Permitting After-Acquired Evidence of Employee Qualifications: Perpetuating a *McKennon* Distinction Without a Difference

Katherine E. Miller*

"Above all, the [Americans with Disabilities Act] is about one clear and forthright message: That discrimination of any kind has no place in America. . . . Discrimination no longer has a legal leg to stand on."[1]

I. INTRODUCTION

Despite legislative and societal condemnation, employment discrimination has found several legal legs to stand on, both historically and in the modern era.[2] One such mechanism the Ninth Circuit recently revived, seemingly contradictory to Supreme Court precedent, is the use of after-acquired evidence to defeat an employee's disability discrimination claim.[3] After-acquired evidence is information unknown to an employer at the time it takes adverse employment action against an employee that the employer subsequently learns during the discovery phase of litigation.[4] Where the discovered information includes objectively

---

* J.D. Candidate, Suffolk University Law School, 2022; B.A. 2003, Boston College. Special thanks to Professor David Yamada for his guidance and feedback. I am grateful to Aziza Asad and the entire *Suffolk University Law Review* team for their thoughtful revisions. Finally, thank you to my husband, Casey, and daughters, Emma and Alison, for their patience, love, and support. This Note is dedicated to the memory of my beautiful niece, Avery Anne Coupe.

1. *Examining the Americans with Disabilities Act on the One-Year Anniversary, What Has Happened, and What More Needs to Be Done: Hearing Before the Subcomm. on Disability Pol'y of the Comm. on Lab. and Hum. Res.*, 102d Cong. 2 (1991) (statement of Sen. Tom Harkin, Chairman, Subcomm. on Disability Pol'y).

2. *See* Katie Eyer, *The Return of the Technical* McDonnell Douglas *Paradigm*, 94 WASH. L. REV. 967, 977-80 (2019) (cataloging numerous, technical judicial rules disadvantaging plaintiffs); Theresa M. Beiner, *The Many Lanes out of Court: Against Privatization of Employment Discrimination Disputes*, 73 MD. L. REV. 837, 867 (2014) (noting employment discrimination cases involve higher incidence of summary judgment favoring defendants); Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 109-10 (2012), https://www.yalelawjournal.org/pdf/1111_aau9fyvc.pdf [https://perma.cc/5J7J-C3Z7] (explaining judicial impediments to discrimination claims occurring since 1964).

3. *Compare* Anthony v. TRAX Int'l Corp., 955 F.3d 1123, 1133-34 (9th Cir. 2020) (barring TRAX's liability for discrimination after post-termination discovery of Anthony's lack of bachelor's degree), *with* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 356 (1995) (holding after-acquired evidence of McKennon's wrongdoing did not bar discrimination claim).

4. *See* Cheryl Krause Zemelman, Note, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 176-77 (1993) (arguing after-acquired evidence doctrine at odds with antidiscrimination objectives). Typical examples of after-acquired evidence include post-termination discovery of on-the-job misconduct or of misrepresentations on a résumé or employment application. *See id.* at 176 n.5 (noting discrimination litigation itself ironically prompts discovery of such evidence).

terminable conduct, the employer may then move for summary judgment to avoid liability or, at minimum, argue for reduced damages.[5] In 1995, however, the Supreme Court of the United States held in *McKennon v. Nashville Banner Publishing Co.* that an employer cannot use after-acquired evidence of an employee's on-the-job misconduct as a supervening termination reason to defeat an employment discrimination claim.[6]

While the Court in *McKennon* did not explicitly reach other factual scenarios beyond the on-the-job misconduct presented under the Age Discrimination in Employment Act (ADEA), it barred use of after-acquired evidence at the liability stage, invoking a broad national policy to deter discrimination.[7] Nevertheless, various circuit courts have since carved out or maintained several distinctions to avoid the *McKennon* limitation on after-acquired evidence in employment discrimination litigation.[8]

For example, under the Americans with Disabilities Act (ADA), an employee asserting an employment discrimination claim must be a qualified individual as

5. *See id.* at 176 (explaining evidence used at both liability and remedy stages); *see also* Robert J. Gregory, *The Use of After-Acquired Evidence in Employment Discrimination Cases: Should the Guilty Employer Go Free?*, 9 LAB. LAW. 43, 44 (1993) (showing after-acquired evidence used to avoid determining liability).

6. *See McKennon*, 513 U.S. at 360 (declining to allow liability defense using evidence of employee misconduct unknown at termination). Beginning in 1988 and continuing until *McKennon*, numerous courts developed and applied the after-acquired evidence doctrine to preclude employer liability. *See, e.g.*, Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988) (holding after-acquired evidence of misconduct undermines Summers's claim of injury and precludes all relief), *abrogated by McKennon*, 513 U.S. 352; Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403, 1405 (8th Cir. 1994) (adopting rule from *Summers* to uphold dismissal based on Welch's application fraud), *abrogated by McKennon*, 513 U.S. 352; *see also* Zemelman, *supra* note 4, at 178-80 (tracing history of doctrine). Development of the after-acquired evidence doctrine was emblematic of a broader shift in judicial antidiscrimination enforcement, away from broad public policy objectives and toward individual remedies for disparate treatment. *See* Zemelman, *supra* note 4, at 188 (describing shift to compensation focus); *see also* William R. Corbett, *What Is Troubling About the Tortification of Employment Discrimination Law*, 75 OHIO ST. L.J. 1027, 1053 (2014) (criticizing tort-like causation standards in employment discrimination). In *McKennon*, the landmark after-acquired evidence case, the Supreme Court reaffirmed that antidiscrimination laws do not merely redress individual harms but reflect public policy condemning invidious bias in employment. *See* 513 U.S. at 357 (citing congressional intent in enacting antidiscrimination laws). The Court held that after-acquired evidence of on-the-job misconduct may not be used to preclude liability but could, nevertheless, limit relief. *See id.* at 361-62 (reasoning reinstatement and front pay inappropriate in such circumstances).

7. *See McKennon*, 513 U.S. at 358-59 (recognizing effective enforcement and deterrence rely upon private litigation). The Court acknowledged that McKennon's misconduct may have been a supervening ground for termination but ruled that it did not absolve the Nashville Banner of its discriminatory conduct. *See id.* at 356-57 (emphasizing broader deterrence objective of antidiscrimination statutory scheme). The Court highlighted the dual objectives of individual employee compensation and employer deterrence. *See id.* at 358 (reasoning private litigation vindicates both objectives). The Court also recognized that an employer's autonomy in making lawful employment decisions was a legitimate interest. *See id.* at 361 (explaining antidiscrimination law does not interfere with employers' other prerogatives). To effectively balance these competing concerns, the Court allowed after-acquired evidence to limit remedial relief but held it could not be used to escape liability. *See id.* at 361-63 (limiting type of damages).

8. *See infra* notes 11-12 and accompanying text (discussing cases applying judicial estoppel and qualification–standing requirement).

defined by the Act to establish standing.[9] Similarly, employees must prove qualification as a prima facie element of employment discrimination claims brought under Title VII of the Civil Rights Act of 1964 (Title VII) or the ADEA.[10] Some courts have employed judicial estoppel to permit after-acquired evidence when employees assert their qualification for the contested position but have represented a total inability to work elsewhere, such as before the Social Security Administration (SSA).[11] Other courts allowed after-acquired evidence of application or résumé fraud to show that the employee was never qualified for employment, thus destroying the discrimination claim.[12]

Judicial estoppel and the qualification–standing defense predate *McKennon*, and circuits have split over their continued viability in the wake of that

9. *See* Americans with Disabilities Act of 1990 § 102(a), 42 U.S.C. § 12112(a) (covering only qualified individuals). A qualified individual under the ADA is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 101(8).

10. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (establishing burden-shifting evidentiary framework, including qualification element, for disparate treatment cases); *infra* notes 29-32 and accompanying text (explaining *McDonnell Douglas* three-phase framework); 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, 202 n.23 (1996) (summarizing development of framework in subsequent Supreme Court cases).

11. *See, e.g.*, McNemar v. Disney Store, Inc., 91 F.3d 610, 617-18 (3d Cir. 1996) (allowing Disney Store's use of disability benefits application statements made after challenged employment action); McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 562-63 (5th Cir. 1998) (explaining SSA disability statement creates presumption McConathy not qualified). Rooted in a desire to preserve the integrity of the justice system, judicial estoppel precludes an employee from taking contradictory positions in separate legal proceedings, such as in a disability-benefits proceeding and then in a discrimination lawsuit. *See Estoppel*, BLACK'S LAW DICTIONARY (11th ed. 2019) (stating judicial estoppel doctrine prevents conflicting assertions); Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 121-22 (3d Cir. 1992) (explaining judicial estoppel protects courts, not litigants). The Equal Employment Opportunity Commission (EEOC) responded to this trend in 1997 by issuing specific enforcement guidance, and the Supreme Court has addressed the proper scope of the doctrine in ADA claims. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC NO. 915.002, EEOC ENFORCEMENT GUIDANCE ON THE EFFECT OF REPRESENTATIONS MADE IN APPLICATIONS FOR BENEFITS ON THE DETERMINATION OF WHETHER A PERSON IS A "QUALIFIED INDIVIDUAL WITH A DISABILITY" UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990 (ADA) (1997) (publishing agency position stating representations for disability benefits not per se bar to discrimination claims); Cleveland v. Pol'y Mgmt. Sys. Corp., 526 U.S. 795, 797-98 (1999) (recognizing contradictory statements not fatally inconsistent in different contexts).

12. *See* Anthony v. TRAX Int'l Corp., 955 F.3d 1123, 1128-31 (9th Cir. 2020) (explaining Anthony's failure to establish prima facie qualification); Anaeme v. Diagnostek, Inc., 164 F.3d 1275, 1281 (10th Cir. 1999) (allowing after-acquired evidence to rebut prima facie qualification claim). This distinction amounts to a quasi-standing argument and will be referenced throughout this Note as the qualification–standing argument or defense. *See* Gilty v. Vill. of Oak Park, 919 F.2d 1247, 1251 (7th Cir. 1990) (referring to "quasi-standing" element of qualification). The Ninth Circuit held that Anthony was not a qualified individual under the ADA because she lacked the required bachelor's degree. *See* Americans with Disabilities Act of 1990 § 102(a) (prohibiting discrimination only against qualified individuals); *Anthony*, 955 F.3d at 1128 (explaining qualified means plaintiff possesses required skills, experience, and education). No definitive study has examined the prevalence of résumé or application falsification, but various surveys indicate that the frequency is substantial. *See* Melissa Hart, *Retaliatory Litigation Tactics: The Chilling Effects of "After-Acquired Evidence,"* 40 ARIZ. ST. L.J. 401, 426, 426 n.128 (2008) (collecting survey results and estimating 25%–50% of résumés contain varying degrees of misstatements).

decision.[13] The Ninth Circuit recently demonstrated that these two *McKennon* exception theories are alive and well, merging them in its reasoning in *Anthony v. TRAX International Corp.*[14] In response to Anthony's ADA claim, the Ninth Circuit allowed TRAX's qualification–standing defense using after-acquired evidence of Anthony's application fraud.[15] The *Anthony* court buttressed its reasoning with judicial estoppel cases from the Third and Fifth Circuits.[16] The Ninth Circuit panel declined to apply *McKennon*, stating that while the Supreme Court barred using after-acquired evidence to establish a supervening justification for a wrongful employment action, such evidence may still be used to show that McKennon could not establish the qualification element for a prima facie case of discrimination.[17]

The Ninth Circuit's reasoning erroneously equated the otherwise distinct theories of judicial estoppel and qualification–standing while also ignoring the broad policy objectives of the ADA that the *McKennon* Court highlighted.[18] This Note begins by exploring the relevance of an employee's qualifications to Title VII, ADEA, Rehabilitation Act, and ADA claims; as well as how the EEOC has interpreted the ADA qualification requirement.[19] Next, it explains the history of the after-acquired evidence doctrine and discusses how courts continue to allow after-acquired evidence to defeat employment discrimination claims, notwithstanding the *McKennon* Court's holding.[20] Based on those assessments, this Note argues that the Ninth Circuit's qualification–standing exception allowing after-acquired evidence to foreclose employer liability contravenes the intent of the ADA and the legal reasoning of *McKennon*.[21] Given the uniformity of purpose across the various federal antidiscrimination statutes, this Note concludes that the qualification–standing exception is equally inapplicable to other

13. *See* Barbara Ryniker Evans & Robert E. McKnight, Jr., *Splitting the Baby on After-Acquired Evidence in Employment Discrimination Cases*, 19 AM. J. TRIAL ADVOC. 241, 248-57 (1995) (detailing cases comprising circuit split leading up to *McKennon*); *infra* Section II.B.3 (summarizing continued use of after-acquired evidence following *McKennon*).

14. *See Anthony*, 955 F.3d at 1132-33 (applying judicial estoppel cases in qualification–standing analysis).

15. *See id.* at 1134 (declining to extend *McKennon* to after-acquired evidence in qualification analysis). During litigation of the ADA claim, TRAX discovered that Anthony did not have the required bachelor's degree despite her contrary representation in her employment application. *See id.* at 1126-27 (describing nature of after-acquired evidence at issue).

16. *See id.* at 1132-33 (ignoring analogous application-fraud cases and citing judicial estoppel reasoning of *McNemar* and *McConathy*).

17. *See id.* at 1130 (qualifying *McKennon* to apply only to employer's motive for discharge).

18. *See infra* Part III (analyzing theoretical bases of judicial estoppel and qualification–standing requirements against *McKennon*).

19. *See infra* Section II.A (documenting use of qualifications and interpretation of its relevance under various antidiscrimination statutes).

20. *See infra* Section II.B (explaining circuit split preceding *McKennon* and subsequent use of after-acquired evidence).

