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To Bar or Not to Bar: Title I of the ADA and After-Acquired Evidence of a Plaintiff's Failure to Satisfy Job Prerequisites

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TO BAR OR NOT TO BAR: TITLE I OF THE ADA AND AFTER-ACQUIRED EVIDENCE OF A PLAINTIFF'S FAILURE TO SATISFY JOB PREREQUISITES

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ABSTRACT

Through enactment of Title I of the Americans with Disabilities Act (ADA) in 1990, Congress unequivocally resolved to prohibit discrimination on the basis of disability in the workplace. However, distortions have since created loopholes through which disability-based employment discrimination may freely slip. An enforcement regulation promulgated by the Equal Employment Opportunity Commission (EEOC) enables such circumvention of the ADA by creating an additional prima facie requirement: a plaintiff must not only be able to perform the essential functions of the position as required by the statute, but must also satisfy all job-related requirements of the position as demanded by the EEOC's 29 C.F.R. 1630.2(m). Thus, in cases where a plaintiff's failure to satisfy job prerequisites is discovered only after the alleged discrimination, 29 C.F.R. 1630.2(m) still permits (indeed, requires) dismissal. In light of the Supreme Court's rejection of after-acquired evidence as a bar to employment discrimination claims in other contexts, action must be taken to eradicate this ADA escape clause. Although the EEOC advocates abandoning its regulation in favor of the ADA's less stringent standard in certain circumstances, its proposed method usurps the applicable burden-shifting framework and sets the stage for prima facie overload on the plaintiff.

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This Note proposes a more straightforward alternative approach: legislative action should be taken to enable reversion to the ADA's singular essential functions standard in instances where a plaintiff's failure to satisfy job-related requirements (1) is discovered only after the alleged discriminatory employment action, and (2) constitutes the sole flaw in the prima facie case.

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INTRODUCTION

Our nation holds out as its fundamental premise that "*all* men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the Pursuit of Happiness."[1] President George H.W. Bush echoed this principle in his speech at the July 1990 signing ceremony for the American with Disabilities Act (ADA), as he acknowledged the prejudice that historically blocked the disabled population's access to this guarantee: "[w]ith today's signing of the landmark [ADA], every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom."[2] As President Bush alluded, this basic constitutional ethic has historically been an unfulfilled promise for disabled Americans, rather than a guaranteed reality.[3] Despite the United States' foundational declaration of equality across *all* mankind, human history tells a different, darker story, replete with exclusion and marginalization.[4] The enactment of the ADA in 1990 was a momentous move to change this with respect to disabled Americans, an express attempt to "remove the physical barriers we have created and the social barriers that we have accepted."[5]

Congress intended the ADA to serve as "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[6] Congressional findings therein recognize the historical exclusion of disabled persons from

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[1] THE DECLARATION OF INDEPENDENCE para.2 (U.S. 1776) (emphasis added).

[2] George H.W. Bush, President, United States, Remarks on the Signing of the American with Disabilities Act (July 26, 1990) (*available at* https://millercenter.org/the-presidency/presidential-speeches/july-26-1990-remarks-signing-americans-disabilities-act [https://perma.cc/HFV6-LHDX]).

[3] *Id.*; *see* Rachel Heather Hinckley, Note, *Evading Promises: The Promise of Equality Under U.S. Disability Law and How the United Nations Convention on the Rights of Persons with Disabilities Can Help*, 39 GA. J. INT'L & COMPAR. L. 185, 191 (2010).

[4] *See* Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1359 (1993).

[5] Bush, *supra* note 2.

[6] Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12101(b) (West 2009); *see also* Lisa Schlesinger, *The Social Model's Case for Inclusion: "Motivating Factor" and "But For" Standards of Proof Under the Americans with Disabilities Act and the Impact of the Social Model of Disability on Employees with Disabilities*, 35 CARDOZO L. REV. 2115, 2116 (2014).

mainstream society, noting they remain disadvantaged as a group due to longstanding segregation and purposeful, forced political powerlessness.[7] To address our society's pervasive problem of continued discrimination on the basis of disability and prohibit such activity under federal law,[8] the ADA contains five titles: Employment (Title I), Public Services (Title II), Public Accommodations (Title III), Telecommunications (Title IV), and Miscellaneous Provisions (Title V).[9]

Title I, the focus of this Note, was modeled after Title VII of the Civil Rights Act of 1964[10] and undertakes to promote equal employment opportunities for individuals with disabilities by prohibiting employment discrimination on that basis.[11] However, implementation of the ADA has since presented loopholes through which disability discrimination may slip unhindered, or at least unremedied.[12] Specifically, a victim of egregious discrimination suing under the ADA may find their suit defeated with zero consideration of the employer-defendant's alleged discriminatory action, if the defendant manages to uncover, post hoc, evidence of the plaintiff's failure to fulfill job-related requirements.[13] While the Supreme Court held that "after-acquired" evidence could only limit damages and not bar all relief in employment discrimination suits filed under the Age Discrimination in Employment Act (ADEA),[14] federal circuits currently disagree as to whether it may entirely defeat, on prima facie grounds, a suit filed under the ADA.[15]

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[7] § 12101(a).

[8] *Id.*

[9] ADA NAT'L NETWORK, *What is the Americans with Disabilities Act (ADA)?*, https://adata.org/learn-about-ada [https://perma.cc/4U57-BRQA] (last updated July 2021).

[10] Jamie L. Ireland & Richard Bales, *Title II of the Americans with Disabilities Act of 1990 and Its Prohibition of Employment Discrimination*, 28 N. ILL. U. L. REV. 183, 188 (2008).

[11] *Id.*; 42 U.S.C.A. §§ 12101(a)(3), (8).

[12] *See* Melissa Hart, *Retaliatory Litigation Tactics: The Chilling Effects of "After-Acquired Evidence"*, 40 ARIZ. ST. L.J. 401, 401–02.

[13] Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1130 (9th Cir. 2020) (holding that after-acquired evidence of an employee's lack of qualification permits summary judgement for employer-defendant without consideration of "whether there was a legitimate, nondiscriminatory reason for the plaintiff's discharge.").

[14] McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 362–63 (1995).

[15] *Compare Anthony*, 955 F.3d at 1131, *with* Rooney v. Koch Air, LLC, 410 F.3d 376, 382 (7th Cir. 2005) (holding that after-acquired evidence of an employee's lack of qualification merely limits potentially recoverable damages).

With regard to the "qualified individual" element of an ADA prima facie suit, the Equal Employment Opportunity Commission (EEOC) enforcement standard requires that a plaintiff satisfy job-related requirements.[16] However, under the less stringent definition in the ADA itself, a plaintiff must only be able to perform the "essential functions" of the position in order to be qualified.[17] So, in cases where a plaintiff fails to satisfy job prerequisites (and this failure is discovered after the alleged discrimination), application of the ADA essential functions standard would potentially allow the suit to continue unbarred, where the more stringent EEOC regulation would operate to enable dismissal.[18]

Part I will provide a brief overview of the legal history of disability in the United States, with a focus on the enactment of the ADA and its underlying policy goals.[19] Part II will examine the ADA in practice by reviewing the burden-shifting framework of an ADA suit, the "qualified individual" limitation (and corresponding essential functions standard), and the EEOC's distinct enforcement standard for the same.[20] Part III will review the Supreme Court's decision in *McKennon v. Nashville Banner Publishing Co.* and discuss the circuit disagreement over whether after-acquired evidence of an employee's lack of job qualification is fatal to an employee's ability to establish a prima facie case under the ADA (in other words, whether to extend *McKennon*'s ADEA reasoning to ADA cases).[21] Part IV argues *McKennon* should apply to ADA cases, but rejects the EEOC's proffered mechanism, which posits that reversion to the essential functions standard should depend on a relevance determination made prematurely at the prima facie stage;[22] according to the EEOC, reversion is only proper where the qualifications at issue were not relevant to the defendant's challenged action.[23] Part IV instead proposes the alternative "sole glitch" method, arguing legislative action should be

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[16] *See* 29 C.F.R. § 1630.2(m) (2020).

