried that evidence used to limit a plaintiff's recovery that is discovered only because the plaintiff brought suit challenging the defendant's illegal acts has "the stain of retaliation."219 Essentially, "after acquired evidence penalizes the wronged employee twice because such 'evidence would not have been discovered had the employer not discriminated against the employee [to begin with]."220 Thus, even while permitting discovery to proceed in support of the defense, one court noted that it was "concerned that the overzealous pursuit of discovery carries the potential for abuse and could subject the named plaintiffs to retaliation."221 Another court, anticipating the possibility for retaliation inherent in the after-acquired evidence doctrine, suggested that "the calculated discovery of after-acquired evidence (as opposed to, for example, its inadvertent or independent discovery)" might constitute actionable retaliation.222 In such circumstances, "although it is exceedingly unlikely that any economic damages would flow therefrom, it may very well be that

217. Id. (emphasis added).
218. Id.
222. Mardell, 31 F.3d at 1238 n.31.
any evidence so stained would have to be suppressed at the remedies stage of the proceedings” except for limited purposes.\textsuperscript{223} Further, a finding of retaliation, even without economic damages, can provide the plaintiff equitable review, a modest award of emotional distress damages,\textsuperscript{224} and perhaps a more sizeable award of attorney’s fees as a “prevailing party.”\textsuperscript{225}

In spite of these long-standing suggestions that assertion of the defense might support an allegation of retaliation, only one reported opinion has directly considered such a retaliation claim.\textsuperscript{226} In \textit{Harmar v. United Airlines, Inc.}, a group of plaintiffs filed a complaint alleging that the defendant’s assertion of the after-acquired evidence defense in a related suit violated the ADEA’s anti-retaliation provisions.\textsuperscript{227} In its very brief opinion, the court granted United Airlines’ motion to dismiss the retaliation claim.\textsuperscript{228} The court noted that filing a frivolous lawsuit could be retaliatory, but concluded that “[p]resenting an affirmative defense, even a frivolous one, will not support a retaliation claim.”\textsuperscript{229} The \textit{Harmar} court took the view that any retaliatory potential in the defense was diminished by the fact that the plaintiff would already have hired a lawyer, and so would not incur additional hardship or expense.\textsuperscript{230} Further, the court noted that an affirmative defense does not subject the plaintiff to any risk of owing damages, and is therefore less likely to chill claims than is the filing of a lawsuit against a discrimination plaintiff.\textsuperscript{231}

The \textit{Harmar} opinion underestimates the potential of the after-acquired evidence defense to chill the exercise of federal civil rights. In fact, an employer’s assertion of the defense and the extensive and intrusive discovery that accompanies its assertion can certainly dissuade plaintiffs

\textsuperscript{223} Id.
\textsuperscript{224} But see DeRoche v. Mass. Comm’n Against Discrimination, 848 N.E.2d 1197, 1202–03 (Mass. 2006) (holding that a finding of retaliation alone is insufficient to permit an inference of emotional harm).
\textsuperscript{226} Harmar v. United Airlines, Inc., No. 95 C 7665, 1996 U.S. Dist. LEXIS 5346, at *2–5 (N.D. Ill. Apr. 17, 1996). The plaintiff in \textit{O’Day v. McDonnell Douglas Helicopter Co.}, 79 F.3d 756 (9th Cir. 1996), made a slightly different argument. Mr. O’Day argued that his removal and copying of sensitive corporate documents was itself protected activity under the ADEA’s retaliation provisions, and that the defendant could therefore not legally discharge him for engaging in that conduct. \textit{Id.} at 762–63. Because the defendant could not fire O’Day for his document misappropriation, he argued, it could not constitute after-acquired evidence supporting the defense. \textit{Id.} at 762. The Ninth Circuit affirmed the district court’s rejection of this argument. \textit{Id.} at 763–64.
\textsuperscript{227} Harmar, 1996 U.S. Dist. LEXIS 5346, at *1–2.
\textsuperscript{228} Id. at *5.
\textsuperscript{229} Id. at *3.
\textsuperscript{230} Id.
\textsuperscript{231} Id.
with legitimate claims of discrimination from pursuing these claims. While some of the evidence that might support the defense could come in as impeachment testimony, the after-acquired evidence legitimates broad discovery that might otherwise be found overly intrusive; the defense also ensures that damaging information about the plaintiff will come into court in spite of its prejudicial effect.\footnote{232} As such, the defense raises for a reasonable employee real questions about whether protecting her civil rights is worth the potential embarrassment and exposure. Further, the potential for the after-acquired evidence defense may make it more difficult for a plaintiff to find legal representation.\footnote{233} Aggressive use of the defense may not affect the ability of the plaintiff in the particular litigation to find a lawyer, but it does send a message to other employees that if they press their rights the consequences will be aggressive background investigation.\footnote{234}