21. *See infra* Part III (assessing current case law in light of history and intent of ADA and *McKennon*).

antidiscrimination claims beyond the ADA, but plaintiffs and the EEOC must focus their arguments on traditional elements of statutory interpretation to prevail.[22]

II. HISTORY

A. Employee Qualification as a Requirement in Antidiscrimination Claims

1. The Civil Rights Act of 1964 and the Age Discrimination in Employment Act

Congress's uniform intent in enacting Title VII, the ADA, and the ADEA was, quite simply, to eradicate discrimination in the workplace.[23] To the extent that judicial opinions undermined this sweeping mandate, Congress has taken steps to course correct and reaffirm its original intent.[24] The House Committee on Education and Labor, for example, explained its recommendation to adopt the Civil Rights Act of 1991 by citing the following statement with approval:

> [I]t is important to remember the dual purpose of private enforcement of Title VII. On the one hand, the object is to make whole the individual victims of unlawful discrimination . . . . But this is only part of it. The individual Title VII litigant acts as a "private attorney general" to vindicate the precious rights secured by that statute. It is in the interest of American society as a whole to assure that equality of opportunity in the work place is not polluted by unlawful discrimination. Even the smallest victory advances that interest.[25]

Despite this broad, common objective, the text of the various federal civil rights statutes differs, and neither Title VII nor the ADEA contain the ADA's explicit individual qualification requirement.[26] The concept of qualification developed from the Court's earliest interpretations of Title VII and arose from overt

---

22. *See infra* Section III.A (equating ADA qualified-individual requirement with *McDonnell Douglas* qualification element); *infra* Part IV (recommending statutory interpretation over EEOC deference argument).

23. *See* Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2 (prohibiting employment discrimination because of race, color, religion, sex, or national origin); Americans with Disabilities Act of 1990 § 102(b)(1), 42 U.S.C. § 12101(b) (stating ADA provides "clear and comprehensive national mandate" to eliminate disability discrimination); Age Discrimination in Employment Act of 1967 § 2(b), 29 U.S.C. § 621(b) (codifying ADEA's purpose "to prohibit arbitrary age discrimination in employment").

24. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3554 (codified as amended in scattered sections of 42 U.S.C.) (rejecting numerous Supreme Court opinions and directing litigation focus to employer compliance with ADA obligations); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.) (abrogating Supreme Court interpretations weakening "scope and effectiveness of Federal civil rights protections"); Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (codified as amended in scattered sections of 29 U.S.C.) (amending ADEA to correct judicial misinterpretation and proscribe age discrimination in employment benefits).

25. *See* H.R. REP. NO. 101-644, pt. 1, at 30 (1990) (quoting statement of attorney Jane Lang).

26. *See* Civil Rights Act of 1964 § 703(a) (prohibiting discrimination against any individual because of race, color, religion, sex, or national origin); Age Discrimination in Employment Act of 1967 § 4(a) (proscribing discrimination against any individual because of age).

concerns that antidiscrimination statutes would erode employer discretion to hire only qualified individuals.[27] The Court stated that antidiscrimination laws ensured qualifications would be the controlling factor in employment determinations and not impermissible characteristics such as race, age, or sex.[28]

The Court soon developed an evidentiary-burden-shifting framework for Title VII claims, requiring that an employee's prima facie showing include, among other things, qualification for the disputed job opening.[29] Now generally referred to as the *McDonnell Douglas* evidentiary framework, it permits an inference of discrimination when a plaintiff from a protected class shows that they applied to, were qualified for, and were rejected from an open position that otherwise remained open to additional applicants.[30] The Court later explained that the prima facie case serves to eliminate other common, nondiscriminatory reasons for the

27. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (interpreting Title VII to require employment opportunity for "persons of like qualifications"); Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971) (noting Title VII does not guarantee employment regardless of qualification). Congress debated this concern extensively after opponents argued that Title VII would subordinate employer discretion to hire based on ability and qualifications in favor of "race quotas." *See* John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 FORDHAM L. REV. 423, 471-74 (2002) (discussing whether Title VII embodies antidifferentiation or antisubordination mandate). Without incorporating an explicit qualification requirement, members of both the Senate and House reached a bipartisan compromise to statutorily affirm employer discretion by upholding use of ability tests and by codifying that Title VII did not require preferential hiring to achieve a workforce balance matching societal demographics. *See* Civil Rights Act of 1964 § 703(h) (affirming continued legality of merit-based hiring practices); *id.* § 703(j) (foreclosing any interpretation requiring preferential hiring); *see also* Hasnas, *supra*, at 474 (explaining debate and compromise history).

28. *See Griggs*, 401 U.S. at 436 (confirming employers may hire most qualified applicant). Although *Griggs* was an early disparate-impact case, the Court relied upon its discussion of qualifications in later disparate-treatment cases. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (quoting *Griggs* Court's qualification language).

29. *See McDonnell Douglas Corp.*, 411 U.S. at 802 (establishing evidentiary framework). The *McDonnell Douglas* test sets up an indirect method of determining the employer's motivation by eliminating other possible legitimate motives for the adverse action. *See* Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *Is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887, 1897, 1897 n.46 (2004) (comparing direct and indirect methods of proof).

30. *See McDonnell Douglas*, 411 U.S. at 802 (establishing prima facie elements of discrimination claim including qualification). Proving these elements gives rise to an inference of unlawful discrimination, a presumption that the defendant can rebut by proffering a legitimate, nondiscriminatory reason for the adverse employment action. *See* Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 254 (1981) (clarifying allocation of burdens). If proffered, the plaintiff must prove that the employer's reason is pretextual and that the real reason is discriminatory animus. *See id.* at 256 (establishing plaintiff has burden of persuasion); *see also* Zemelman, *supra* note 4, at 178 (explaining *Burdine* clarified *McDonnell Douglas* to establish current burden-shifting evidentiary framework); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2245-49 (1995) (tracing development of *McDonnell Douglas* and *Burdine*, including interesting internal discussions from Marshall Papers). The various federal circuits treat the qualification element of the *McDonnell Douglas* prima facie case slightly differently: Seven circuits use the word qualified, three require the employee to show performance meeting the employer's legitimate expectations, and one circuit requires a showing that the employee was performing satisfactorily. *See* Michael J. Hayes, *That Pernicious Pop-Up, the Prima Facie Case*, 39 SUFFOLK U. L. REV. 343, 362-63 (2006) (summarizing various approaches not including First Circuit); Oliver v. Digit. Equip. Corp., 846 F.2d 103, 108 (1st Cir. 1988) (referencing qualification requirement).

alleged adverse action.[31] Once the employer has proffered a legitimate, nondiscriminatory reason at the framework's second stage, however, the prima facie elements themselves are no longer relevant, and a court's focus shifts to deciding the ultimate issue of intentional discrimination.[32] With respect to the ADEA, the Supreme Court has never ruled on whether the *McDonnell Douglas* evidentiary framework is appropriate, but numerous federal district and appellate courts apply *McDonnell Douglas* and its attendant qualification requirement to ADEA claims.[33]

2. The Rehabilitation Act of 1973

Title VII did not include disability as a protected class, but Congress enacted disability antidiscrimination legislation with the Rehabilitation Act of 1973 (Rehabilitation Act).[34] The Rehabilitation Act applies only to disability discrimination by federal agencies, federal contractors, and recipients of federal financial

---

31. *See Burdine*, 450 U.S. at 253-54 (explaining elimination of other reasons permits inference of discrimination); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977) (requiring elimination of two common legitimate reasons: lack of qualifications and absence of job vacancy); *see also* Hayes, *supra* note 30, at 376 (clarifying possible reasons for adverse action *disproved* by employee, not *proved* by employer).

32. *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (focusing courts on issue of discrimination over technical application of *McDonnell Douglas*). *But see* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148-49 (2000) (holding relative strength or weakness of evidence supporting prima facie elements considered on summary judgment); Hayes, *supra* note 30, at 345 (arguing *Reeves* did not overturn *Aikens*).

33. *See, e.g.*, Diaz v. Eagle Produce, Ltd., 521 F.3d 1201, 1207-08 (9th Cir. 2008) (utilizing *McDonnell Douglas* burden-shifting framework with evidence of satisfactory job performance supporting qualification element); Cicero v. Borg-Warner Auto., Inc., 280 F.3d 579, 585 (6th Cir. 2002) (evaluating ADEA claim using *McDonnell Douglas* framework); Kentroti v. Frontier Airlines, Inc., 585 F.2d 967, 969 (10th Cir. 1978) (applying *McDonnell Douglas* to age discrimination claim). Although the Supreme Court has assumed that *McDonnell Douglas* may apply to ADEA claims, it has never definitively ruled on that issue. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 n.2 (2009) (acknowledging Court has not decided whether *McDonnell Douglas* appropriate in ADEA context); O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311 (1996) (assuming applicability without deciding).

34. *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.); Paul Steven Miller, *Disability Civil Rights and a New Paradigm for the Twenty-First Century: The Expansion of Civil Rights Beyond Race, Gender, and Age*, 1 U. PA. J. LAB. & EMP. L. 511, 513 (1998) (describing timeline of antidiscrimination legislation). As a class, persons living with disabilities comprise the largest minority group in the United States today. *See* OFF. OF DISABILITY EMP. POL'Y, U.S. DEP'T OF LAB., DIVERSE PERSPECTIVES: PEOPLE WITH DISABILITIES FULFILLING YOUR BUSINESS GOALS, https://www.dol.gov/agencies/odep/publications/fact-sheets/diverse-perspectives-people-with-disabilities-fulfilling-your-business-goals [https://perma.cc/55NS-83ZC] (noting over fifty million Americans with disabilities comprise largest minority group). Prior to the Rehabilitation Act's passage, Congress attempted to amend Title VII to include a disability classification, but the proposal never made it out of committee. *See* 118 CONG. REC. 9712 (1972) (proposing House committee consider adding physical or mental handicap employment protections to Title VII); 118 CONG. REC. 525-26 (1972) (including comparable Senate proposal). The proposed language would have incorporated disability into the existing Title VII framework. *See* 118 CONG. REC. 526 (1972) (aligning to model for race and sex discrimination). The 1972 proposed language did not include the concept of reasonable accommodation. *See id.* (requiring only equal treatment under Title VII).

assistance.[35] Unlike Title VII or the ADEA, protection under the Rehabilitation Act is limited to a *qualified* individual with a disability.[36] In 1978, the Department of Health, Education, and Welfare promulgated regulations defining a qualified handicapped person as someone "who, with reasonable accommodation, can perform the essential functions of the job in question."[37] In *Southeastern Community College v. Davis*,[38] the Supreme Court looked to this definition to support its interpretation that a qualified individual must meet all program requirements notwithstanding a disability.[39] Under the Rehabilitation Act, even where a qualified individual with a disability cannot perform the job's essential functions, the employer must determine whether reasonable accommodations are available to enable that individual to perform those functions.[40] As with Title VII and the ADEA, courts also apply the *McDonnell Douglas* burden-shifting framework to employment discrimination cases brought under the Rehabilitation Act.[41]

3. The Americans with Disabilities Act of 1990

Congress included the Rehabilitation Act's qualification requirement in the ADA to affirm employers' discretionary autonomy to execute hiring decisions based on permissible qualifications, although such language does not similarly appear in Title VII or the ADEA.[42] Congress also tasked the EEOC with enacting

35. *See* Rehabilitation Act of 1973 § 501(b), 29 U.S.C. § 791(b) (instructing federal agencies develop affirmative action plans for hiring individuals with disabilities); *id.* § 503(a) (requiring federal contractors employ qualified individuals with disabilities); *id.* § 504(a) (prohibiting discrimination against individuals with disabilities by federally funded programs).

36. *See* Robert L. Burgdorf Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 420 (1997) (noting significant differences). *Compare supra* note 26 (defining protected populations under Title VII and ADEA), *with* Rehabilitation Act of 1973 § 503(a) (adding qualification requirement for purposes of Rehabilitation Act). Professor Burgdorf, one of the ADA's original drafters, criticized use of the term "qualified," as has the U.S. Civil Rights Commission and the National Council on Disability. *See* Burgdorf, *supra*, at 409, 422 (stating "qualified" unnecessary term and distorts statute's intent).

37. *See* 45 C.F.R. § 84.3(l)(1) (2021) (defining covered handicapped individual with respect to employment).

38. 442 U.S. 397 (1979).

39. *See id.* at 406-07 (assessing college rejection of nursing applicant with hearing impairment).

40. *See* Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 287 n.17 (1987) (qualifying *Davis* to include reasonable accommodation assessment).

41. *See, e.g.*, Ríos-Jiménez v. Sec'y of Veterans Affs., 520 F.3d 31, 40 (1st Cir. 2008) (evaluating Rehabilitation Act claim using *McDonnell Douglas*); Wishkin v. Potter, 476 F.3d 180, 185 (3d Cir. 2007) (applying *McDonnell Douglas* to Rehabilitation Act claim); Reynolds v. Brock, 815 F.2d 571, 574 (9th Cir. 1987) (requiring *McDonnell Douglas* prima facie elements in wrongful termination suit brought under Rehabilitation Act).