[17] *See* 42 U.S.C.A. § 12111(8) (West 2009).

[18] *See, e.g.*, *Anthony*, 955 F.3d at 1130.

[19] *See infra* Part I.

[20] *See infra* Part II; *see also* 29 C.F.R. § 1630.2(m).

[21] *See infra* Part III.

[22] *See infra* Part IV.

[23] Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff-Appellant and in Favor of Reversal at 23–24, Anthony v. Trax Int'l Corp., 955 F.3d 1123 (9th Cir. 2020) (No. 18-15662) [hereinafter Brief of the EEOC].

taken to enable reversion of the qualified individual inquiry to the ADA's less stringent essential functions standard in instances where a plaintiff's failure to satisfy job-related requirements (1) is discovered only after the alleged discriminatory employment action, and (2) constitutes the sole flaw in the plaintiff's prima facie case.[24]

I. DISABILITY IN AMERICAN LAW

The legal sphere has long been an environment hostile to the disabled community,[25] and Western society's general virulence toward people with disabilities stretches back into history.[26] Sovereign policies historically reflected inimical cultural attitudes of fear and derision, permitting (and empowering) targeted prejudice.[27] During the American colonial period, the colonies went so far as to deport disabled individuals on the basis of their supposed inability to succeed on the frontier.[28] Society thus used various tools to exclude individuals with disabilities from the mainstream, later including institutional homes and sheer (legal) discrimination.[29] So, stigmatized as inferior and less than human, the disabled population endured continual intolerance as civilization set them apart and below.[30] Indeed, thanks to abundant documentation in scholarly literature, "[t]he pervasiveness and perniciousness" of disability-based discrimination is beyond question.[31]

"Rehabilitation" in lieu of sheer rejection began to take shape in America during the nineteenth century, as states established various rehabilitative programs with the assistance and sponsorship of charitable organizations such as the Salvation Army and the Red Cross.[32] Most of these focused on vocational

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[24] *See infra* Part IV.

[25] *See* Hinckley, s*upra* note 3, at 192; Drimmer, *supra* note 4, at 1359–60.

[26] Barbara P. Ianacone, *Historical Overview: From Charity to Rights*, 50 TEMP. L.Q. 953, 953 nn.2–3 (1977).

[27] *See* Hinckley, *supra* note 3, at 192.

[28] Anne E. Beaumont, Note, *This Estoppel Has Got to Stop: Judicial Estoppel and the Americans with Disabilities Act*, 71 N.Y.U. L. REV. 1529, 1536 (1996).

[29] *See* Hinckley, *supra* note 3, at 191; Drimmer, *supra* note 4, at 1343.

[30] *See* Drimmer, *supra* note 4, at 1342–43.

[31] 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, 415 (1997).

[32] *See* Drimmer, *supra* note 4, at 1361.

rehabilitation, which trained individuals with disabilities in work-related skills with the goal of facilitating entry into the workforce.[33] The Industrial Revolution and subsequent rise in workers' compensation laws furthered this productivity-focused model in the early twentieth century.[34] However, capitalist society's fixation on production and generating maximum yields predictably gave rise to animosity toward disabled workers, who were prejudicially viewed as more inefficient.[35] The simultaneous popularity of Social Darwinism manipulated modern theories of natural selection to justify this animus.[36]

Thus, despite implementation of vocational rehabilitation programs, social antipathy toward individuals with disabilities remained high in the early twentieth century.[37] Government programs to aid disabled military veterans following World War I[38] eventually led to Woodrow Wilson signing the first federal civilian vocational rehabilitation act in 1920, which encompassed "congenital" disabilities.[39] Subsequent legislation focused federal disability policy on welfare benefits,[40] and it was not until the 1960s that disability began to emerge as a civil rights issue.[41]

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[33] *See id.*

[34] *See id.* at 1362, 1366.

[35] *See id.* at 1368 n.121 ("The pervasiveness of the belief that people who are unable to produce within the capitalist system weaken the nation cannot be overstated.").

[36] *See* Beaumont, *supra* note 28, at 1537; Ianacone, *supra* note 26, at 954 n.10 ("After Darwin's publication of THE ORIGIN OF SPECIES in 1859, his theories of natural selection and survival of the fittest were distorted to justify contempt of the economically, physically, and mentally disadvantaged.").

[37] *See* Beaumont, *supra* note 28, at 1537.

[38] *See id.*

[39] *See* Drimmer, *supra* note 4, at 1364–65. Criticism of the Vocational Rehabilitation Act of 1920 centers on its prejudice, both in limiting rehabilitation assistance to individuals with disabilities deemed "curable" and in viewing the services it provided as "charitable" rather than based in civil rights. *Id.* at 1365–66.

[40] Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 10–11 (2004) ("With the creation of the Aid to the Permanently and Totally Disabled (APTD) program in 1950 and the Social Security Disability Insurance (SSDI) program in 1956 ... welfare benefits became the central component of federal disability policy.").

[41] *See* Hinckley, *supra* note 3, at 191–92.

The United States government largely declined to recognize individuals with disabilities as equally deserving of civil rights, protections, and opportunities until the second half of the twentieth century.[42] The impetus for change was the Civil Rights movement, which brought issues of inequality and prejudice to the forefront of public consciousness.[43] Confronted with social conflict on all sides,[44] societal perspective began to change and gradually granted prevalence to the view that all Americans were entitled to equal "access to public life."[45] Americans with disabilities simultaneously began to engage in activism, demanding the equal protection and social equality historically denied them.[46] This advocacy became what is known as the disability rights movement, characterized by a new school of thought, "that it is society's myths, fears, and stereotypes that most make being disabled difficult."[47] On the civil liberties front, the disability rights movement remained less visible than its counterparts,[48] due in part to the ubiquity of its community.[49] Nonetheless, the aftershock of the 1960s was widespread; the public had come to view "equal access to society as a civil right, and the federal government as more than a passive player in enforcing that right."[50]

Congress echoed this change in perspective with legislation seeking to protect the rights of African Americans, particularly the Civil Rights Act of 1964 (CRA), which protected racial and ethnic minorities from discrimination in employment, education, and public accommodations.[51] The disability rights movement saw

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[42] *See id.*; Drimmer, *supra* note 4, at 1343.

[43] *See* Hinckley, *supra* note 3, at 191–92; *see also* Drimmer, *supra* note 4, at 1375–76.

[44] Beyond the Civil Rights movement, the nation was also exposed to the feminist movement and the student antiwar movement. *See* Drimmer, *supra* note 4, at 1375–76.

[45] *See id.*

[46] *See id.*

[47] JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 5 (1994).

[48] *See* Hinckley, *supra* note 3, at 192.