The fact that the after-acquired evidence defense may have this chilling effect is not alone sufficient reason to endorse retaliation claims based on assertion of the defense. Once the defense has been recognized as a legitimate litigation tool for defendants, separating its retaliatory use from its appropriate use may be nearly impossible. Even commentators who were very critical of the strongest version of the after-acquired evidence defense in its early years took the view that “[t]here is nothing inherently illegitimate about an employer’s acquisition of such information through pretrial discovery or through its own pretrial investigation.”\footnote{235} Instead, those considering the issue have generally concluded that “the risk that damaging information may be discovered is one that a plaintiff assumes when bringing an employment discrimination action.”\footnote{236} Like bringing a counterclaim, filing a lawsuit or any other otherwise permissible litigation tactic, assertion of the after-acquired evidence defense is something that clearly happens with no retaliatory motive quite regularly. And yet, there are also suggestions in attorney interviews that assertion of the defense may sometimes be frivolous, and that it may be used to push the boundaries of discovery to a questionable degree or otherwise to intimidate plaintiffs.\footnote{237}

The McKennon Court’s answer to this possibility was to emphasize the discretion available to district courts to “deter . . . abuses” through awards

of attorney's fees and exercise of their authority under the Federal Rules of Civil Procedure. A very small number of cases do show this kind of judicial monitoring of the boundaries of appropriate conduct in discovery. But the number of cases in which objections to broad discovery are overruled, or in which there is simply no evidence that courts are considering the need to impose limits, is much larger. Moreover, there is not a single case in which a court has imposed Rule 11 sanctions for inclusion of a frivolous after-acquired evidence defense. Even in cases where the defense appears to be entirely unsupported by the evidence, the worst that happens for the defendant is a denial of summary judgment on the question. This is not such a terrible outcome strategically for the employer, as it keeps the topic of the employee's alleged misconduct central in the continuing litigation.

Recognizing the need to separate appropriate uses of the doctrine from inappropriate use, courts and commentators have occasionally proposed "fixes" to address the concern that after-acquired evidence doctrine may allow the defendant to use the civil discovery process to intimidate and potentially retaliate against plaintiffs. For example, a few courts have applied a rule analogous to the "inevitable discovery" doctrine in criminal law, concluding that the defendant should not be permitted to rely on evidence that was uncovered exclusively as a result of litigation discovery. This kind of fix would be an improvement on the Court's McKennon doctrine, but a more direct approach—and more consistent with the statutory language as well as the newly broad understanding of retaliation—would be to recognize that, in some cases, plaintiffs may have viable retaliation claims against defendants for asserting after-acquired evidence.

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239. See supra Part II.B.
240. See supra Part II.B.
241. See supra Part II.B.2.b.
242. See supra Part II.B.2.
243. See, e.g., Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1240 (3d Cir. 1994); Rivera v. NIBCO, Inc., 204 F.R.D. 647, 651 (E.D. Cal. 2001) ("[D]efendants may engage in independent investigation regarding plaintiffs' immigration status but may not ask plaintiffs such questions directly. As noted by plaintiffs . . . such investigation should have been done at the time of hiring, not post-discrimination. The defendant-employer is not placed in an adverse position because but for the lawsuit the employer never would have had reason to pursue such an inquiry." (citation omitted)); Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 324 (D.N.J. 1993); see also Zemelman, supra note 19, at 208 ("If an employer cannot show with reasonable certainty a date that it would have discovered legitimate nondiscriminatory reasons to make the employment decision in question, the court should award the plaintiff full backpay.").
Of course, winning a claim of retaliation on the basis of the assertion of this defense would not, and probably should not, be easy. But the difficulty of assessing the appropriateness of the claim in any given case should not be an excuse for avoiding it entirely. In the context of retaliation allegations based on the filing of counterclaims, courts have generally found that the plaintiff must make some showing that the employer was motivated by a desire to retaliate, rather than by some legitimate litigation goal. This same requirement is implicit in the EEOC guidance and is the appropriate standard to apply to claims of retaliation based on assertion of after-acquired evidence. A plaintiff pursuing such a claim would have to show that the defendant was seeking to punish her by asserting the defense, and was not simply making all legitimate legal arguments. This burden might be met, for example, by demonstrating that the defendant’s allegation that the plaintiff’s misconduct was termination-worthy was frivolous based on the employer’s overall history. Proving this kind of intent would impose a significant burden on plaintiffs. But because questions of motive are fact questions, likely to go to the jury, the possibility of a retaliation claim is one that a defendant would have to take seriously, and that might prompt some care in assertion of the after-acquired evidence defense.