42. *See* Americans with Disabilities Act of 1990 § 101(8), 42 U.S.C. § 12111(8) (including definition of "qualified individual with a disability"); S. REP. NO. 101-116, at 26 (1989) (equating statutory definitions and affirming employer discretion to hire most qualified applicant). The ADA expressly requires consistent interpretations of similar requirements under the ADA and the Rehabilitation Act. *See* Americans with Disabilities Act of 1990 § 107(b) (mandating avoidance of conflicting or inconsistent standards); *see also* Tyndall v. Nat'l Educ. Ctrs., Inc., 31 F.3d 209, 213 n.1 (4th Cir. 1994) (relying on Rehabilitation Act case law to determine ADA qualification). While both the House and the Senate passed the ADA with overwhelming bipartisan support, the

regulations to interpret and enforce the ADA.[43] While the ADA defines a qualified individual as someone who can perform the essential functions of the employment position, the EEOC promulgated further guidance establishing a two-part qualification test.[44] First, qualified individuals must possess the necessary skills, experience, education, and other job requirements.[45] Second, they must be able to perform the essential functions of the position with or without accommodation.[46] While the ADA has always included a qualification requirement, Congress adjusted other aspects of the ADA with the ADA Amendments Act of 2008 (ADAAA).[47] Congress intended to shift litigation away from a plaintiff's eligibility and refocus courts on whether the alleged discrimination occurred.[48]

Since 2010, the primary allegations in EEOC charges under the ADA have involved post-hire issues: wrongful discharge, failure to provide reasonable accommodation, harassment, and differential treatment in the terms and conditions of employment.[49] In 2019, disability discrimination accounted for over 33% of

Act also generated significant debate, with the House Committee on Education and Labor alone conducting five separate hearings. *See* JONATHAN R. MOOK, AMERICANS WITH DISABILITIES ACT: EMPLOYEE RIGHTS AND EMPLOYER OBLIGATIONS § 1.04[3] (Matthew Bender ed., 2020) (recounting history leading to ADA passage). Congressional concerns primarily revolved around the lack of clear employer guidance and a fear of debilitating costs to implement accommodations. *See id.* § 1.04[4] (quoting business groups' testimony in congressional hearings); S. REP. NO. 101-116, at 26-27 (clarifying employer has no obligation to prefer applicants with disabilities). Professor Paul Steven Miller, former EEOC Commissioner, explained that while Title VII is built on the idea of *equal treatment* resulting in equal opportunity, this objective does not seamlessly translate to disability law where reasonable accommodation, i.e., purposeful *unequal treatment*, is often necessary to achieve equal opportunity. *See* Miller, *supra* note 34, at 512, 514 (stating Title VII concerned with level playing field and ADA with accessible playing field); *see also* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 40 (2000) (explaining ADA paradoxically relies on differential treatment to achieve equality); Burgdorf, *supra* note 36, at 524-25 (noting identical treatment itself discriminatory in context of ADA). *But see* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 16-17 (2006) (theorizing ADA merely requires accommodations already routinely made for nondisabled workers).

43. *See* Americans with Disabilities Act of 1990 § 106 (requiring EEOC to issue further regulations within one year of ADA passage).

44. *Compare id.* § 101(8) (defining qualified individual), *with* 29 C.F.R. § 1630.2(m) (2021) (laying out two-part test).

45. *See* 29 C.F.R. § 1630.2(m) (adding background requirements not found in ADA statutory definition).

46. *See id.* (defining "qualified" in two conjunctive parts).

47. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, §§ 4(a), 5(a), 122 Stat. 3553, 3555, 3557 (2008) (replacing "because of" disability with "on the basis of" and requiring construction promoting "broad coverage").

48. *See* 154 CONG. REC. 22,232 (2008) (explaining amendment's purpose); *see also* 154 CONG. REC. 18,517 (2008) (opining court cases inappropriately focus on plaintiffs' disabilities rather than merits of discrimination claims); Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 188 (2010) (recognizing ADAAA intended to reverse judicial constriction of ADA scope).

49. *See Statutes by Issue (Charges Filed with EEOC) FY 2010–FY 2019*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/statutes-issue-charges-filed-eeoc-fy-2010-fy-2019 [https://perma.cc/Q2JB-HJWX] (summarizing 2010–2019 charges by issue).

the workplace discrimination charges the EEOC received, which is the second-highest charge type behind retaliation claims.[50]

B. After-Acquired Evidence

1. Development of a Circuit Split

In the late 1980s and early 1990s, courts inconsistently permitted employer use of after-acquired evidence in employment discrimination claims.[51] First, in *Mantolete v. Bolger*,[52] the Ninth Circuit allowed the U.S. Postal Service to rebut the qualification element of Mantolete's prima facie case using information only obtained in discovery, but it prohibited use of that information as a post hoc non-discriminatory reason for the adverse action.[53] Courts illustrated this distinction by invoking a hypothetical "nondoctor doctor" and reasoning it would be absurd to allow such a fraudster to recover from the defrauded employer.[54] Other courts developed a second category of rationale that eschewed the Ninth Circuit's distinction between permissible qualification–standing use and impermissible post hoc termination justification.[55] For example, in *Summers v. State Farm Mutual Automobile Insurance Co.*, the Tenth Circuit barred all recovery in light of after-

50. *See* Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Releases Fiscal Year 2019 Enforcement and Litigation Data (Jan. 24, 2020), www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2019-enforcement-and-litigation-data [https://perma.cc/7XJL-94FF] (announcing annual results showing 53.8% of charges attributed to retaliation and 33.4% to disability discrimination).

51. *See infra* notes 53-57, 59-60 and accompanying text (explaining different outcomes and justifications).

52. 767 F.2d 1416 (9th Cir. 1985).

53. *See id.* at 1417-18 (assessing handicap discrimination claim brought under Rehabilitation Act); *see also* Zemelman, *supra* note 4, at 178-79 (distinguishing legitimate and nonlegitimate uses established in *Mantolete*). The U.S. Postal Service denied employment to Mantolete, who lived with epilepsy. *See Mantolete*, 767 F.2d at 1418 (explaining employment application shelved after pre-employment physical). Prior to trial, she moved to exclude evidence of her work and medical histories unknown to the Postal Service at the time of the adverse employment decision. *See id.* at 1420. The trial court denied the motion and allowed use of the evidence only to rebut the qualification element of Mantolete's prima facie case. *See id.* (noting after-acquired evidence allowed for limited purpose); *cf.* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1187-89 (11th Cir. 1992) (Godbold, J., dissenting) (reasoning claim permissibly denied due to lack of qualification–standing), *vacated en banc*, 32 F.3d 1489 (11th Cir. 1994). *But see* EEOC v. Farmer Bros. Co., 31 F.3d 891, 901 (9th Cir. 1994) (stating in dicta "inequitable" to allow after-acquired evidence of misrepresentations to preclude otherwise valid claim). *Farmer Bros. Co.* involved a Title VII claim, but the court's reasoning relied generally on "common sense and a reasonably developed sense of equity." *See* 31 F.3d at 902.

54. *See* Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988) (introducing hypothetical discriminatorily discharged—but fraudulent—doctor), *abrogated by* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995). The Tenth Circuit stated the nondoctor should not recover regardless of when the employer discovered the charade. *See id.* (refusing to exclude such evidence); *see also* Oral Argument at 5:30, 8:03, *McKennon*, 513 U.S. 352 (No. 93-1543), https://www.oyez.org/cases/1994/93-1543 [https://perma.cc/Z8RK-T38R] (referencing both nondoctor doctor and nonlawyer lawyer hypotheticals).

55. *See Summers*, 864 F.2d at 708 (holding evidence of employee wrongdoing negated claim of injury). *See generally* Christine Neylon O'Brien, *Employment Discrimination Claims Remain Valid Despite After-Acquired Evidence of Employee Wrongdoing*, 23 PEPP. L. REV. 65 (1995) (surveying full body of federal after-acquired evidence case law and differing approaches preceding *McKennon*).

acquired evidence of Summers's on-the-job misconduct.[56] The court determined that Summers suffered no injury because he would have been terminated from the position had State Farm known of his misconduct.[57] Various courts subsequently extended the *Summers* court's "would-have-fired" rationale to also preclude recovery for prehire résumé fraud in "would-not-have-hired" scenarios, reasoning that plaintiffs similarly suffer no injury when the entire employment relationship should never have existed.[58]

A third category of reasoning developed when the Third Circuit rebuffed both *Mantolete* and *Summers* in *Mardell v. Harleysville Life Insurance Co.*[59] Mardell alleged gender discrimination under Title VII and age discrimination under the ADEA.[60] During discovery, Harleysville learned that Mardell had misrepresented her education and employment history before her hiring.[61] While Harleysville's argument for summary judgment took a *Mantolete* position that Mardell lacked standing due to her absence of qualifications, the district court adopted the *Summers* rationale, stating that Mardell suffered no redressable injury.[62] On appeal, the Third Circuit vacated the lower court's ruling and rejected Harleysville's qualification–standing argument for two reasons.[63] First, the court reasoned that the qualification element of the *McDonnell Douglas* prima facie case is relevant only insofar as it contributes to a permissible inference of

56. *See Summers*, 864 F.2d at 708 (accepting after-acquired evidence cannot cause discharge but can apply to injury claimed); *cf.* Milligan-Jensen v. Mich. Tech. Univ., 975 F.2d. 302, 305 (6th Cir. 1992) (holding discrimination "irrelevant" in light of application falsification); Dotson v. U.S. Postal Serv., 977 F.2d 976, 978 (6th Cir. 1992) (per curiam) (granting Postal Service's motion for summary judgment based on Dotson's application omissions). The *Summers* court relied upon *Mantolete* and a second Ninth Circuit case, both dealing with a plaintiff's relative lack of qualifications, to support the conclusion that on-the-job misconduct was similarly disqualifying. *See Summers*, 864 F.2d at 707-08 (explaining relevant precedent).

57. *See Summers*, 864 F.2d at 708 (reasoning lack of right to job relevant, not just discrimination finding). Other courts have applied similar reasoning. *See* Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403, 1405 (8th Cir. 1994) (adopting *Summers* rationale in case involving application misrepresentation), *abrogated by McKennon*, 513 U.S. 352; Washington v. Lake Cnty., 969 F.2d 250, 256 (7th Cir. 1992) (adapting *Summers* to application-fraud case and barring recovery where fraud provided independent termination reason), *abrogated by McKennon*, 513 U.S. 352. The Eleventh Circuit later observed that the *Summers* rationale led at least one jurisdiction to hold that sexual harassment victims also suffered no injury after lying on an employment application. *See Wallace*, 968 F.2d at 1178 n.7 (identifying two cases from District of Kansas).

58. *See infra* note 92 (listing cases adopting "would-not-have-hired" reasoning); *see also* Hart, *supra* note 12, at 424 (distinguishing "would-have-fired" and "would-not-have-hired" rationales).

59. *See* 31 F.3d 1221, 1230-31 (3d Cir. 1994) (rejecting *Summers* de facto nonliability and *Mantolete* de jure nonliability*)*, *vacated*, 514 U.S. 1034 (1995), *aff'd* 65 F.3d 1072 (1995) (per curiam).

60. *See id.* at 1222.

61. *See id.* at 1223-24 (explaining lack of college degree and other employment discrepancies). Harleysville moved for summary judgment based largely on multiple affidavits in which management personnel averred that they would not have hired Mardell had they known of her misrepresentations. *See id.* at 1224 (recounting procedural history).

62. *See id.* (summarizing district court reasoning).

63. *See Mardell*, 31 F.3d at 1230-31, 1240 (denying qualification–standing defense and reserving all consideration of after-acquired evidence for remedy stage).

unlawful discrimination.[64] The inference of animus relies on the employer's subjective knowledge of the employee's qualifications, not the employee's objective and unknown qualifications.[65] Second, the court reasoned that a qualification–standing limitation would contravene the plain language of both Title VII and the ADEA, which cover any individual within a protected class.[66] The Third Circuit also rejected the lower court's reliance on *Summers*, holding instead that after-acquired evidence—whether it involves on-the-job misconduct or application fraud—is irrelevant to determining liability but may otherwise be used to limit remedies.[67]

In addition to the various approaches to after-acquired evidence relating to a plaintiff's qualification–standing or a defendant's post hoc termination reason, courts have permitted such evidence to judicially estop a plaintiff from asserting contradictory claims in a discrimination suit.[68] This scenario arose when a plaintiff represented total disability in one forum to obtain disability benefits and partial disability in a discrimination claim to satisfy the qualification requirement.[69] In that scenario, courts would dismiss the discrimination claim because allowing

64. *See id.* at 1230 (stressing *McDonnell Douglas* concerned with establishing employer's motive, not employee's objective qualifications); *supra* notes 29-32 and accompanying text (explaining *McDonnell Douglas* burden-shifting framework).

65. *See* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1230 (3d Cir. 1994) (emphasizing relevance of only *known* qualifications), *vacated*, 514 U.S. 1034 (1995), *aff'd* 65 F.3d 1072 (1995) (per curiam). The *Mardell* court rejected Harleysville's standing argument as irrelevant to the ultimate question of the employer's discriminatory intent. *See id.* at 1230-31 (focusing on employer's subjective assessment of qualifications and not employee's objective skills). The court also theorized that the qualification–standing defense should be wholly inapplicable in cases involving direct evidence of discrimination. *See id.* at 1230 n.15 (distinguishing *McDonnell Douglas* framework from claims involving direct evidence).

66. *See id.* at 1231 (noting statutory definitions do not provide exceptions for misconduct, fraud, or other disqualification); *see also supra* note 26 (defining scope of statutory protection including *any* individual). Conversely, the ADA explicitly confers standing only to qualified individuals. *See* Americans with Disabilities Act of 1990 § 102(a), 42 U.S.C. § 12112(a) (prohibiting discrimination against qualified individuals based on disability). *But see supra* Section II.A (discussing qualification requirement not solely statutorily necessitated but also judicially required prima facie element).

67. *See Mardell*, 31 F.3d at 1238-40 (recognizing important interest of employer autonomy to execute legitimate business decisions). The *Mardell* court acknowledged that ordering reinstatement of any employee found to have committed terminable fraud or misconduct would be inappropriate. *See id.* at 1240 (explaining reinstatement may infringe on employer's management prerogatives).