[49] *See* SHAPIRO, *supra* note 47, at 126. Because it "spanned a splintered universe" of hundreds of different groups, the movement struggled to agree on immediate issues and objectives and occasionally dealt with direct in-house conflict. *Id.*

[50] *See* Drimmer, *supra* note 4, at 1375–76.

[51] *See id.* Other legislation included the Voting Rights Act of 1965, "which guaranteed access to political participation[,] and the Civil Rights Act of 1968, which guaranteed access to housing." *Id.* at 1376.

similar potential[52] and, harnessing this momentum, formed activist groups at local levels.[53] Congress responded with legislation like the Architectural Barriers Act of 1968 (ABA), which recognized the right of the disabled population to have access to public buildings.[54] However, the ABA applied to only federal government buildings and failed to actually recognize the existence of any form of disability discrimination.[55] Moreover, despite implicitly acknowledging that society tended to exclude people with disabilities via the construction of public facilities,[56] the ABA did not include any enforcement provisions.[57] So, while the ABA was not an insignificant step toward equality and guaranteeing access,[58] its actual impact was minimal.[59]

Congress continued to take gradual steps into the 1970s, including enactment of the Education of the Handicapped Act,[60] but disability rights remained on a separate table from civil rights until the Rehabilitation Act of 1973 (RA),[61] which was the first federal law to prohibit discrimination against people with disabilities.[62] The RA did so only subtly, holding out as its purpose the creation of national employment-focused rehabilitation programs for disabled Americans.[63] However, embedded in the RA was Section 504, the civil liberty nucleus which prohibited

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[52] *See id.*; *see also* SHAPIRO, *supra* note 47, at 41 (analogizing the 1962 integration of the University of Mississippi with the concurrent attendance of a quadriplegic student at the University of California at Berkeley).

[53] *See* Drimmer, *supra* note 4, at 1376.

[54] *See id.* at 1377–78.

[55] *See id.*

[56] *See id.*

[57] *See id.*

[58] By recognizing that individuals with disabilities have the right to enter public buildings, the ABA both acknowledged the historical oversight in this regard and legitimized the federal government's responsibility to guarantee this access. *See id.*

[59] The compliance of federal agencies was voluntary and sporadic due to the lack of enforcement provisions. *See id.* at 1378.

[60] *See* Melanie D. Winegar, Note, *Big Talk, Broken Promises: How Title I of the Americans with Disabilities Act Failed Disabled Workers*, 34 HOFSTRA L. REV. 1267, 1300 (2006).

[61] *See id.*

[62] *See* Drimmer, *supra* note 4, at 1381.

[63] *See* Beaumont, *supra* note 28, at 1539.

discrimination against "otherwise qualified individuals" on the basis of disability in federally funded programs and activities.[64]

On its face, Section 504 constituted a major policy shift by elevating disability rights as civil rights, deserving of constitutional protection instead of solely financial assistance or rehabilitation.[65] Notably, the wording of Section 504 directly corresponds with Title VI of the CRA;[66] enforcement also fell to the EEOC, the agency responsible for enforcing civil rights laws, including the CRA.[67] Moreover, the new RA implicitly acknowledged prejudice toward disability as the underlying issue.[68] However, Section 504 was "little-noticed and unsought-after" during the legislative process.[69] The Department of Health, Education and Welfare (HEW) even stalled the final regulations implementing section 504 until compelled to approve them by a twenty-five-day sit-in at its San Francisco office.[70] This standoff served as a beacon for unified political activism by the disability rights movement in the United States,[71] calling national attention to its conviction and power.[72]

After Section 504, more expansive legislation soon came to pass.[73] Beginning in 1975 with what was initially known as the "Education for All Handicapped Children Act,"[74] Congress

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[64] *See id.*; Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1976) (codified at 29 U.S.C. § 794(a)).

[65] *See* Beaumont, *supra* note 28, at 1539.

[66] *See* Winegar, *supra* note 60, at 1300–01.

[67] *See id.*

[68] *See* Drimmer, *supra* note 4, at 1384 (stating the RA "helps to counter the discrimination and prejudice that has dominated society's treatment of disability.").

[69] *See* Beaumont, *supra* note 28, at 1539; *see also* SHAPIRO, *supra* note 47, at 65 ("Section 504 of the Rehabilitation Act of 1973 was no more than a legislative afterthought.").

[70] *See* SHAPIRO, *supra* note 47, at 66–69.

[71] *See* Beaumont, *supra* note 28, at 1539–40 (describing the sit-in as "one of the first instances" of such large-scale action by people with disabilities).

[72] *See* SHAPIRO, *supra* note 47, at 66–68 (describing the sit-in as the "political coming of age of the disability rights movement").

[73] *See* Beaumont, *supra* note 28, at 1540.

[74] Pub. L. No. 94-142, § (1), 89 Stat. 773, 775 (1975) (guaranteeing public education to children with disabilities).

continued to incorporate disability rights as civil rights.[75] This included creating various federal programs geared toward developing employment opportunities, as well as amending existing legislation.[76] Despite these developments, it was not until nearly two decades later that the government addressed disability discrimination on a more comprehensive scale.[77]

Limited employment opportunities have historically been available to people with disabilities due to "inadequate education and training programs, limited access to public transportation, and employer misconceptions about ... safety and reliability."[78] Thus, the employed disabled population has traditionally been relegated to menial positions pursuant to society's prejudiced equation of disability with inferiority.[79] The RA was a crucial step in acknowledging this animus in the context of employment and helped pave the way forward to true equal participation in society by elevating disability rights to civil liberty protection.[80] Nonetheless, the RA "suffered from a major omission" in its scope:[81] it prohibited discrimination against individuals with disabilities throughout the federal government (and various federally funded organizations),[82] but did not apply to the private sector.[83] Accordingly, the RA left private sector employees with disabilities unprotected.[84]

This omission was brought to the attention of the executive branch in the 1980s, at which point President Reagan appointed the National Council of the Handicapped to advocate for policies benefiting the disabled community.[85] In 1986, the Council called

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[75] *See* Beaumont, *supra* note 28, at 1540 ("In 1986, the Air Carrier Access Act guaranteed access to commercial airline transportation for people with disabilities ....").

[76] *See id.*

[77] *See* Hinckley, *supra* note 3, at 193; Beaumont, *supra* note 28, at 1540.

[78] *See* Ianacone, *supra* note 26, at 959.

[79] *See id.*

[80] *See* Winegar, *supra* note 60, at 1269.

[81] *Id.*

[82] *See* Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1976) (codified at 29 U.S.C. § 794(a)); Beaumont, *supra* note 28, at 1539.

[83] *See* Winegar, *supra* note 60, at 1269.