This kind of care is warranted. The analysis of after-acquired evidence cases conducted in Part II of this Article suggests that many of the after-acquired evidence defenses asserted by employers are highly dubious. Defendants lose summary judgment on after-acquired evidence twice as often as they win it. Because courts do not generally strike the defense for lack of evidence, a loss on summary judgment is as close as a court will come to suggesting that the defense is unsupported. It seems likely, though, that some assertions of the defense in which the court denied summary judgment involved circumstances that would simply not support the defense at all. Similarly, defendants’ efforts to expand the doctrine—also reflected in the case analysis in Part II—suggest that tendency to push the boundaries of a doctrine that should in fact be carefully limited in civil rights litigation.

The interviews with practicing attorneys described in Part III demonstrate, among other things, the impact that a legal doctrine can have on the choices parties make in crafting their litigation strategies. The existence of the after-acquired evidence doctrine, for example, deters some plaintiffs and their lawyers from pursuing claims and encourages early

245. See supra Part IV.B.3.
246. See supra Part II.B.2.
settlement. One reason to consider seriously claims of retaliation based on assertion of after-acquired evidence is that the threat of a charge of retaliation might cause a more careful evaluation by defendants of the appropriateness of the defense in a particular case.

V. CONCLUSION

So what is really wrong with after-acquired evidence? The evidence from the judicial opinions discussing the doctrine and interviews with lawyers who confront it regularly suggest a number of problems. Most significantly, the after-acquired evidence doctrine risks filtering out serious instances of discrimination because it puts the plaintiff on trial or, as importantly, because it raises that risk in the mind of the potential plaintiff and her lawyer. Because the most-often used employee misconduct supporting the defense is resume or application fraud that would not likely have been discovered if the plaintiff had not filed a claim of discrimination, the defense significantly alters the risks to the potential plaintiff of pursuing her civil rights. The doctrine thus filters employment discrimination claims not on the basis of whether the employer’s conduct was illegal, but effectively on the basis of the plaintiff’s moral worth. Moreover, after-acquired evidence adds to a general tendency in discrimination cases today to shift the focus from the seriousness of a defendant’s discriminatory conduct onto tangential questions in the litigation.

Ideally, the after-acquired evidence defense should be abandoned. Its justification rests on assumptions about employment discrimination remedies that are deeply flawed. A new conceptualization of remedies in civil rights cases would abandon the doctrine. But such a broad rethinking of remedies is unlikely to occur anytime soon. In the meantime, as long as after-acquired evidence continues to be a damages-limiting defense for employers who are found to have illegally discriminated, its use should be carefully circumscribed. Lawyers assessing the potential value of litigation should be able to count on vigorous judicial limitations on expansive discovery and assessment of all equitable concerns in awarding damages.

247. See supra Part III.C.

248. On this point, the tone of the after-acquired evidence cases before and after McKennon has remained quite similar, despite the Supreme Court’s caution that the doctrine was not supposed to express a judgment about the moral worth of the plaintiff. McKennon v. Nashville Banner Publ’g Co., 513 U.S. 352, 361 (1995); see also Mardell, 31 F.3d at 1233 (criticizing this aspect of the doctrine and observing that, to the contrary, “[i]nstead of focusing on the worthiness of the victim, the statutes exclusively and unambiguously fix on the employer’s motives”); Zemelman, supra note 19, at 199 (discussing early cases and noting that they “framed the issue simply as whether a particular plaintiff deserves a remedy”).
But these instances of judicial discretion are in fact quite rare. Some alternative protections should be available to plaintiff employees facing frivolous assertions of the defense. The possibility that an assertion of the defense designed to scare the plaintiff or other employees out of challenging discrimination might subject the employer to claims of retaliation would provide this kind of additional deterrence against the doctrine's misuse.