68. *See* Wendy Wilkinson, *Judicially Crafted Barriers to Bringing Suit Under the Americans with Disabilities Act*, 38 S. TEX. L. REV. 907, 916 n.31 (1997) (cataloging cases in various jurisdictions); *supra* note 11 and accompanying text (defining judicial estoppel). Historically, federal cases rarely referenced judicial estoppel, but use of the doctrine as a defense to ADA discrimination claims increased. *See* Lawrence B. Solum, *Caution! Estoppel Ahead:* Cleveland v. Policy Management Systems Corporation, 32 LOY. L.A. L. REV. 461, 468, 473 (1999) (noting paucity of historical case references but increasing frequency in defense of ADA claims).

69. *See* Reigel v. Kaiser Found. Health Plan, 859 F. Supp. 963, 970-71 (E.D.N.C. 1994) (citing employee's subsequent inconsistent assertion of ability to work to bar her requests); *see also* Wilkinson, *supra* note 68, at 918 (recognizing *Reigel* rationale involved judicial estoppel); *cf.* Brown v. Nat'l R.R. Passenger Corp., No. 86-CV-10284, 1990 U.S. Dist. LEXIS 10535, at *6, *11-12 (N.D. Ill. Aug. 10, 1990) (invoking judicial estoppel to dismiss claim based on contradictory statements only learned in discovery).

contradictory claims of qualification would undermine the integrity of the judicial process and provide the plaintiff with an unjust advantage.[70]

2. The Supreme Court Resolves Part of the Split

The Supreme Court resolved the after-acquired evidence circuit split, at least in part, in *McKennon v. Nashville Banner Publishing Co.*[71] Christine McKennon alleged age-based wrongful termination.[72] The Nashville Banner learned during discovery that McKennon had copied and removed confidential company files throughout her final year of employment.[73] Although the Nashville Banner conceded for the purpose of summary judgment that it had terminated McKennon in violation of the ADEA, the district court granted summary judgment for the Nashville Banner because McKennon's misconduct represented a separate ground for termination foreclosing any remedy, and the Sixth Circuit affirmed.[74]

The Supreme Court reversed.[75] Without discussing any explicit distinction between the various types of evidence previously confronted in the lower courts—for example, application fraud versus on-the-job misconduct—the Court

---

70. *See Brown*, 1990 U.S. Dist. LEXIS 10535, at *12 (explaining purpose of judicial estoppel doctrine); Swahn Grp., Inc. v. Segal, 108 Cal. Rptr. 3d 651, 659-60 (Ct. App. 2010) (clarifying judicial estoppel concerns judicial proceedings while equitable estoppel concerns relationship of parties). Despite the doctrine's familiarity, it is controversial and not clearly defined. *See* Solum, *supra* note 68, at 468 (documenting inconsistent interpretations and varying degrees of acceptance). Rejecting judicial estoppel, Judge Learned Hand stated:

> Judgment by estoppel is not designed as a moral sanction against inconsistency: [I]t does not visit penalties upon those who take one position today and deny it tomorrow; it is designed only to prevent a party who has, or has not, prevailed upon an issue in an earlier action to vex the same antagonist with the same dispute in a later one.

Bertha Bldg. Corp. v. Nat'l Theatres Corp., 248 F.2d 833, 837 (2d Cir. 1957) (Hand, J., dissenting).

71. *See* 513 U.S. 352, 356 (1995) (addressing whether wrongful conduct discovered after termination can preclude all relief).

72. *See id.* at 354 (describing basis of McKennon's claim). McKennon worked for the Nashville Banner for thirty years and alleged that her termination violated the ADEA. *See id.* (explaining alleged age-based discrimination).

73. *See id.* at 355 (recounting after-acquired evidence of on-the-job misconduct). McKennon stated that she copied the files as "insurance" against her feared age-based termination. *See id.* Two days after her deposition, the Nashville Banner sent McKennon a termination letter documenting that she had copied the files, although she had been terminated nine months earlier. *See* O'Brien, *supra* note 55, at 67, 67 n.11 (reviewing facts and theorizing purpose of letter to minimize duration of any possible backpay award). McKennon averred that the ten copied pages showed the Nashville Banner's actual financial position and undermined management's threats to eliminate her position due to financial difficulties. *See* Brief for Petitioner, *McKennon*, 513 U.S. 352 (No. 93-1543), 1994 WL 385636, at *4 (describing nature of confidential files at issue). The Nashville Banner asserted that this explanation was a sham post hoc rationalization. *See* Brief for Respondent, *McKennon*, 513 U.S. 352 (No. 93-1543), 1994 WL 488297, at *15 n.25 (responding to McKennon's characterization of events).

74. *See McKennon*, 513 U.S. at 355. The Sixth Circuit held that *Summers* and its categorical prohibition against liability should apply equally to on-the-job misconduct and application fraud based on their factual similarity. *See* McKennon v. Nashville Banner Publ'g Co., 9 F.3d 539, 542 (6th Cir. 1993) (reiterating after-acquired evidence complete bar to recovery), *rev'd*, 513 U.S. 352 (1995).

75. *See McKennon*, 513 U.S. at 356 (holding discovery of supervening termination reason does not bar employee from all relief under ADEA).

held that after-acquired evidence may not be leveraged as a supervening termination reason to foreclose liability, although it may be used to appropriately limit remedies.[76] The Court unanimously rejected the premise that an employee's wrongful conduct would render an employer's discrimination irrelevant.[77] The Court focused on the congressional intent to eliminate workplace discrimination and situated the ADEA within Congress's broad statutory scheme to achieve that objective.[78] Recognizing the ADEA's dual purpose to both redress individual harms and generally deter discrimination, the Court concluded that foreclosing all liability based solely on after-acquired evidence of employee wrongdoing would run counter to those objectives.[79]

---

76. *See id.* at 361-62 (barring only front pay and reinstatement). Immediately following the *McKennon* opinion, the question arose as to whether it would apply with full force to other factual scenarios. *See* Christine Neylon O'Brien, *The Impact of After-Acquired Evidence in Employment Discrimination Cases After* McKennon v. Nashville Banner Publishing Company, 29 CREIGHTON L. REV. 675, 685 (1996) (questioning whether *McKennon* holding applies to application or résumé fraud). *But see* Evans & McKnight, *supra* note 13, at 260 (stating *McKennon* rejected "exactly" such argument). The *McKennon* Court identified ten cases as comprising the circuit split to be addressed on appeal, eight of which involved qualification misrepresentations and only two of which related to misconduct like McKennon's. *See McKennon*, 513 U.S. at 356 (listing cases presenting conflicting views for resolution on appeal). *Compare McKennon*, 9 F.3d at 541 (involving on-the-job misconduct), *and* Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 701 (10th Cir. 1988) (involving post-hire falsification of company records), *abrogated by McKennon*, 513 U.S. 352, *with* O'Driscoll v. Hercules Inc., 12 F.3d 176, 177-78 (10th Cir. 1994) (involving résumé fraud), *vacated*, 513 U.S. 1141 (1995), Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403, 1405 (8th Cir. 1994) (involving résumé fraud), *abrogated by McKennon*, 513 U.S. 352, Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1222 (3d Cir. 1994) (involving résumé fraud), *vacated*, 514 U.S. 1034 (1995), *aff'd* 65 F.3d 1072 (1995) (per curiam), Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 366 (7th Cir. 1993) (involving misrepresentation of college degree), Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 411 (6th Cir. 1992) (involving misrepresentation of education), *abrogated by McKennon*, 513 U.S. 352, Washington v. Lake Cnty., 969 F.2d 250, 256 (7th Cir. 1992) (addressing application fraud), *abrogated by McKennon*, 513 U.S. 352, Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1177 (11th Cir. 1992) (involving nondisclosure of criminal conviction), *vacated en banc*, 32 F.3d 1489 (11th Cir. 1994), *and* Smallwood v. United Air Lines, Inc., 728 F.2d 614, 625 (4th Cir. 1984) (involving nondisclosure of adverse prior employment details), *abrogated by McKennon*, 513 U.S. 352.

77. *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995) (rejecting Sixth Circuit's reasoning). The Court sought to balance the competing interests of employees to be free from discrimination in the workplace and employers to effectuate legitimate business decisions. *See id.* at 361 (articulating relevant concerns); Evans & McKnight, *supra* note 13, at 241 (describing *McKennon* Court's accommodation of both employee and employer interests). The Court recognized potential discovery abuse arising from employer attempts to limit remedies as not "insubstantial" but determined that trial courts could control abuse through the Federal Rules of Civil Procedure. *See McKennon*, 513 U.S. at 363. Whether the Court's prediction has been validated is unclear. *Compare* EEOC v. Jack Marshall Foods, Inc., No. CV-09-0160-WS-N, 2009 U.S. Dist. LEXIS 147119, at *11 (S.D. Ala. Aug. 4, 2009) (quashing employer's blanket discovery subpoenas to plaintiff's former employers without suspected misrepresentation of qualifications), *with* EEOC v. Woodmen of the World Life Ins. Soc'y, No. 03-CV-165, 2007 U.S. Dist. LEXIS 7488, at *3, *16 (D. Neb. Feb. 1, 2007) (allowing discovery from thirteen entities for employee's financial, medical, and employment information to mitigate damages).

78. *See McKennon*, 513 U.S. at 357 (employing powerful language of "societal condemnation" of discrimination embodied in Title VII, ADEA, and ADA).

79. *See id.* at 357-58 (describing common features of ADEA and Title VII and explaining private litigants vindicate public policies). The Court expressly disclaimed the Sixth Circuit's reliance in *Summers* on the mixed-motive analysis from *Mount Healthy City School District Board of Education v. Doyle*. *See id.* at 359 (reasoning seminal mixed-motive case inapposite to single-motive claim); *see also* Mt. Healthy City Sch. Dist. Bd. of Educ.

*3. Continued Allowance of After-Acquired Evidence Post-*McKennon

Several lower courts have since limited the reach of *McKennon* to its facts, allowing after-acquired evidence in two contexts: judicial estoppel and qualification–standing.[80]

a. Judicial Estoppel Cases

Judicial estoppel prevents a litigant from taking contrary positions on the same issue in separate legal proceedings.[81] The typical scenario in an ADA case involves dismissal of a discrimination claim after a defendant employer presents after-acquired evidence of the employee's prior statements of total disability in SSA benefits forms or related proceedings.[82] Because a qualified person with a disability is one who can perform the essential functions of the job, statements of total disability implicitly or explicitly demonstrate a lack of qualification.[83]

For example, in *McNemar v. Disney Store, Inc.*, decided one year after *McKennon*, the Third Circuit allowed after-acquired evidence of McNemar's prior, inconsistent SSA application statements to negate the prima facie qualification element.[84] Notwithstanding McNemar's prior statement of total disability and resulting implied lack of qualification, the EEOC argued his prior job

---

v. Doyle, 429 U.S. 274, 285-86 (1977) (foreclosing liability where employer shows adverse action would have occurred due to secondary legitimate motive). While *McKennon* delivered a partial victory for plaintiffs by preventing employers from completely avoiding liability, it otherwise extended the employment-at-will doctrine by allowing for severe restriction of remedies. *See* 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, 359, 369 (1996) (arguing *McKennon* subordinated employment discrimination to employment-at-will and inadequately addressed psychological injury and deterrence objectives). Employment-at-will describes an employment relationship that is terminable by either the employee or the employer, at any time and for any reason, even without cause. *See Employment*, BLACK'S LAW DICTIONARY (11th ed. 2019) (explaining at-will employment default rule in all states but Montana).

80. *See infra* note 87 and accompanying text (summarizing two judicial estoppel and qualification–standing cases post-*McKennon*).

81. *See supra* note 11 and accompanying text (providing judicial estoppel definition, explanation, and examples).

82. *See* Wilkinson, *supra* note 68, at 915-16 (describing scenarios and criticizing use of needed disability compensation to foreclose civil rights claims); *see also* Scarano v. Cent. R.R. Co. of N.J., 203 F.2d 510, 513 (3d Cir. 1953) (applying judicial estoppel to dismiss disability claim).

83. *See* Americans with Disabilities Act of 1990 § 101(8), 42 U.S.C. § 12111(8) (defining qualified individual under ADA); *supra* note 12 and accompanying text (equating qualification to statutory standing requirement); *see also* McNemar v. Disney Store, Inc., 91 F.3d 610, 618 (3d Cir. 1996) (holding prior total-disability statements foreclose ADA claim).

84. *See McNemar*, 91 F.3d at 615, 621 (holding *McKennon* inapplicable to evidence relating to McNemar's prima facie case). McNemar alleged that he suffered unlawful workplace discrimination in violation of the ADA because of his HIV diagnosis. *See id.* at 613. After the Disney Store terminated his employment, McNemar submitted an SSA disability benefits application form certifying he was completely disabled as of five weeks before his termination date. *See id.* at 615 (describing disability benefits application). The Disney Store argued, and the district court agreed, judicial estoppel barred McNemar from asserting his qualification under the ADA in contradiction to his earlier, sworn SSA statements. *See id.* at 616 (explaining lower court's reasoning).

performance sufficiently established his qualifications.[85] The EEOC argued that McNemar's disability application statements were therefore irrelevant to the ultimate question of the Disney Store's motivation for termination and were otherwise inadmissible under *McKennon*.[86] Nevertheless, the Third Circuit rejected the EEOC's arguments and held that *McKennon* did not limit use of evidence that undermines a plaintiff's prima facie case.[87]

The Supreme Court has since clarified the extent to which courts can use judicial estoppel to inhibit plaintiffs' ADA claims, holding that inconsistent statements neither automatically foreclose, nor create a presumption against, ADA claims.[88] Instead, a plaintiff must show how the prior statements are consistent with any subsequent ADA claim of qualification.[89]

b. Qualification–Standing Cases

In addition to judicial estoppel, employers have successfully argued post-*McKennon* to allow after-acquired evidence of application or résumé fraud to undermine employees' prima facie qualification claims.[90] In *EEOC v. Con-Way*

85. *See* Brief of the EEOC as Amicus Curiae in Support of the Appellant at 6, *McNemar*, 91 F.3d 610 (No. 95-1590) [hereinafter EEOC Amicus Brief in *McNemar*] (contending actual job performance sufficient evidence of minimum necessary qualifications).