[84] *See id.*

[85] *See id.* at 1269–70. The Council became an independent federal agency in 1984 after President Reagan signed the Rehabilitation Act Amendments of 1984.

for the enactment of a comprehensive equal opportunity law applying to people with disabilities, prefacing the initial drafts of the Americans with Disabilities Act (ADA) in 1988.[86] The ADA eventually passed Congress with overwhelming bipartisan support[87] and was signed into law on July 26, 1990, by President George H.W. Bush, who proclaimed his pride in how the ADA would finally allow disabled individuals to "blend fully and equally into the rich mosaic of the American mainstream."[88]

The ADA prohibits covered employers from "discriminat[ing] against a qualified individual on the basis of disability" with regard to various employment matters, like hiring, compensation, and promotion.[89] ADA coverage extends to employers with fifteen or more employees,[90] thus reaching further than the RA and prohibiting disability discrimination in the private as well as the public sector.[91] Under the ADA, employers cannot employ criteria or job-related standards that screen out (or tend to screen out) individuals based on disabilities, unless the test is both related to the specific position and consistent with business necessity.[92] Moreover, employers are required to make reasonable accommodations for otherwise qualified individuals, unless doing so would result in an undue hardship on the employer.[93] The statute clarifies that reasonable accommodations encompass measures like facility accessibility and job restructuring;[94] undue hardship is a holistic inquiry, satisfied only when the proposed accommodation would impose significant difficulty or expense on the employer.[95]

The ADA Amendments Act of 2008 (ADAAA) expanded the ADA's definition of disability in response to case law narrowly

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See NAT'L COUNCIL ON DISABILITY, *National Council on Disability celebrates 40 years of advancing federal disability policy* (Nov. 6, 2018), https://ncd.gov/newsroom/2018/NCD-celebrates-40-years [https://perma.cc/4UAQ-EFXS].

[86] *See* Winegar, *supra* note 60, at 1270.

[87] *See id.* at 1270–71. In 1990, the final version was passed by 377 to 28 in the House on July 12 and by 91 to 6 in the Senate on July 13. *Id.*

[88] Bush, *supra* note 2.

[89] Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12112(a) (West 2009).

[90] *Id.* § 12111(5)(A).

[91] *See* Hinckley, *supra* note 3, at 187.

[92] § 12112 (b)(6).

[93] *Id.* § 12112 (b)(5).

[94] *Id.* § 12111(9).

[95] *Id.* § 12111(10).

construing and constraining the statute's reach.[96] The ADAAA represented permanence, enabling broader protection and "solidifying the ADA's status alongside [the CRA] as a core civil rights law."[97] This process of setting the ADA on par with the CRA can be traced to the ADA itself, as Congress's findings explicitly acknowledge both the contemptible history and ongoing practice of disability-based discrimination.[98] Indeed, the ADA's purpose statement is unequivocal; Congress intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[99]

In the employment context, Title I of the ADA is modeled after Title VII of the CRA[100] to both prevent discrimination against and increase the opportunities available to individuals with disabilities.[101] The ADA has seen significant progress in this regard, although some argue the need for protection against disability-based employment discrimination remains acute.[102] With regard to enforcement, Congress authorized the EEOC to promulgate regulations to implement Title I.[103] Employees who bring employment discrimination suits may be entitled to various forms of legal relief, including punitive and compensatory damages.[104] However, a plaintiff suing under Title I of the ADA carries a heavier burden than mere allegation.[105]

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[96] *See generally* Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. §§ 12101–12113).

[97] Michelle A. Travis, *Disqualifying Universality under the Americans with Disabilities Act Amendments Act*, 2015 MICH. ST. L. REV. 1689, 1693 (2015).

[98] § 12101(a).

[99] *Id.* § 12101(b)(1).

[100] *See* Ireland & Bales, *supra* note 10, at 188.

[101] § 12101(a)(8).

[102] "Prior to the ADA, sixty-six percent of disabled individuals of working age did not have a job but wanted to work. As of the twentieth anniversary of the ADA, forty-one percent of disabled individuals still report difficulty finding or keeping a job." Schlesinger, *supra* note 6, at 2116. *See also* Winegar, *supra* note 60, at 1267–68.

[103] *See* Ireland & Bales, *supra* note 10, at 189.

[104] *See id.* at 188; David D. Kadue & William J. Dritsas, *When What You Didn't Know Can Help You—Employer's Use of After-Acquired Evidence of Employee Misconduct to Defend Wrongful Discharge Claims*, 27 BEVERLY HILLS BAR ASS'N J. 117, 126 (1993).

[105] *See* Douglas A. Blair, *Employees Suffering from Bipolar Disorder or Clinical Depression: Fighting an Uphill Battle for Protection under Title I of the Americans with Disabilities Act*, 29 SETON HALL L. REV. 1347, 1362 (1999).

II. THE ADA PLAINTIFF

In *McDonnell Douglas Corp. v. Green*, the Supreme Court set forth a burden-shifting analysis governing the standard of proof in cases filed under Title VII of the CRA.[106] This analysis (known as the *McDonnell Douglas* framework) requires the complainant carry the initial burden of establishing a prima facie case of discrimination under the statute.[107] After the plaintiff achieves this, a presumption of unlawful discrimination exists;[108] the burden then shifts to the defendant-employer "to articulate some legitimate, nondiscriminatory reason for [its] actions."[109] That is, the employer must produce sufficient evidence that would support a finding that the employment action was not caused by unlawful discrimination.[110] If the employer successfully meets this burden of production and rebuts the presumption of discrimination created by the plaintiff's prima facie case, the plaintiff resumes the ultimate burden of proof and persuasion.[111]

Although the *McDonnell Douglas* framework originated in the context of employment discrimination claims filed under Title VII of the CRA, courts began applying it to other antidiscrimination statutes, including the ADA[112] (specifically in instances where the plaintiff lacks direct evidence of discriminatory intent).[113] Despite some debate over the framework's analytical value, it remains consistently relied upon by federal district courts at the pretrial motion stage.[114] Consequently, under the framework, an ADA plaintiff must satisfy the elements of a prima facie case in order to defeat a defendant's motion for summary judgment.[115] If the court finds the plaintiff failed to do so, then summary judgment may be granted without the employer being required to

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[106] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973).

[107] *Id.* at 802.

[108] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993).

[109] *McDonnell Douglas Corp.*, 411 U.S. at 802.

[110] *St. Mary's Honor Ctr.*, 509 U.S. at 507.

[111] *Id.*

[112] *See* Blair, *supra* note 105, at 1362 n.83; *see, e.g.*, Pouncy v. Vulcan Materials Co., 920 F. Supp. 1566, 1579 (N.D. Ala. 1996).

[113] Rooney v. Koch Air, LLC, 410 F.3d 376, 380 (7th Cir. 2005).

[114] *See* Travis, *supra* note 97, at 1740.

[115] *Rooney*, 410 F.3d at 380–81.

formulate a legitimate, nondiscriminatory reason for the employment action.[116] The ADA-specific prima facie requirements are somewhat jurisdiction-dependent, but a plaintiff will generally need to establish that they: (1) are "disabled" under the definition of the statute; (2) are a "qualified individual"; and (3) suffered discrimination (in the form of adverse employment action) on the basis of their disability.[117]

The ADA defines "disability" as either an impairment that substantially limits one or more of an individual's life activities, a record of such an impairment, or having been regarded as having such an impairment (be it actual or merely perceived).[118] With regard to being a "qualified individual," the requirements become more convoluted.[119] The ADA explicitly defines a qualified individual as one "who, with or without reasonable accommodation, can perform the essential functions of the employment position."[120] The statute then clarifies that determining the essential functions of a particular position involves considering the employer's judgment, like the official description of the position.[121] This essential functions component was implemented to focus the reasonable accommodation determination on the important aspects of the position.[122]

However, the EEOC subsequently promulgated a regulation expanding the ADA's foundational, straightforward "qualified" definition.[123] 29 C.F.R. § 1630.2(m) states that a disabled individual is only qualified under the ADA if they "satisf[y] the requisite skill, experience, education and other job-related requirements of the employment position ... and, with or without reasonable accommodation, can perform the essential functions of such position."[124] Thus, the EEOC set forth a new two-step inquiry for the ADA qualified individual element: courts first determine whether the individual satisfied the *prerequisites* of the job, and second consider whether the individual can perform the essential functions

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[116] Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1130 (9th Cir. 2020).
[117] *See* Blair, *supra* note 105, at 1362.
[118] 42 U.S.C.A. §§ 12102(1), (3) (West 2009).
[119] *See infra* notes 123–25 and accompanying text.
[120] § 12111(8).
[121] *Id.*
[122] *See* Travis, *supra* note 97, at 1738.
[123] Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1127 (9th Cir. 2020).
[124] 29 C.F.R. § 1630.2(m) (2020).

of the job, with or without reasonable accommodation.[125] Because Congress authorized the EEOC to promulgate "legislative regulations" for Title I of the ADA, courts defer to the agency's regulations so long as they are reasonable.[126] So, a plaintiff's inability to satisfy either prong of the EEOC two-step qualified individual inquiry means a failure to establish a prima facie case.[127]

Some scholars argue that post-ADAAA case law demonstrates that the qualification inquiry has become a "gate-keeping mechanism to avoid the difficult questions of accommodation and full recognition of disability civil rights."[128] Although the ADAAA modified and expanded the definition of disability,[129] it left the qualified individual element untouched.[130] And whereas pre-ADAAA litigation saw cases being dismissed on disability status grounds, post-ADAAA opinions suddenly put a spotlight on the qualification element of a prima facie case.[131] An empirical analysis reviewing all reported federal district court summary judgment decisions in ADA cases from 2010 to 2013 revealed that employers responded to the ADAAA by "shifting their asserted grounds for seeking summary judgement" to challenge the qualifications rather than disabled status of the litigant employee.[132] Moreover, this new "disqualification" strategy was effective: the employer summary judgment success rate rose from 47.9 percent pre-ADAAA to 69.7 percent post-ADAAA.[133]

This suggests that while the ADAAA succeeded in making it more difficult for an employer to challenge an ADA suit based on the employee's disability status, employers simply redirected their attention to the employee's qualifications.[134] Scholars point out that this new preferred defense strategy is particularly problematic in

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[125] *Id.*; *see Anthony*, 955 F.3d at 1127–28.

[126] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *What You Should Know: EEOC Regulations, Subregulatory Guidance, and Other Resource Documents* (May 5, 2016), https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-regulations-subregulatory-guidance-and-other-resource [https://perma.cc/VRS3-LNVC].

[127] *See* Blair, *supra* note 105, at 1362–63; *Anthony*, 955 F.3d at 1128.

[128] Travis, *supra* note 97, at 1695.

[129] *See id.* at 1693–94.

[130] *See id.* at 1707.

[131] *See id.* at 1710–11.

[132] *Id.* at 1704–05.

[133] *See id.* at 1705–06.

[134] Travis, *supra* note 97, at 1695.

that an employee's qualified individual status is at least partially dependent on the employer's own interpretation; the two qualified individual evidentiary sources mentioned in the ADA are the employer's judgment and written job description, given nearly dispositive weight by many courts.[135] As a result, employers are able to appropriate control of the ADA's qualified individual requirement and enjoy judicial deference toward their own determination of whether the opposing party is qualified.[136] Employers can thusly exploit the qualified inquiry far beyond its original "circumscribed role of defining the boundary of an employer's accommodation mandate."[137] This new battle strategy gives rise to a another issue: to what extent can employers utilize evidence of unfulfilled qualifications to thwart an employee's prima facie case, when the deficiency is discovered only *after* the alleged discrimination?

III. AFTER-ACQUIRED EVIDENCE OF AN ADA PLAINTIFF'S LACK OF QUALIFICATION

A. After-Acquired Evidence in ADEA Cases: McKennon v. Nashville Banner Publishing Co.

The doctrine of after-acquired evidence appeared regularly in employment discrimination litigation of the 1980s,[138] as courts came to accept employer arguments that a plaintiff could not legally be a victim of discrimination when their late-discovered conduct would have resulted in termination regardless.[139] As used by courts, the doctrine honed in on prior employee misconduct and acted as a complete bar to liability.[140] This made it a potent weapon for employer-defendants: "it was a goldmine or a godsend. All you have to do is take an employee and find out something that they have done wrong, some misconduct that you never knew about and, boom, there goes their civil rights claim."[141] However, some

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[135] *See id.* at 1710.

[136] *See id.*

[137] *Id.*

[138] *See* Hart, *supra* note 12, at 405–06.

[139] *See id.*

[140] *See id.* at 406.

[141] *Id.* (Audio script file: All Things Considered, NAT'L PUB. RADIO (Jan. 23, 1995) (available in LexisNexis Library, Script File) (transcript of Michael Terry,

courts declined to use after-acquired evidence as a complete bar to liability, concerned that a plaintiff's prior conduct could essentially enable an employer to discriminate without punishment.[142]

The United States Supreme Court confronted this dispute in 1995 with *McKennon v. Nashville Banner Publishing Co.*, an employment discrimination suit filed under the Age Discrimination in Employment Act of 1967 (ADEA).[143] Plaintiff Christine McKennon worked at Nashville Banner for thirty years before losing her job in a force reduction plan, which McKennon alleged was actually discrimination based on her age.[144] Banner deposed McKennon in the course of the lawsuit and discovered she had removed several confidential documents from the office during her employment.[145] Such misconduct violated McKennon's terms of employment and, had the company been aware of it, would have resulted in her immediate discharge.[146] At the pretrial motion stage, Banner conceded its discrimination against McKennon, but pointed to the new, after-acquired evidence of her misconduct as a bar to liability.[147] The trial court granted Banner's motion for summary judgment and denied all relief, and the U.S. Court of Appeals for the Sixth Circuit affirmed.[148]

The Supreme Court reversed and held that after-acquired evidence of wrongdoing which would have resulted in discharge did not completely bar a plaintiff-employee from obtaining relief under the ADEA.[149] The Court found that an employment action violative of the ADEA (or assumed to be so) could not be disregarded or rendered irrelevant simply by late-discovered evidence of an employee's wrongdoing, even assuming the misconduct was grave enough to have resulted in discharge.[150] In its analysis, the Court walked through the objectives of the ADEA as a workplace

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attorney for Christine McKennon, relating a statement made by a management lawyer)).

[142] *See id.* at 407.

[143] *See id.*; McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 354 (1995).

[144] *McKennon*, 513 U.S. at 354–55.

[145] *Id.* at 355.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.* at 356.

[150] *Id.* at 356–57.

antidiscrimination statute, noting it reflected Title VII in both substance and purpose.[151] That is, the *McKennon* Court emphasized that the goal of these laws encompassed deterrence as well as compensation: "Congress designed the remedial measures in these statutes to serve as a 'spur or catalyst' to cause employers 'to self-examine ... and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination."[152] As such, the Court reasoned it would contradict this scheme to allow after-acquired evidence of employee wrongdoing to completely bar a claim alleging an employer's violation of the ADEA.[153]

With regard to how the newly discovered misconduct may nonetheless alter the available relief, the Court rejected the strict "unclean hands" argument[154] and recognized that an employee's ADEA suit served an important public purpose (here, vindicating the national policy against discrimination in employment).[155] Thus the Court reasoned that the limits of remedial relief in after-discovered evidence cases should not be categorical, but should instead be dealt with on a case-by-case basis to adjust for varying facts and equitable considerations.[156] So, *McKennon* left to the courts the job of working through "the duality between the legitimate interests of the employer and the important claims of the employee who invokes the national employment policy mandated by the Act."[157]

McKennon demonstrates that after-acquired evidence of employee transgressions cannot necessarily bar all relief, at least in ADEA cases.[158] But how does this approach apply to non-ADEA antidiscrimination employment laws? A split in opinion currently exists between federal circuit courts of appeals over whether after-discovered evidence of an employee's lack of job qualification may

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[151] *Id.* at 357–58.