86. *See id.* (positing after-acquired evidence could not bar liability). The EEOC further argued judicial estoppel was inappropriate when the plaintiff's suit not only sought to redress an individual harm but also advance the public policy of deterring employment discrimination. *See id.* at 6-7 (referencing broad policy-based reasoning of *McKennon*).

87. *See McNemar*, 91 F.3d at 621 (limiting *McKennon* only to after-acquired evidence supporting affirmative defense). The Fifth Circuit has also affirmed dismissal of an ADA claim based on judicial estoppel. *See* McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 563 (5th Cir. 1998) (differentiating judicial estoppel from *McKennon*). The *McConathy* court similarly cabined *McKennon* as addressing an employer's use of evidence relating to a termination reason and not evidence going to the employee's job qualifications. *See id.* (stating *McKennon* does not preclude judicial estoppel using after-acquired evidence). Various scholars have criticized the Third and Fifth Circuits' narrow focus as ignoring the overarching policy concerns and broader deterrence objectives of antidiscrimination laws. *See, e.g.*, Diller, *supra* note 42, at 23 (criticizing judges' focus on worthiness of plaintiffs rather than statutory equality mandate); Wilkinson, *supra* note 68, at 938 (asserting judicially crafted barriers ignore legislative intent, allowing discrimination to continue unabated).

88. *See* Cleveland v. Pol'y Mgmt. Sys. Corp., 526 U.S. 795, 797-98 (1999) (addressing whether application for, or receipt of, disability benefits creates presumption against ADA qualification); *infra* Section III.C (explaining *Cleveland* rationale); *see also* Wilkinson, *supra* note 68, at 913-14 (explaining conflicting disability policies led to irreconcilable choices between survival benefits and civil rights).

89. *See Cleveland*, 526 U.S. at 797-98 (holding seemingly contradictory statements not always incompatible but plaintiff has burden to demonstrate consistency).

90. *See, e.g.*, Anthony v. TRAX Int'l Corp., 955 F.3d 1123, 1134 (9th Cir. 2020) (holding no ADA claim because of employee's lack of required bachelor's degree); EEOC v. Fargo Assembly Co., 142 F. Supp. 2d 1160, 1165 (D.N.D. 2000) (denying Fargo Assembly's motion for summary judgment but permitting after-acquired evidence of qualifications at trial). *But see* Serrano v. Cintas Corp., 699 F.3d 884, 904 (6th Cir. 2012) (considering application fraud in remedial phase); Rooney v. Koch Air, LLC, 410 F.3d 376, 382 (7th Cir. 2005) (ignoring after-acquired evidence of employee's lack of driver's license at liability stage per *McKennon*); Shattuck v. Kinetic Concepts, Inc., 49 F.3d 1106, 1109 (5th Cir. 1995) (holding application falsification impacts remedy, not liability). The Sixth Circuit has inconsistently ruled on this issue. *Compare Serrano*, 699 F.3d at 904 (reserving consideration of application dishonesty for remedial phase), *with* Moos v. Square D Co., 72 F.3d 39, 43 n.3 (6th Cir. 1995) (stating *McKennon* did not undermine policy against résumé fraud). District courts within the circuit

Freight, Inc.,[91] the Eighth Circuit affirmed summary judgment for Con-Way Freight on a race-discrimination claim, holding that the employee, Roberta Hollins, was not qualified because of her criminal conviction history.[92] Although the court made no mention of *McKennon*, the EEOC's brief stated that Con-Way Freight previously admitted it had not considered Hollins's criminal history when it rejected her, and *McKennon* should therefore bar Con-Way Freight's subsequent use of that evidence as a supervening reason for the adverse employment action.[93] The court rejected the EEOC's arguments and affirmed for Con-Way Freight, applying the "would-not-have-hired" rationale and reasoning that the EEOC could not establish a prima facie case under *McDonnell Douglas* when Hollins's criminal conviction rendered her unqualified.[94]

Recently, in *Anthony v. TRAX International Corp.*, the Ninth Circuit more explicitly determined that *McKennon* does not apply to an employer's use of after-acquired evidence to rebut a plaintiff's qualifications.[95] Anthony requested a temporary work-from-home arrangement as she prepared to return from a medical leave of absence, but TRAX's benefits coordinator responded that the company would terminate Anthony unless she returned to work without

---

have also inconsistently determined whether to allow after-acquired evidence to rebut the plaintiff's prima facie qualification element. *Compare* Winchester v. City of Hopkinsville, 93 F. Supp. 3d 752, 768 (W.D. Ky. 2015) (allowing after-acquired evidence to avoid plaintiff evading qualification requirement), *with* Maiden v. APA Transp. Corp., No. 00-CV-883, 2002 U.S. Dist. LEXIS 8076, at *36 n.7 (S.D. Ohio May 3, 2002) (noting *McKennon* proscribes barring all liability in application-fraud cases).

91. 622 F.3d 933 (8th Cir. 2010).

92. *See id.* at 936 (reasoning employer would not otherwise have hired employee). Con-Way Freight staff testified that the regional manager stated hiring Hollins, a black woman, would be "opening up a can of worms" and he "probably didn't want to go that route" or he would be "just asking for the NAACP." *See id.* at 935-36 (recounting statements supporting discrimination claim). Various cases preceding *McKennon* also adopted the "would-not-have-hired" rationale. *See* Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 414 (6th Cir. 1992) (accepting Honeywell would not have hired Johnson had it known of misrepresentations), *abrogated by* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995); Milligan-Jensen v. Mich. Tech. Univ., 975 F.2d 302, 305 (6th Cir. 1992) (holding discrimination "irrelevant" when Michigan Tech would not have hired Milligan-Jensen due to application falsification); Smallwood v. United Air Lines, Inc., 728 F.2d 614, 627 (4th Cir. 1984) (ordering judgment for United who would not have hired Smallwood but for misrepresentations), *abrogated by McKennon*, 513 U.S. 352. *But see* Washington v. Lake Cnty., 969 F.2d 250, 256 (7th Cir. 1992) (holding "would-not-have-hired" rationale unjustified), *abrogated by McKennon*, 513 U.S. 352. The Fourth Circuit reasoned in *Smallwood* "the company was entitled to prove at trial that the respondents had not been injured because they *were not qualified and would not have been hired in any event*." *See* 728 F.2d at 618 (emphasis added) (quoting E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 n.9 (1977)). This quotation from *Rodriguez* relied, in turn, upon the Court's rationale in *Mount Healthy*, a case addressing a mixed-motive discrimination claim. *See E. Tex. Motor Freight Sys.*, 431 U.S. at 403 n.9 (citing seminal mixed-motive case). *McKennon* expressly disclaimed any application of *Mount Healthy* outside of the mixed-motive context. *See McKennon*, 513 U.S. at 359-60 (1995) (explaining *Mount Healthy* inapposite to single-motive disparate treatment claim).

93. *See* Brief of the EEOC as Appellant at 13-14, *Con-Way Freight, Inc.*, 622 F.3d 933 (No. 09-2930) (arguing conviction history irrelevant if admittedly unrelated to hiring decision); *see also* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (holding prima facie elements no longer relevant once employer proffers nondiscriminatory reason).

94. *See Con-Way Freight, Inc.*, 622 F.3d at 937-38 (holding theft conviction made Hollins unqualified); *see also supra* text accompanying note 30 (listing prima facie elements for *McDonnell Douglas* first stage).

95. *See Anthony*, 955 F.3d at 1134 (holding Anthony not otherwise qualified without required degree).

restrictions.[96] Having failed to submit a full work release to TRAX by the time her leave expired, TRAX fired Anthony, prompting her disability discrimination claim under the ADA.[97] During discovery, TRAX learned that Anthony did not have the required bachelor's degree she had represented on her employment application.[98] The district court granted summary judgment for TRAX, and the Ninth Circuit affirmed, reasoning that after-acquired evidence of Anthony's résumé fraud could be used to show that she was unqualified.[99]

The EEOC argued on appeal that its two-part ADA qualification test is only applicable when the employee's qualifications are relevant to the employer's adverse action decision; otherwise, a plaintiff can establish qualification by showing the statutorily required ability to perform the job's essential functions.[100] The EEOC reasoned that Anthony's education, employment, and skills were immaterial because the thrust of her claim—that TRAX failed to engage in the

96. *See* Anthony v. TRAX Int'l Corp., 955 F.3d 1123, 1126 (2020) (describing evidence of employer's alleged failure to engage in interactive process for reasonable accommodation). Under the ADA, an employer must engage in an interactive process with the covered employee to determine the reasonable and appropriate modifications or adjustments to the work environment. *See* 29 C.F.R. § 1630.2(o) (2021) (defining reasonable accommodation and outlining process for determining appropriate accommodation); *Anthony*, 955 F.3d at 1134 (describing "mandatory obligation" to engage in interactive process).

97. *See Anthony*, 955 F.3d at 1126 (describing legal claim). Anthony's medical leave was due to post-traumatic stress disorder, anxiety, and depression. *See id.*

98. *See id.* at 1126-27 (explaining TRAX's discovery occurred after Anthony's termination and during litigation); Appellant's Opening Brief at 9, *Anthony*, 955 F.3d 1123 (No. 18-15662) (acknowledging uncontested lack of required degree). Attorneys have since advised employers to review application files for information that could disqualify ADA plaintiffs. *See, e.g.*, Joshua R. Woodard & Jennifer R. Yee, *Federal Equal Employment Opportunity Law: Recent Developments*, ARIZ. ATT'Y, Jan. 2021, at 34, 38 (providing practical takeaway from *Anthony*).

99. *See Anthony*, 955 F.3d at 1127, 1134 (affirming Anthony not qualified and therefore not afforded protection under ADA); Anthony v. TRAX Int'l Corp., No. 16-CV-02602, 2018 U.S. Dist. LEXIS 64205, at *10 n.2 (D. Ariz. Apr. 16, 2018) (explaining Anthony not qualified under ADA definition), *aff'd*, 955 F.3d 1123 (2020). While job qualification requirements are often determined exclusively at the employer's discretion, Anthony worked as a technical writer in support of a federal government contract that dictated the minimum education requirements for her role. *See Anthony*, 955 F.3d at 1127 (describing unique factual scenario). At oral argument before the Ninth Circuit panel, one judge was sympathetic to the argument that an employee can be considered capable and qualified despite the employer searching after the fact to find some missing qualification. *See* Oral Argument at 2:15, *Anthony*, 955 F.3d 1123 (No. 18-15662), https://youtu.be/jwJ7mZCYFJo [https://perma.cc/E9D2-HXGR] (questioning plaintiff's counsel). The judge described the education requirement as merely a competency placeholder in many circumstances. *See id.* at 1:50 (parsing meaning and importance of qualifications). The judge was concerned, however, that the qualification at issue in Anthony's case involved a contractually mandated requirement tied to her employer's remuneration. *See id.* at 1:53 (noting employer's government contract).

100. *See* Brief of the EEOC as Amicus Curiae in Support of Plaintiff-Appellant and in Favor of Reversal at 22, *Anthony*, 955 F.3d 1123 (No. 18-15662) [hereinafter EEOC Amicus Brief in *Anthony*] (pointing exclusively to Congress's express essential functions standard). While the EEOC acknowledged its two-part test, it argued that the test's extra step was not required unless the employee's qualifications were in some way relevant to the adverse action decision. *See id.* at 26 (urging court to focus on employer's motivation and not uniform, but illogical, prima facie element); *cf. supra* note 65 and accompanying text (explaining *Mardell* court's adoption of similar rationale).

interactive accommodation process—was wholly unrelated to qualifications.[101] The Ninth Circuit described the EEOC's position as perplexing, declined to extend deference under *Auer v. Robbins*,[102] and instead applied the two-part qualifications test as controlling circuit precedent.[103] The court relied on its prior

101. *See* EEOC Amicus Brief in *Anthony*, *supra* note 100, at 26 (differentiating cases where adverse action related in some way to employer's selection criteria). The EEOC previously advanced a similar argument before the Eighth and Third Circuits. *See* Brief of the EEOC as Appellant, *supra* note 93, at 13 (arguing *McKennon* should foreclose use of employee's previously undisclosed criminal conviction history); EEOC Amicus Brief in *McNemar*, *supra* note 85, at 12 (asserting qualifications immaterial if unrelated to employer's motivation). Although not addressing the ADA, a Ninth Circuit panel previously held that an employer cannot rely on an employee's lack of qualifications when qualifications played no role in the employer's decision. *See* Ostroff v. Emp. Exch., Inc., 683 F.2d 302, 304 (9th Cir. 1982) (holding qualifications not required prima facie element under *McDonnell Douglas* if unrelated to employer's motive). TRAX never proffered a legitimate, nondiscriminatory reason for firing Anthony because the case was in the early stages of litigation. *See* Brief of Appellee TRAX International Corporation at 24, *Anthony*, 955 F.3d 1123 (No. 18-15662) (challenging only prima facie claim and offering no legitimate reason). In other cases involving résumé or application falsification, however, employers have asserted that the employees were terminated for poor performance. *See, e.g.*, Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 411 (6th Cir. 1992) (stating unsatisfactory performance), *abrogated by* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995); Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1223 (3rd Cir. 1994) (per curiam) (claiming poor work performance), *vacated*, 514 U.S. 1034 (1995), *aff'd* 65 F.3d 1072 (1995); Bonger v. Am. Water Works, 789 F. Supp. 1102, 1104 (D. Colo. 1992) (asserting termination for poor performance). In those cases, after-acquired evidence of falsified credentials certainly relates, and may lend weight, to the employers' claims of poor performance. *See* Jenny B. Wahl, *Protecting the Wolf in Sheep's Clothing: Perverse Consequences of the* McKennon *Rule*, 32 AKRON L. REV. 577, 599-600 (1999) (arguing adverse economic effects of *McKennon*).