[152] *Id.* at 358 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975)).

[153] *Id.*

[154] The *McKennon* Court describes the doctrine of unclean hands as "[e]quity's maxim that a suitor who engaged in his own reprehensible conduct in the course of the transaction at issue must be denied equitable relief." *Id.* at 360.

[155] *Id.* at 358, 360.

[156] *Id.* at 361.

[157] *Id.*

[158] *Id.*; *see* Hart, *supra* note 12, at 407.

be used to entirely defeat a suit filed under the ADA on prima facie grounds, or whether it may only limit available relief.[159]

B. The Seventh Circuit

The Seventh Circuit found *McKennon*'s reasoning applicable to ADA claims in the 2005 case *Rooney v. Koch Air*, where it stated that after-acquired evidence of an employee's lack of qualification should merely limit potentially recoverable damages.[160] Plaintiff Daniel Rooney worked as an Assistant Customer Assurance Manager for defendant Koch Air.[161] Part of his position required job-site visits and, after suffering back injuries, Rooney refused to perform this duty despite being medically cleared to do so; Rooney then rejected an alternative (lower-paid) position.[162] During discovery, Koch Air learned Rooney had not possessed a valid driver's license during his employment, despite the company requiring he have one (as his job involved driving company vehicles).[163] At the pretrial motion stage, the district court granted Koch Air's motion for summary judgment, but specifically focused on Rooney's failure to satisfy the fourth element of the jurisdiction's ADA prima facie case, which required that similarly situated employees received more favorable treatment.[164]

The Seventh Circuit affirmed on appeal, but by finding Rooney failed to satisfy the disabled individual element of his prima facie case.[165] Nonetheless, the Seventh Circuit also ventured into the qualification element of Rooney's ADA claim.[166] Despite noting Rooney failed the essential functions prong regardless due to his inability to perform the job-site visits,[167] the court went on to explain that the after-acquired evidence of his failure to fulfill a job-related requirement (in other words, his lack of a valid driver's

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[159] *Compare* Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1131 (9th Cir. 2020), *with* Rooney v. Koch Air, LLC, 410 F.3d 376, 382 (7th Cir. 2005).

[160] *Rooney*, 410 F.3d at 382.

[161] *Id.* at 378–79.

[162] *Id.* at 379–80.

[163] *Id.* at 382.

[164] *Id.* at 381.

[165] *Id.* at 381–82.

[166] *Id.* at 382.

[167] *Id.*

license) would not alone have barred all relief.[168] The Seventh Circuit explicitly found "no distinction ... between an age discrimination claim like the one in *McKennon* and an ADA claim," and therefore reasoned that a "late revelation" of a plaintiff's failure to fulfill job prerequisites would merely limit recoverable damages.[169]

C. The Ninth Circuit

In a recent 2020 case, *Anthony v. Trax International Corp.*, the Ninth Circuit disagreed, instead finding that after-acquired evidence of an ADA plaintiff-employee's lack of qualification meant a failed prima facie case which could completely bar relief (by permitting summary judgment for the employer-defendant).[170] Plaintiff Sunny Anthony worked for defendant Trax as a Technical Writer, a position requiring a bachelor's degree in English, journalism, or a related field.[171] Anthony suffered from post-traumatic stress disorder and consequently missed periods of work under the Family and Medical Leave Act (FMLA);[172] she was fired when her FMLA leave expired before she submitted a release form medically clearing her for return to her position.[173] Anthony filed suit under the ADA and alleged she was discriminatorily discharged, submitting evidence she would have been eligible for rehire in alternative support positions.[174] During litigation, Trax discovered that Anthony lacked the bachelor's degree required for the Technical Writer position, despite her employment application representing otherwise.[175] The district court granted Trax's motion for summary judgment in light of this after-acquired evidence.[176]

On appeal to the Ninth Circuit, the EEOC filed an *amicus curiae* brief in support of Anthony, supporting the Seventh Circuit's

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[168] *Id.*
[169] *Id.*
[170] Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1134 (9th Cir. 2020).
[171] *Id.* at 1126.
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.* at 1126–27.
[176] *Id.* at 1127.

reading of *McKennon* as meaning after-acquired evidence of an employee's lack of qualification could "at most, ... limit the applicable relief," instead of completely negating an employer's potential liability for disability discrimination.[177] The EEOC cited both *McKennon* and *Rooney* for support, emphasizing their compatibility with the underlying enforcement objectives of the ADA—deterrence and compensation.[178] As amicus, the EEOC made an interesting argument: the two-step qualification standard promulgated in its own regulation (additionally requiring a plaintiff to satisfy the job-related requirements of the position) should apply only when the particular qualifications are *relevant* to the employer's challenged decision-making.[179] Otherwise, the EEOC argued, the prima facie requirements in after-acquired evidence cases like *Anthony* should revert to the ADA's essential functions standard.[180]

Nonetheless, the Ninth Circuit affirmed using the EEOC's standard two-step inquiry, finding Anthony was not qualified due to her failure to satisfy the position's requirement of a bachelor's degree.[181] The court rejected the plaintiff's argument that this two-step qualified individual test be limited to facts known by the employer at the time of the employment decision, instead reasoning that an employee's objective possession of the requisite qualification is the only relevant fact at that time.[182] According to the court, an employer's subjective knowledge of such qualification (or lack thereof) at the time of the employment decision has "no bearing" on the employee's status as a qualified individual under the ADA.[183] Moreover, the Ninth Circuit noted that its precedent clearly embraced the two-step inquiry as the ADA qualification standard, and pointedly rejected the EEOC's amicus argument: "[T]o the extent the EEOC wants us to disregard the prerequisites step of its two-step inquiry ... , it could reconsider its own implementing regulations."[184] And, unlike the Seventh Circuit in

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[177] Brief of the EEOC, *supra* note 23, at 16.

[178] *Id.* at 17–18.

[179] *Id.* at 23.

[180] The EEOC argued Anthony's bachelor's degree (or lack thereof) was not relevant because it shed no light on whether Trax violated the ADA by "demanding [she] return to work without restrictions or not at all." *Id.* at 26.

[181] *See Anthony*, 955 F.3d at 1128.

[182] *Id.* at 1129.

[183] *Id.*

[184] *Id.* at 1133.