102. 519 U.S. 452 (1997).

103. *See* Anthony v. TRAX Int'l Corp., 955 F.3d 1123, 1128 (2020) (holding two-part test mandatory in ADA claims); *see also* Johnson v. Bd. of Trs., 666 F.3d 561, 566-67 (9th Cir. 2011) (rejecting EEOC interpretation of qualification test). *But see Johnson*, 666 F.3d at 570 (Paez, J., concurring in part and dissenting in part) (criticizing majority for failing to afford *Auer* deference to EEOC interpretation of two-part qualification test); Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) (explaining how circuit rules allow overturning prior circuit opinion due to intervening higher authority). The standard established in *Auer* dictates that courts should defer to an agency's interpretation of its own regulation. *See Auer*, 519 U.S. at 461 (holding agency interpretation controls unless plainly erroneous or inconsistent). *Kisor v. Wilkie*, however, substantially limited the *Auer* deference doctrine. *See* 139 S. Ct. 2400, 2415 (2019) (mandating exhaustion of all other tools of construction before deferring to agency); *cf.* Milner v. Dep't of the Navy, 562 U.S. 562, 574 (2011) (refusing to consult history when statutory language clear). *Kisor* established that deference should be given only if the agency regulation is genuinely ambiguous and, following that, only if the agency's interpretation is reasonable and reflects the agency's official position in its area of expertise. *See Kisor*, 139 S. Ct. at 2415-16 (explaining multiple constraints on *Auer* deference standard); *see also* Jeff Overley, *Chevron Deference's Future in Doubt if Barrett Is Confirmed*, LAW360 (Oct. 23, 2020, 11:11 PM), https://www-law360-com.ezproxysuf.flo.org/articles/1318381/chevron-deference-s-future-in-doubt-if-barrett-is-confirmed [https://perma.cc/64JR-YFAU] (predicting less deferential Court overall in future). The Ninth Circuit has since employed the newly constrained standard, in a case unrelated to the EEOC, concluding that *Auer* deference was unnecessary. *See* Sec'y of Lab. v. Seward Ship's Drydock, Inc., 937 F.3d 1301, 1310 (9th Cir. 2019) (employing traditional tools to determine regulation not ambiguous). In other contexts, courts grant the EEOC deference as frequently as they deny it. *See* Theodore W. Wern, Note, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533, 1549-50 (1999) (analyzing Supreme Court cases and finding EEOC receives less deference than other agencies). The EEOC has exercised its authority under the ADA in many forms: administrative regulations, notice and comment rules, interpretive guidance, a compliance manual, enforcement guides, and policy statements. *See* Eric Dreiband & Blake Pulliam, *Deference to EEOC Rulemaking and Sub-Regulatory Guidance: A Flip of the Coin*, 32 A.B.A. J. LAB. & EMP. L. 93, 106 (2016) (recognizing section 106 of ADA grants EEOC broad procedural and substantive rulemaking authority).

ruling in *Mantolete* and various out-of-circuit judicial-estoppel cases to support limiting the reach of *McKennon*.[104] The court's opinion differentiated *McKennon* in two key respects: First, *Anthony* addressed the ADA, which is expressly limited to qualified individuals, while *McKennon* confronted the ADEA, which has no statutory qualification requirement.[105] Second, the *Anthony* court noted that the evidence at issue related to Anthony's prima facie case while *McKennon* addressed evidence supporting an employer's post hoc termination reason.[106]

III. ANALYSIS

In the lead-up to the Supreme Court's review of *McKennon*, the various circuit decisions had developed two overarching issues that the *McKennon* opinion failed to properly tease apart; the first was whether courts should permit after-acquired evidence to avert a defendant's liability or reserve such evidence for consideration only at the remedy stage.[107] The second question was whether a prohibition against after-acquired evidence at the liability stage applied equally to evidence of application fraud, on-the-job misconduct, and judicial estoppel of inconsistent statements.[108] While the Court resolved the first aspect of the split with *McKennon*, the Court's framing of the issue as "wrongful conduct that would have led to discharge," as opposed to conduct that would have precluded hire, failed to explicitly resolve the second question.[109] Various courts, including the Ninth Circuit in *Anthony*, interpreted this perceived limitation as continuing

---

The Supreme Court has met EEOC interpretations with some skepticism. *See id.* at 107 (describing cases where Supreme Court declined to adopt EEOC interpretation). One study found a deference rate for the EEOC of approximately 54% compared to the baseline figure across all agencies—including the EEOC—of 72%. *See* Wern, *supra*, at 1550 (summarizing study results).

104. *See Anthony*, 955 F.3d at 1132-33 (relying on *McNemar* and *McConathy*); *see also supra* note 53 and accompanying text (explaining facts and reasoning of *Mantolete*).

105. *See Anthony,* 955 F.3d at 1130 (comparing statutory definitions). *But see supra* note 30 and accompanying text (explaining *McDonnell Douglas* framework and attendant qualification requirement often applied in ADEA claims).

106. *See Anthony*, 955 F.3d at 1130 (reasoning different use makes *McKennon* inapplicable even outside ADA context). An empirical study of after-acquired evidence cases post-*McKennon* showed that less than 7% of cases involved unauthorized removal of documents as in *McKennon*, while 49.8% addressed falsification of application documents as in *Anthony*. *See* Hart, *supra* note 12, at 415 (calculating qualification falsification occurred in 146 of 293 cases).

107. *Compare, e.g.*, Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1240 (3d Cir. 1994) (holding after-acquired evidence relevant to remedy only), *vacated*, 514 U.S. 1034 (1995), *aff'd* 65 F.3d 1072 (1995) (per curiam), *with* Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988) (allowing after-acquired evidence to preclude liability), *abrogated by* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995).

108. *Compare, e.g.*, *Mardell*, 31 F.3d at 1223, 1226 (involving application fraud), *with Summers*, 864 F.2d at 703, 705 (concerning on-the-job misconduct), *and* Reigel v. Kaiser Found. Health Plan, 859 F. Supp. 963, 970 (E.D.N.C. 1994) (addressing inconsistent statements).

109. *See McKennon*, 513 U.S. at 356 (describing issue on appeal); *supra* note 76 and accompanying text (explaining *McKennon* resolution of liability and remedy distinction); *see also* Anthony v. TRAX Int'l Corp., 955 F.3d 1123, 1131 (9th Cir. 2020) (stating *McKennon* prohibition does not extend to qualification–standing); Hart, *supra* note 12, at 424 (differentiating "would-have-fired" and "would-not-have-hired" rationales).

to allow after-acquired evidence to support employers' de jure nonliability.[110] This cabining of *McKennon* is flawed, and continuing to allow after-acquired evidence to wholly negate employer liability subordinates the ADA, ignores the objectives of antidiscrimination law beyond individual recovery, contravenes *McKennon*, and dissuades plaintiffs from asserting legitimate claims.[111]

A. A Qualification Requirement Is Not Unique to the ADA

Despite the differing statutory language of the ADEA and the ADA, the *Anthony* court was wrong to differentiate from *McKennon* on the basis that the ADEA does not include a qualification requirement.[112] Similar to the ADA, one of the prima facie elements of an ADEA claim under the *McDonnell Douglas* framework is a showing that the plaintiff was qualified for the job.[113] Although Title VII and the ADEA cover any individual without reference to employment qualifications or ability to perform, courts plainly understand that a Title VII or ADEA plaintiff must also be qualified for the job in question.[114] This qualification element exists not as a standing requirement, but to allow the factfinder to

110. *See Anthony*, 955 F.3d at 1130 (holding *McKennon* does not apply to qualification inquiry); EEOC v. Con-Way Freight, Inc., 622 F.3d 933, 938 (8th Cir. 2010) (permitting after-acquired evidence of theft conviction to defeat prima facie qualification element); McNemar v. Disney Store, Inc., 91 F.3d 610, 620-21 (3d Cir. 1996) (declining to follow *McKennon* in decision relying upon judicial estoppel rationale); EEOC v. Fargo Assembly Co., 142 F. Supp. 2d 1160, 1164-65 (D.N.D. 2000) (confining *McKennon* to supervening termination and permitting after-acquired evidence to rebut ADA qualification). Those courts developed the distinction that *McKennon* involved only the "supervening grounds for termination" argument for on-the-job misconduct and excluded the defenses of qualification–standing or judicial estoppel of inconsistent statements. *See supra* text accompanying note 106 (demonstrating distinction between qualification–standing and independent termination reason); *supra* note 70 and accompanying text (explaining judicial estoppel). *But see* O'Brien, *supra* note 76, at 685 (noting *McKennon* broadly addressed employee wrongdoing).

111. *See* Hart, *supra* note 12, at 424 (criticizing chilling effect of tactics that shift liability focus from employer to employee); *see also supra* notes 23-25 and accompanying text (explaining Congress's sweeping intent beyond individual recovery to eradicate discrimination). After-acquired evidence leads to more settlements at decreased amounts. *See* Hart, *supra* note 12, at 434 (explaining plaintiffs with any discoverable misconduct dissuaded from pursuing claims).

112. *See supra* note 33 and accompanying text (explaining *McDonnell Douglas* framework, typically used in ADEA cases, includes prima facie qualification element). *Anthony* relied on the fact that the ADA includes an objective qualification requirement absent from the ADEA. *See Anthony*, 955 F.3d at 1130 (differentiating statutory text).

113. *See supra* text accompanying note 30 (listing elements); *supra* note 90 (noting courts require proof of objective qualifications even when employee has successfully performed job). Because *McDonnell Douglas* permits an *inference* of discriminatory animus when a prima facie case is made, the qualification requirement rules out the contradictory possibility of termination for poor performance. *See supra* note 30 and accompanying text (describing inference of discrimination arising from circumstantial evidence eliminates employer's legitimate nondiscriminatory reasons).

114. *See supra* note 26 and accompanying text (reciting statutory definitions); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (including qualification element). An employer need not hire unqualified applicants that may be part of a Title VII protected class because an employer's refusal to hire, promote, or retain unqualified employees is not a decision made "because of" a protected trait. *See* Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (prohibiting only adverse employment actions taken because of race, color, religion, sex, or national origin); McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361 (1995) (recognizing employers' freedom of choice).

eliminate common reasons for the adverse employment action, namely poor performance, and otherwise infer discrimination in the absence of direct evidence.[115]

The ADA's qualification requirement serves the same purpose and compels the same treatment.[116] The ADA's accommodation obligation necessitates including the term "qualification," but not as a means to arbitrarily foreclose relief for an ADA plaintiff that would otherwise be available under Title VII and the ADEA.[117] To be sure, a fraudulent applicant may not deserve to recover, and after-acquired evidence may be otherwise relevant to support an employer's claim of poor performance.[118] But framing the issue as one of standing fails to explain *why* the employee deserves no recovery, which is the proper inquiry under *McKennon*.[119] Allowing after-acquired evidence to disproportionately destroy standing in ADA claims, as compared to all other antidiscrimination laws, would decrease claims and hinder enforcement.[120] A Ninth Circuit panel previously recognized, although in dicta, that a bright-line rule considering only the

115. *See supra* note 30 and accompanying text (explaining prima facie showing under *McDonnell Douglas* permits inference of discrimination).

116. *See supra* note 32 (requiring courts to focus on ultimate question of discrimination); *McKennon*, 513 U.S. at 357 (defining goal of antidiscrimination law broadly to eradicate discrimination). Outside of the ADA, the Ninth Circuit has even acknowledged the inappropriateness of rejecting a claim based on qualifications that played no role in the employer's decision, notwithstanding the fact that qualification is a prima facie element under the *McDonnell Douglas* framework. *See* Ostroff v. Emp. Exch., Inc., 683 F.2d 302, 304 (9th Cir. 1982) (holding qualifications irrelevant to prima facie case of disparate treatment when unrelated to employer's motive). For this same reason, an employer need not hire, promote, or retain a disabled individual who cannot perform the essential functions of the position with or without accommodation. *See* Americans with Disabilities Act of 1990 § 101(8), 42 U.S.C. § 12111(8) (defining qualified individual to include consideration of effect of accommodation on ability); Burgdorf, *supra* note 36, at 422 n.54 (explaining adverse action for lack of qualification not discriminatory).

117. *See McKennon*, 513 U.S. at 357 (situating ADA alongside Title VII and ADEA collectively comprising singular statutory scheme with common purpose). The ADA could have been drafted to extend protection to any individual who can perform the essential functions of the position with or without reasonable accommodation, implying qualification in the same manner as Title VII and the ADEA. *See* 118 CONG. REC. 526 (1972) (proposing incorporating disability protections in Title VII); Burgdorf, *supra* note 36, at 422 (noting significant criticisms of inclusion of qualification in ADA). The specific question of what significance qualification should have in a wrongful termination suit is substantial; even twenty years after the ADA's passage, only 21% of individuals with disabilities are employed compared to 59% of individuals without disabilities. *See* MOOK, *supra* note 42, § 1.02[2] (describing impact of disability and disability discrimination on employment rates in 2010).

118. *See* Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988) (discussing nondoctor doctor hypothetical), *abrogated by McKennon*, 513 U.S. 352; Oral Argument, *supra* note 54, at 5:30, 8:03 (referencing both nondoctor doctor and nonlawyer lawyer hypotheticals); Wahl, *supra* note 101, at 599-600 (stating evidence may support employer's legitimate claim of poor performance).

119. *See McKennon*, 513 U.S. at 361 (considering wrongdoing relevant to determining remedy).

120. *See* Hart, *supra* note 12, at 415 (estimating qualification misrepresentations account for approximately 50% of after-acquired evidence claims). This approach also risks compounding the abusive discovery practices warned of in *McKennon*. *See, e.g.*, Woodard & Yee, *supra* note 98, at 38 (advising employers to carefully review application files specifically for disability discrimination claimants); *see also supra* note 77 (discussing risk of discovery abuse).

employee's wrongdoing without equivalent attention to the discrimination claim itself would be inequitable.[121]

B. Congress Did Not Intend a Unique ADA Standing Requirement

Notwithstanding the logical irrelevance of an employee's qualifications to proving employer discrimination under the ADA, the Ninth Circuit reasoned that to ignore the ADA's qualification requirement would contradict Congress's express statutory limitation.[122] Congress has been clear, however, that the focus of disability discrimination litigation should be directed to identifying prohibited discrimination, not to the eligibility or worthiness of plaintiffs.[123] To the extent that the ADA unnecessarily diverged from Title VII in that respect, the ADAAA intended to harmonize the two statutes, broaden the class of protected individuals under the ADA, and promote the understanding that the ADA serves the same purpose as earlier civil rights legislation—to condemn and remediate discriminatory barriers to employment.[124] While the ADAAA did not alter or remove the qualified-individual requirement or address the EEOC's further two-part definitional guidance, its prohibition against unnecessarily restricting the ADA's protected class should be instructive when evaluating the significance of a plaintiff's qualifications.[125] Where qualification has no relevance to the litigation, imposing the EEOC's "skills, education, and experience" factor does nothing more than introduce similarly arbitrary and distracting eligibility criteria that the ADAAA rebuked.[126] The Supreme Court rejected comparable judicial

---

121. *See* EEOC v. Farmer Bros. Co., 31 F.3d 891, 902 (9th Cir. 1994) (suggesting more nuanced, fact-specific equitable analysis instead of bright-line rule). Under the standard proposed in *Farmer Brothers Co.*, Anthony might very well fall into the category of plaintiffs whose recovery is completely barred. *See id.* at 901-02 (theorizing unlicensed doctor would not recover). Nevertheless, the rule suggested by *Farmer Brothers Co.* aligns with the *McKennon* Court's conclusion that "factual permutations and the equitable considerations they raise will vary from case to case." *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361 (1995) (leaving to future decisions determination of proper boundaries of relief).

122. *See* Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1133 (9th Cir. 2020) (noting Congress limited ADA to qualified individuals). *But see supra* notes 23-25 and accompanying text (showing Congress had broad intent to eradicate workplace discrimination).

123. *See supra* note 48 and accompanying text (explaining intent of ADAAA).

124. *See* Cox, *supra* note 48, at 213 (discussing history and intent of ADAAA relative to Title VII); *see also* Burgdorf, *supra* note 36, at 421 (stating qualification requirement one of several severe drafting disasters in Rehabilitation Act). The Supreme Court has emphasized these intentions in multiple opinions, signaling lower courts to focus litigation on employer conduct instead of employee worthiness. *See, e.g.*, Cleveland v. Pol'y Mgmt. Sys. Corp., 526 U.S. 795, 805-06 (1999) (repeating ADA purpose to eliminate discrimination and declining to endorse categorical presumption of disqualification); *McKennon*, 513 U.S. 352, 357 (refusing to disregard discrimination because of McKennon's misconduct); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (focusing courts on issue of discrimination over technical application of *McDonnell Douglas*).

125. *See* Cox, *supra* note 48, at 224 (concluding ADAAA should signal broader intent to courts).

126. *See* Diller, *supra* note 42, at 25 (criticizing array of ADA cases where courts erroneously focused on peripheral questions rather than discrimination); *supra* note 101 and accompanying text (explaining EEOC adopted same argument in several cases).

constraints in *Cleveland* and *McKennon*, and it follows that it would apply similar reasoning to deny a qualification–standing limitation.[127]

The U.S. Chamber of Commerce also asserted this plain language reasoning at oral argument in *Anthony*, but the Chamber disproved its own point when it argued that businesses are entitled to rely on a regulation's plain text.[128] TRAX did not rely upon the EEOC's qualification test, nor Anthony's qualifications, when it fired her.[129] TRAX fired her simply because her disability prevented her from returning to a full work schedule; a reason having nothing to do with her skills, education, experience, or other job requirements.[130] TRAX's reliance interest is, therefore, immaterial and hypothetical.[131]

While it is true that history and purpose should be employed to "clear up ambiguity, not create it," the ADA's inclusion of the word "qualified" was ambiguous from its inception; courts, Congress, and the EEOC have all worked to clarify its proper role.[132] In light of this persistent ambiguity and the explanations of those with contemporaneous knowledge of statutory intent—like Professors Miller and Burgdorf—the EEOC's recurring argument that its two-part test only applies when qualifications are disputed is easily reconciled with the ADA's broad statutory definition.[133] The EEOC could, therefore, formally request deference

127. *See* Diller, *supra* note 42, at 30, 49 (recommending rules allowing courts to reach central question of presence of improper discrimination); McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357-58 (1995) (holding after-acquired evidence of misconduct does not supersede relevance of discrimination in determining liability).

128. *See* Oral Argument, *supra* note 99, at 24:35 (arguing in support of TRAX); *see also supra* notes 44-46 and accompanying text (explaining ADA statutory qualification language). The Chamber of Commerce viewed the EEOC's position as asking the court to simply ignore a regulation when it would produce an undesirable policy consequence. *See* Oral Argument, *supra* note 99, at 25:07 (criticizing EEOC's position). The Ninth Circuit focused on the inconsistency between the EEOC's position as amicus in *Anthony* and the EEOC's own two-part qualification test. *See* Anthony v. TRAX Int'l Corp., 955 F.3d 1123, 1128 (9th Cir. 2020) (stating EEOC's position "perplexing").

129. *See* Appellant's Opening Brief, *supra* note 98, at 5 (recounting termination related to physician-recommended work schedule change). Under *McDonnell Douglas*, an employer is not required to proffer a nondiscriminatory explanation until the employee has established a prima facie case. *See supra* note 30 (explaining burden-shifting stages). Therefore, TRAX never put forth a reason for Anthony's termination and exclusively challenged her qualifications instead. *See* Brief of Appellee TRAX Int'l Corp., *supra* note 101, at 38 (challenging allegation of failure to engage in interactive process by asserting Anthony's lack of qualification).

130. *See Anthony*, 955 F.3d at 1126 (noting TRAX learned Anthony lacked bachelor's degree in course of litigation).

131. *See* Hart, *supra* note 12, at 419 (criticizing after-acquired evidence for creating purely hypothetical questions favoring defendants).

132. *See* Milner v. Dep't of the Navy, 562 U.S. 562, 574 (2011) (refusing to consult history when statutory language clear); *supra* note 42 (showing congressional concerns with qualification related to employer selection and employer decision, not employee standing); *supra* note 27 and accompanying text (recounting Supreme Court recognition of qualification purpose); *see also* Burgdorf, *supra* note 36, at 427 (calling language "problematic and awkward").

133. *See supra* note 42 and accompanying text (explaining qualification relevant to determining accommodation obligation, not standing requirement); Burgdorf, *supra* note 36, at 422 (stating inclusion of word "qualified" unnecessary and distorts ADA's intent). As the EEOC also noted in its amicus brief to the Ninth Circuit for *Anthony*, there is support for the proposition that the two-step test does not supplant the ADA's statutory definition of a qualified individual unless qualifications are disputed. *See* EEOC Amicus Brief in *Anthony*, *supra*

for this more restrictive application of its own two-part test, but success is questionable given that the EEOC's definitional guidance is likely not ambiguous, and even if it was, a court will first resort to traditional tools of construction instead of deference.[134] Nevertheless, to allow the term "qualified" to serve as an escape clause for wrongful discrimination when qualifications were otherwise immaterial to the employer's adverse action determination—and then only in the context of the ADA—is more confusing and unjust than the alternative, especially where the ADA itself defines a qualified individual simply as one who can perform the essential functions, without reference to objective qualifications.[135]

C. Cleveland v. Policy Management Systems Corp. *Addresses Inconsistent Statements*

The *Anthony* court further sought to bolster its reasoning with out-of-circuit judicial-estoppel case law, but failed to acknowledge that the Supreme Court clarified the proper use of judicial estoppel to preclude employees' inconsistent statements in *Cleveland*.[136] While the *Cleveland* Court acknowledged that an ADA plaintiff must prove qualification as an essential element of a discrimination claim, any useful parallel to *Anthony* ends there.[137] The *Cleveland* Court did not invoke the after-acquired evidence doctrine, nor did it differentiate between statements known or unknown to the employer at the time of the adverse employment action.[138] The Court addressed only sworn statements—not all inconsistencies—and was therefore explicitly concerned only with judicial estoppel, not equitable estoppel.[139] Judicial estoppel applies only to inconsistent positions in *legal* proceedings, otherwise its purpose of protecting judicial integrity is not implicated.[140] Therefore, although *Cleveland* would abrogate *McConathy* and *McNemar* to the extent they established a bright-line presumption against establishing prima facie qualification, *Cleveland* otherwise upheld an employer's

note 100, at 23-24 (arguing circuit precedent restricts use of two-part test to circumstances where qualifications disputed).

134. *See supra* note 103 (explaining *Kisor* constrained *Auer* and EEOC receives less deference than other agencies generally).

135. *See supra* note 44 and accompanying text (comparing statutory text and EEOC guidance).

136. *See* Anthony v. TRAX Int'l Corp., 955 F.3d 1123, 1132-33 (9th Cir. 2020) (invoking *McNemar* and *McConathy*); Cleveland v. Pol'y Mgmt. Sys. Corp., 526 U.S. 795, 797-98 (1999) (addressing whether statement of total disability to SSA precludes ADA claim). A prior inconsistent statement may sometimes—but not always—prevent a plaintiff from establishing the qualification element of an ADA discrimination claim. *See Cleveland*, 526 U.S. at 806 (holding Cleveland cannot create question of fact by self-contradiction without showing why statements compatible).

137. *See Cleveland*, 526 U.S. at 806-07 (requiring explanation sufficient to warrant reasonable finding of qualification notwithstanding prior statement).

138. *See id.* at 798-99 (noting Cleveland fired two months before statement of total disability to SSA).

139. *See id.* at 800, 806 (referencing judicial estoppel specifically and discrepancies between sworn affidavits and depositions); *see also supra* note 70 and accompanying text (explaining judicial estoppel's relation to legal proceedings).

140. *See* Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 121-22 (3d Cir. 1992) (clarifying judicial estoppel protects courts, not litigants).

ability to invoke judicial estoppel using after-acquired evidence of inconsistent statements.[141]

In *Anthony*, the Ninth Circuit relied on *McConathy* and *McNemar* to support its conclusion that after-acquired evidence can be admissible to defeat the prima facie qualification element, but the court failed to acknowledge that the judicial estoppel policy rationale underpinning those cases was not implicated in Anthony's case.[142] The policy rationale of *Cleveland*—to protect the integrity of the courts—is inapplicable when the prior inconsistent statement occurs outside of a legal forum.[143] The doctrine is simply not "a moral sanction against inconsistency."[144] There is also no inconsistency within the specific context of Anthony's judicial proceedings: Anthony admitted in her deposition that she lacked a bachelor's degree and did not attempt to assert otherwise for the purpose of summary judgment.[145] As a result, judicial estoppel is inapposite and any allowance of after-acquired evidence in the context of a judicial estoppel claim in *Cleveland*, *McNemar*, or *McConathy* is similarly immaterial to the facts of *Anthony*.[146]

D. McKennon *Already Foreclosed a Qualification–Standing Defense*

After properly putting aside the judicial estoppel cases falling under *Cleveland*, a circuit split nevertheless persists as to the proper treatment of after-acquired evidence of qualification misrepresentations.[147] The split, however, is likely relatively narrow in that, to date, both the Eighth and Ninth Circuits have limited their holdings to nondiscretionary, objective job requirements that

141. *See Cleveland*, 526 U.S. at 805-06 (declining to endorse categorical presumption of disqualification but requiring Cleveland reconcile inconsistencies to avoid dismissal).

142. *Compare infra* note 145 and accompanying text (explaining Anthony's inconsistencies occurred neither in legal proceedings nor sworn statements), *with* Cleveland v. Pol'y Mgmt. Sys. Corp., 526 U.S. 795, 806-07 (1999) (addressing affidavits, depositions, and sworn statements).

143. *See* Swahn Grp., Inc. v. Segal, 108 Cal. Rptr. 3d 651, 659-60 (Ct. App. 2010) (showing judicial estoppel and equitable estoppel distinct theories with different objectives).

144. *See* Bertha Bldg. Corp. v. Nat'l Theatres Corp., 248 F.2d 833, 837 (2d Cir. 1957) (Hand, J., dissenting).

145. *See* Appellant's Opening Brief, *supra* note 98, at 9 (acknowledging lack of bachelor's degree undisputed).

146. *See* Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 121 (3d Cir. 1992) (explaining judicial estoppel applies to legal proceedings). Judicial estoppel, which concerns legal proceedings, and equitable estoppel, which concerns the litigants, are simply not interchangeable. *See Swahn Grp., Inc.*, 108 Cal. Rptr. 3d at 659-60 (compartmentalizing distinct theories).