Rooney, the Ninth Circuit in *Anthony* expressly declined to apply *McKennon*'s reasoning to ADA cases.[185] Instead, *Anthony* found that the *McDonnell Douglas* framework enabled summary judgment for the defendant, even when the plaintiff's failure to fulfill job prerequisites was not discovered until after the allegedly discriminatory employment action.[186]

IV. A MIDDLE GROUND FOR AFTER-ACQUIRED EVIDENCE AND ADA QUALIFICATION: REVERT TO ESSENTIAL FUNCTIONS

A. The EEOC Relevance Trigger

The EEOC as amicus in *Anthony* argued its own two-step qualification standard additionally requiring a plaintiff to satisfy the job-related prerequisites of the position should be abandoned in favor of the ADA's essential functions standard in instances where the particular job requirements are not relevant to the employer's allegedly discriminatory action.[187] Thus, the EEOC's proposed essential functions reversion is triggered by an early relevance determination.[188] When faced with an ADA plaintiff's after-discovered failure to fulfill job prerequisites, this approach obliges the court to additionally determine, at the prima facie stage, whether the requirements at issue were relevant to the challenged employment action.[189] Only if the court finds relevance will the qualified individual inquiry revert to the less stringent essential functions test; if no such relevance is found, the prima facie case fails without essential functions coming into the equation.[190]

The EEOC's amicus brief and proposal encapsulate the key truth illuminated by these after-acquired evidence cases: the foundational "qualified individual" standard set forth in the ADA should not be supplanted by the two-step test of 29 C.F.R. 1630.2(m) *in all cases*.[191] However, the EEOC's proposed method is imperfect: by

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[185] *Id.*
[186] *Id.* at 1130.
[187] Brief of the EEOC, *supra* note 23, at 23–24.
[188] *Id.* at 23.
[189] *Id.* at 22.
[190] *Id.*
[191] *Id.* at 23.

basing reversion to the ADA on the nature of the alleged discrimination (in other words, on the extent to which the job-related requirements are relevant), it usurps the *McDonnell Douglas* process and sets the stage for prima facie overload.[192]

The EEOC argues reversion to the essential standard should occur only when the job-related requirements at issue are not relevant to the challenged decision making.[193] However, it is not entirely clear where the burden of proving this new relevancy requirement would lie.[194] That is, in order to even trigger the reversion, a plaintiff (already under attack by after-acquired evidence and working to establish other prima facie elements) may come under pressure to additionally demonstrate that the job-related requirements they lack are not relevant to the employment action they challenge.[195] And even if this new relevancy requirement were to technically fall outside their designated prima facie burden, a plaintiff may nonetheless obliquely assume it amidst desire and effort to avoid dismissal.[196]

Moreover, the essential functions reversion should not depend on the nature of the employment action being challenged.[197] Hearkening back to the *McDonnell Douglas* framework as used in ADA cases, a plaintiff must establish their "qualified individual" status as a prima facie matter, regardless of the circumstances surrounding the alleged discriminatory employment action.[198] It is the employer who carries the burden at the next stage to produce rebuttal evidence that the employment action was not unlawful discrimination.[199] Thus, the fact of qualification itself is a prima facie question (although the proper standard for cases involving after-acquired evidence obviously remains disputed);[200] the *relevance* of the job qualification, on the other hand, properly belongs later in litigation.[201]

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[192] *See infra* Section IV.B.
[193] Brief of the EEOC, *supra* note 23, at 23.
[194] *See id.* at 27.
[195] *See id.*
[196] *See id.*
[197] *See infra* Section IV.C.
[198] *See supra* note 118 and accompanying text.
[199] *See supra* notes 105–11 and accompanying text.
[200] *See supra* note 118 and accompanying text.
[201] *See supra* notes 106–11 and accompanying text.

So, if relevance is not a suitable trigger,[202] this begs the question: exactly when and how should the job-related requirements standard added by the EEOC regulation give way to the essential functions standard required by ADA itself?

B. An Alternative: The "Sole Glitch" Trigger

This Note proposes an alternative to the EEOC's relevance method: the qualified individual inquiry should revert to the ADA's essential functions standard when the evidence of a plaintiff's unfulfilled job-related requirements (1) is discovered only after the alleged discriminatory employment action, and (2) constitutes the sole flaw in the plaintiff's prima facie case.[203] Because the EEOC is authorized to promulgate regulations with legislative force,[204] departure from the two-prong test of 29 C.F.R. § 1630.2(m) requires corrective action by either Congress[205] or the EEOC itself.[206] As the Ninth Circuit noted, such action is due here; otherwise, plaintiffs and courts alike will remain powerless against the job-related requirements prong.[207] However, in the absence of legislative intervention, courts would be well advised to follow the scheme pitched by the EEOC in their Ninth Circuit amicus brief; this approach at least lessens the potency of the job-related requirements standard by partially inhibiting its ability to necessitate dismissal.[208]

Consider this Note's proposed method (hereinafter referred to as the sole glitch approach) in action. At the pretrial motion stage, a defendant uses after-acquired evidence to attack the qualified individual element of an employee's prima facie ADA case, specifically alleging the plaintiff failed to satisfy the job-related

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[202] *See supra* Section IV.A.

[203] *See infra* Section IV.B.

[204] *See supra* note 126 and accompanying text.

[205] Congress is able to overturn a rule issued by a federal agency, including one that has already taken effect, under the Congressional Review Act of 1996. *See* 5 U.S.C. § 801(f). Another alternative would be an amending enactment similar to the ADA Amendments Act of 2008. *See generally* Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. §§ 12101–121113).

[206] *See supra* note 126 and accompanying text.

[207] *See supra* note 184 and accompanying text.

[208] *See* Brief of the EEOC, *supra* note 23, at 16.

requirements of the position as required by the EEOC's 29 C.F.R. 1630.2(m). Instead of dismissing or engaging in a premature relevance inquiry, the court would simply consider whether all other (jurisdiction-dependent) prima facie requirements have been met. If the court finds that the qualified individual element is the only unsatisfied prima facie factor (as a result of the after-acquired evidence attack), then the two-step test incorporating job-related requirements would yield to the singular essential functions inquiry.[209] At this point, a plaintiff could still fail to establish a prima facie case through the qualified individual element if they are unable to satisfy the ADA's threshold essential functions standard.[210] However, the after-acquired evidence of unfulfilled job prerequisites would not function alone to completely bar an ADA plaintiff's suit.[211]

Under the sole glitch approach, an employee cannot throw off their prima facie burden altogether; as an ADA plaintiff, they will still be required to establish that they qualify as disabled under the statute and that they suffered employment discrimination on that basis.[212] Moreover, the job-related requirements element added by the EEOC's expanded definition of qualified individual would give way to the less stringent definition set forth in the ADA in only narrow circumstances. Because the sole glitch method triggers reversion to the ADA standard exclusively in situations where the *sole* prima facie flaw exists due to after-acquired evidence specifically assailing the job prerequisites prong of the qualified individual element, it is sufficiently limited in scope as to not otherwise inhibit the effectiveness or judicial use of the test. For example, the sole glitch trigger could have potentially operated in *Anthony* to allow the suit to continue without forcing the Ninth Circuit to choose between either dismissal or completely overruling its precedent following the EEOC two-step qualified individual standard.[213]

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[209] *See supra* text accompanying notes 124–25.
[210] *See supra* text accompanying notes 119–23.
[211] *See* Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1128 (9th Cir. 2020).
[212] *See* Blair, *supra* note 105, at 1362.
[213] *See Anthony*, 955 F.3d at 1128.

C. The Value of Separating Relevance from Reversion

The sole glitch method is similar to the EEOC amicus approach in that it proposes reversion to the essential functions test, but with a very different choice of trigger.[214] Instead of reverting to the statutory test when after-acquired evidence causes the sole prima facie glitch, the EEOC amicus approach demands relevance be found between the job-related requirements and the alleged discrimination.[215] As described above in Section IV.A, this subverts the *McDonnell Douglas* process and sets the stage for prima facie overload on the plaintiff.[216]

In contrast, the sole glitch method is triggered by a defendant's weaponization of after-acquired evidence rather than an extra relevance inquiry. It consequently retains the *McDonnell Douglas* framework while nonetheless staying in line with the EEOC amicus rationale.[217] The reasoning behind the EEOC amicus approach is similar to that of the Seventh Circuit in *Rooney*: a plaintiff who failed to satisfy job-related requirements should not be categorically barred from bringing suit under the ADA.[218] As the EEOC puts it, dismissing a plaintiff's case based on unfulfilled job requirements discovered only after the alleged discrimination would effectively "do an end-run around *McKennon* and lead to underenforcement of the law."[219] Recall, the Court in *McKennon* reasoned it would run directly contrary to the goal of employment discrimination legislation to allow after-acquired evidence of an employee's shortcomings to completely bar their claim.[220] And although *McKennon* dealt with suits arising under the ADEA, the propriety (and necessity) of extending its rationale to ADA cases is particularly clear given the statutes' affinity: both were modeled after Title VII of the Civil Rights Act,[221] contemplate deterrence

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[214] Brief of the EEOC, *supra* note 23, at 22.

[215] *See supra* Section IV.A.

[216] *See supra* Section IV.A.

[217] *See supra* Sections IV.A, B.

[218] *See* Brief of the EEOC, *supra* note 23, at 27; Rooney v. Koch Air, LLC, 410 F.3d 376, 382 (7th Cir. 2005).

[219] Brief of the EEOC, *supra* note 23, at 27.

[220] McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 358 (1995) (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975)); *see also supra* notes 151–53 and accompanying text.

[221] *See* Ireland & Bales, *supra* note 10, at 188; *McKennon*, 513 U.S. at 357–58.

as well as compensation,[222] and enable private lawsuits to serve the public purpose of vindicating national policy against discrimination in the workplace.[223]

The sole glitch approach thus assuages the rationale of the EEOC method without forcing the court to assess or the parties to prove the relationship between the challenged employment action and unsatisfied job-related requirements as a prima facie matter.[224] Instead of demanding a premature relevance determination (whereby pressuring the plaintiff to prove irrelevance in an effort to trigger the essential function reversion and resist dismissal),[225] the sole glitch alternative simply relies on the *McDonnell Douglas* framework.[226] The plaintiff must still plead a complete prima facie ADA case despite the more generous essential functions standard, and the employer remains burdened with the rebuttal justification of its own employment decision,[227] including ample opportunity to use the relevance of unsatisfied job-related requirements as an argument.[228] In this regard, the Ninth Circuit in *Anthony* was correct: the employer's awareness of the plaintiff-employee's unfulfilled job prerequisites at the time of the challenged employment action, however relevant it might be, does not belong in the prima facie stage.[229]

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[222] *See supra* notes 151–52 and accompanying text; Catherine Fisk & Erwin Chemerinsky, *Civil Rights without Remedies: Vicarious Liability under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 756 (1999) ("Indeed, the United States Supreme Court has recognized expressly that [both the ADEA and ADA] serve[ ] the twin goals of deterrence and compensation.").

[223] *See McKennon*, 513 U.S. at 358 ("[T]he private litigant [in Title VII] not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974))); *see also* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1234 (3d Cir. 1994), *vacated on other grounds*, 65 F.3d 1072 (3d Cir. 1995) ("A plaintiff in an employment-discrimination case accordingly acts not only to vindicate his or her personal interests in being made whole, but also ... to enforce the paramount public interest in eradicating invidious discrimination.").

[224] *See supra* Sections IV.A, B.

[225] *See supra* Section IV.B.

[226] *See supra* Section IV.B.

[227] *See supra* Section IV.B.

[228] *See supra* Section IV.B.

[229] *See* Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1129 (9th Cir. 2020).

CONCLUSION

The Supreme Court made it clear in *McKennon*: employment discrimination legislation must not be categorically subdued by after-acquired evidence of a plaintiff's failures as an employee.[230] Otherwise, credible allegations of workplace discrimination may go unaddressed.[231] Failure to extend this reasoning to suits filed under the ADA undermines the legislation, subverts its goals, and enables underenforcement.[232] The EEOC itself recognizes as much and recommends departure from its two-part test in favor of the ADA's basic essential functions standard in limited circumstances.[233] Emphasizing the analogous policy goals of the ADA and ADEA, the EEOC champions *McKennon*'s rationale to prevent dismissal where after-acquired evidence of a plaintiff's unfulfilled job prerequisites operates as a technicality, irrelevant to the challenged employment action.[234] However, the strength of the EEOC rationale is undermined by the likelihood that the burden of this new preliminary relevance inquiry will either fall upon or be taken up by plaintiffs.[235] Moreover, under the *McDonnell Douglas* burden-shifting framework as applied to ADA cases, the relevance of the plaintiff's qualifications (or lack thereof) to the challenged employment decision properly belongs later in litigation.[236]

Instead of relevance, the trigger for abandoning the two-part test should hinge on the after-acquired evidence attack itself.[237] The "sole glitch" approach proposes that the qualified individual inquiry revert to the ADA's singular essential functions standard when the evidence of unfulfilled job-related requirements is both discovered after the alleged discriminatory employment action, and constitutes the sole flaw in the plaintiff's prima facie case.[238]

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[230] McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 356 (1995).
[231] *See supra* notes 219–23 and accompanying text.
[232] *See supra* notes 219–23 and accompanying text.
[233] *See* Brief of the EEOC, *supra* note 23, at 27.
[234] *See id.* at 27.
[235] *See supra* Sections IV.A, C.
[236] *See supra* Sections IV.A, C.
[237] *See supra* Section IV.B.
[238] *See supra* Section IV.B.

The sole glitch trigger vindicates the EEOC rationale but avoids compelling a plaintiff to establish the relevancy between the challenged employment action and unsatisfied job prerequisites, instead displacing that pressure onto the *McDonnell Douglas* framework.[239] Legislative allowance for this ADA reversion needs to be made by Congress or the EEOC; otherwise, courts must make what headway they can via the EEOC-proposed method.[240]

Congress set a lofty, but firm goal with the ADA: "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities ...."[241] Despite the Supreme Court in *McKennon* articulating the need to protect employment discrimination lawsuits from after-acquired evidence attacks,[242] suits filed under the ADA remain assailable.[243] More than that, they are under assault.[244] Stubborn perpetuation of the EEOC's job-related prerequisite expansion currently enables dismissal of potentially otherwise credible ADA claims.[245] And, while the relevancy relationship between the job-related perquisites and the alleged discrimination is no doubt important, the extent to which the former vindicates the latter is a determination that belongs later in litigation.[246] Congress, the EEOC, and courts must recognize the weaponization of after-acquired evidence in the context of the ADA's qualified individual requirement and be willing to raise the shield of *McKennon* to prevent such post hoc investigations from preliminarily eviscerating lawsuits—even if that means occasionally reverting back to basics (that is, the essential functions standard).[247] Equity requires corrective action as to 29 C.F.R. § 1630.2(m) to enable and encourage that reversion.

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[239] *See supra* Section IV.B.
[240] *See supra* Section IV.B.
[241] 42 U.S.C.A. § 12101(b)(1) (West 2009).
[242] Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1131 (9th Cir. 2020).
[243] *See, e.g.*, *id.*
[244] *Id.*; *see supra* notes 132–34 and accompanying text.
[245] *See Anthony*, 955 F.3d at 1128.
[246] *See supra* Section IV.C.
[247] *See supra* text accompanying notes 179–80.