147. *See supra* note 90 (explaining inconsistent holdings within Sixth Circuit). *Compare* Rooney v. Koch Air, LLC, 410 F.3d 376, 382 (7th Cir. 2005) (ignoring after-acquired evidence of employee's lack of required driver's license at liability stage), Shattuck v. Kinetic Concepts, Inc., 49 F.3d 1106, 1109 (5th Cir. 1995) (assessing application falsification impact on remedy, not liability), *and* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1231 (3d Cir. 1994) (reasoning neither fraud nor misconduct renders Mardell unqualified), *vacated*, 514 U.S. 1034 (1995), *aff'd* 65 F.3d 1072 (1995) (per curiam), *with* Anthony v. TRAX Int'l Corp., 955 F.3d 1123, 1134 (9th Cir. 2020) (foreclosing liability after discovery of résumé fraud), EEOC v. Con-Way Freight, Inc., 622 F.3d 933, 936 (8th Cir. 2010) (affirming dismissal due to disqualifying criminal conviction), *and* Anaeme v. Diagnostek, Inc., 164 F.3d 1275, 1281 (10th Cir. 1999) (differentiating from *McKennon* because after-acquired evidence at issue related to conduct before hiring).

necessitate automatic disqualification by company policy.[148] Nevertheless, any allowance of this type of evidence to foreclose employer liability contravenes the Court's holding in *McKennon*.[149]

The *Anthony* opinion focused exclusively on the *McKennon* Court's seemingly narrow issue framing in order to differentiate qualification–standing, but this restrictive reading of *McKennon* ignores the Court's otherwise expansive policy language and intent.[150] While the Ninth Circuit acknowledged the broad national policy objectives of deterring discrimination and compensating victims, it summarily excluded the ADA from that mandate as expressly applying only to qualified individuals.[151] Yet the ADA, like Title VII and the ADEA, vests enforcement powers, remedies, and procedures in "any person alleging discrimination."[152] Public disclosure of TRAX's alleged discrimination via a private suit served the exact purpose *McKennon* emphasized—to expose that TRAX was unwilling or unable to comply with the ADA.[153] There is no principled reason why an ADA plaintiff should face a higher showing of qualification as compared to a Title VII or ADEA plaintiff, and it is within the Ninth Circuit's discretion to recognize this inequity and to qualify its application of the EEOC's two-part qualification test accordingly.[154]

---

148. *See Anthony*, 955 F.3d at 1127 (emphasizing contractual nature of bachelor's degree requirement); *Con-Way Freight, Inc.*, 622 F.3d at 935 (noting theft convictions automatically disqualifying per policy); *see also* Hart, *supra* note 12, at 428 (positing after-acquired evidence of misrepresentations likely unsuccessful liability defense unless disqualification policy unambiguous and nondiscretionary). One may reasonably assume that *Anaeme* would be limited to its facts. *See Anaeme*, 164 F.3d at 1280 (noting "unique and seemingly uncommon" facts of case). Further, *Anaeme* resulted in a trial and jury verdict in the district court and, notwithstanding the Tenth Circuit's analysis of qualifications on appeal, the Supreme Court has instructed that the prima facie elements are irrelevant at that advanced stage of litigation. *See id.* at 1277 (explaining jury verdict in favor of employer); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (instructing courts to focus on discrimination *vel non*).

149. *See supra* note 76 (explaining eight of ten cases *McKennon* Court considered involved application fraud).

150. *See Anthony*, 955 F.3d at 1130 (acknowledging *McKennon* limited to employment misconduct facts presented); McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357-58 (1995) (describing broad policy reasoning and recognizing private right of action critical enforcement tool).

151. *See Anthony*, 955 F.3d at 1130 (distinguishing protected classes under ADEA and ADA).

152. *See* Americans with Disabilities Act of 1990 § 107(a), 42 U.S.C. § 12117(a) (incorporating civil action allowance contained in section 706 of Title VII); Age Discrimination in Employment Act of 1967 § 7(c), 29 U.S.C. § 626(c)(1) (permitting civil action by any aggrieved individual).

153. *See McKennon*, 513 U.S. at 358-59 (describing importance of exposing discriminatory practices through private suit); *supra* notes 96-97 and accompanying text (explaining legal claim arose from TRAX's failure to engage in interactive assessment of accommodations). Further, notwithstanding the EEOC's two-part test, the ADA itself defines a qualified individual simply as one who can perform the essential functions of the position. *See supra* note 9 (providing statutory definition). In other contexts, the Ninth Circuit accepts that an incumbent employee can show qualification by demonstrating satisfactory performance. *See* Diaz v. Eagle Produce, Ltd., 521 F.3d 1201, 1207-08 (9th Cir. 2008) (looking to job performance to demonstrate qualification).

154. *See McKennon*, 513 U.S. at 357 (emphasizing singular intent of Title VII, ADEA, and ADA to eradicate discrimination); *supra* note 42 and accompanying text (tying qualification to accommodation obligation, not standing requirement); *supra* note 101 and accompanying text (describing rationale for applying two-part test only when qualification relevant to employer's adverse employment decision). Per the Ninth Circuit's law-of-the-circuit rules, the three-judge panel that heard *Anthony* could have reexamined and overturned the prior ruling

Also contrary to the Ninth Circuit's attempt to cabin *McKennon* as limited only to evidence of a superseding termination reason or a "would-have-fired" rationale, the *McKennon* Court expressly referenced numerous application-fraud cases.[155] *Anthony* merely repackages the same set of facts from *Johnson*, *Milligan-Jensen*, and *Smallwood* but shifts from the "would-have-fired" rationale inherent in a supervening termination reason argument to a "would-not-have-hired" argument.[156] Because of the timing of application fraud at the very start of an employment relationship, however, an application-fraud case collapses the "would-have-fired" and "would-not-have-hired" rationales into one indistinct theory.[157] Ultimately, both scenarios rely on after-acquired evidence to create a post hoc justification for the adverse employment action that did not exist when the action was taken, and *McKennon* expressly disallows this practice.[158]

Perhaps intuiting that this distinction therefore changes nothing, TRAX successfully reframed the facts as a lack of prima facie qualifications; in accepting this rationale, the Ninth Circuit ignored the *McKennon* opinion's clear references to qualification misrepresentations in its reasoning.[159] First, it strains credulity to believe that *McKennon* failed to consider application-fraud cases when eight of the ten cases comprising its cited circuit split involved qualification misrepresentations and only two related to misconduct.[160] Second, Justices O'Connor

---

from *Mantolete v. Bolger* based on the intervening, contradictory ruling in *McKennon*. *See supra* note 53 and accompanying text (explaining *Mantolete* facts and reasoning). *Compare* Anthony v. TRAX Int'l Corp., 955 F.3d 1123, 1128 (9th Cir. 2020) (commenting court must adhere to *Mantolete* precedent), *with* Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) (allowing subsequent panel to overturn prior circuit opinion if overruled by intervening higher authority).

155. *See, e.g.*, Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 413 (6th Cir. 1992) (allowing summary judgment based on after-acquired evidence of misrepresentations), *abrogated by McKennon*, 513 U.S. 352; Milligan-Jensen v. Mich. Tech. Univ., 975 F.2d 302, 305 (6th Cir. 1992) (holding discrimination irrelevant following discovery of application falsification); Smallwood v. United Air Lines, Inc., 728 F.2d 614, 623 (4th Cir. 1984) (accepting "would-not-have-hired" rationale based on after-acquired evidence), *abrogated by* McKennon, 513 U.S. 352; *see also McKennon*, 513 U.S. at 356, 359 (citing each case).

156. *See* Hart, *supra* note 12, at 424 (noting both approaches improperly shift attention to worthiness of plaintiff). Notably, TRAX's brief to the Ninth Circuit in *Anthony* included a Statement of Facts consisting of three paragraphs discussing Anthony's lack of qualification without ever addressing the details of her termination. *See* Brief of Appellee TRAX International Corporation, *supra* note 101, at 9-10 (recounting lack of degree, degree requirement, and qualified individual definition with passing mention of termination).

157. *See* Gregory, *supra* note 5, at 62-63 (criticizing dismissal of legitimate claims in contravention of anti-discrimination public enforcement objectives).

158. *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358-59 (1995) (stating misconduct does not render discrimination irrelevant).

159. *See Anthony*, 955 F.3d at 1134 (declining to assess TRAX's engagement in accommodation process because Anthony not otherwise qualified); *see also* Hart, *supra* note 12, at 424 (recognizing this framing amounts to legal fiction pretending entirety of employment relationship had not existed); *supra* note 57 (demonstrating how this rationale led courts to deny both disparate treatment and sexual harassment injury). So packaged, the Ninth Circuit determined that a missing credential was legally distinct from on-the-job misconduct, stating "an employer's ignorance cannot create a credential where there is none." *See Anthony*, 955 F.3d at 1130.

160. *See supra* note 76 (listing cases cited by *McKennon* Court comprising split). At least four of the cited cases specifically addressed the "would-not-have-hired" reasoning, a rationale essentially analogous to qualification–standing. *See supra* note 92 (listing cases). *Smallwood* demonstrates that the "would-not-have-hired"

and Kennedy referenced application-fraud scenarios at oral argument.[161] Third, the *McKennon* Court considered the risk that employers would be motivated to search for employee wrongdoing through abusive discovery practices "into an employee's *background* or performance on the job."[162] This language indicates that the Court anticipated, expected, and understood that its prohibition against after-acquired evidence would apply to both on-the-job misconduct, i.e., "performance," and qualifications, i.e., "background."[163]

IV. CONCLUSION

While the Ninth Circuit's restrictive interpretation of *McKennon* is not widely adopted, this Note intends to head off any future influence of the *Anthony* reasoning and protect employment discrimination claims from continuing subjugation to employment-at-will. While *McKennon* painted with broad strokes and seemingly addressed a single question, the issues involved were numerous and, arguably, inadequately articulated. This lack of clarity allowed employers to exploit gaps that permit after-acquired evidence in employment discrimination cases and to blur the lines of reasoning between otherwise distinct legal theories. *McKennon* explicitly foreclosed use of after-acquired evidence as a supervening termination reason to avert employer liability in employment discrimination claims. *Cleveland* separately resolved how courts should address inconsistent statements of disability made in discrete legal proceedings. Therefore, courts should no longer rely on *Cleveland*-style judicial estoppel cases outside of its limited context, and the Ninth Circuit was wrong to do so in *Anthony*.

What then remains is the question of whether *McKennon* applies equally to qualification–standing rationales, and this Note answers with an emphatic *yes*. After-acquired evidence of application misrepresentations may be relevant to proving an employer's stated legitimate, nondiscriminatory reason for an adverse action, but when no such reason is proffered, an employee's objective qualifications are not an independent standing requirement. The *McDonnell Douglas*

---

rationale is equivalent to the qualification–standing argument: The employees "were not qualified and would not have been hired in any event." *See Smallwood*, 728 F.2d at 618 (quoting E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 n.9 (1977)). This quotation from *East Texas Motor Freight* relied, in turn, upon the Court's rationale in *Mount Healthy*. *See E. Tex. Motor Freight Sys., Inc.*, 431 U.S. at 403 n.9 (citing seminal mixed-motive case). *McKennon* expressly disclaimed any application of *Mount Healthy* outside of the mixed-motive context. *See McKennon*, 513 U.S. at 359 (explaining *Mount Healthy* inapposite to single-motive disparate treatment claim). Therefore, *McKennon* eroded and rejected the foundation upon which the "would-not-have-hired" rationale rests. *See id.* at 360 (stating Nashville Banner could not rely upon knowledge it did not have).

161. *See* Oral Argument, *supra* note 54, at 5:02, 8:01 (asking what remedy appropriate for hypothetical non-doctor doctor or nonlawyer lawyer). Even contemporaneous critics of *McKennon* recognized that its holding would apply to qualifications under the ADA. *See* Evans & McKnight, *supra* note 13, at 260 (acknowledging *McKennon* Court rejected "would-not-have-hired" rationale).

162. *See McKennon*, 513 U.S. at 363 (dismissing oppressive or inappropriate discovery concerns).

163. *See* Smallwood v. United Air Lines, Inc., 728 F.2d 614, 618 (4th Cir. 1984) (demonstrating "would-have-fired," "would-not-have-hired," and qualification defenses indistinct), *abrogated by McKennon*, 513 U.S. 352.

evidentiary framework references qualifications only insofar as they are relevant to eliminating poor performance as a possible reason for an adverse employment action. The ADA only clumsily includes a qualification requirement in an inartful attempt to clarify when an employer is obligated to provide reasonable accommodations. In neither case are qualification requirements intended to deny liability for legitimate discrimination claims. Understandably, there is less sympathy for a plaintiff who has engaged in fraud, but both Congress and the Supreme Court have made clear that antidiscrimination laws concern greater evils whose psychological damage, societal harm, and need for deterrence will often outweigh the individual wrong.

The EEOC's long-standing, relatively unambiguous, two-part, objective qualification test requires ADA plaintiffs to make a stronger showing than the statutory qualification requirement. Due to this lack of ambiguity, the EEOC cannot rely on courts to show deference to any narrower interpretation of this test as the EEOC argued in *Anthony* and *Con-Way Freight*. In light of *Kisor v. Wilkie*, as explained in Part III of this Note, ADA plaintiffs and the EEOC should situate the qualification language of the ADA alongside Title VII and the ADEA, highlight Congress's lack of intent to create a qualification–standing requirement, and argue that *McKennon* clearly incorporated qualification–standing by its numerous references to application-fraud cases and employee background information. As the Ninth Circuit has previously recognized, rejecting a categorical qualification–standing defense requires merely "common sense and a reasonably developed sense of equity."[164]

164. *See* EEOC v. Farmer Bros. Co., 31 F.3d 891, 902 (9th Cir. 1994).