An Insurance Policy for Discrimination: A Review of the EEOC's Qualification Inquiry and After-Acquired Evidence Doctrine in Light of Anthony v. Trax International Corporation

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I. INTRODUCTION

The promise of equality set forth in the Declaration of Independence[1] has been denied to many throughout the history of the United States. Stigmatized as inferior, disabled Americans have endured intolerance, invidious discrimination, and separation from mainstream society.[2] To remedy this historical maltreatment, Congress passed the Americans with Disabilities Act ("ADA") in 1990.[3] The ADA was intended to "signal[] the end of the unjustified segregation and exclusion of persons with disabilities from the mainstream of everyday life."[4] The ADA's passage was the first major step in what has proved to be a continuing effort to create a fully accessible society. Congress took further action by unanimously passing the ADA Amendments Act of 2008 ("ADAAA") to increase ADA accessibility and rebut judicial decisions that had narrowed the ADA's application.[5]

Congress designed the ADA to "level the playing field" for the millions of Americans with one or more physical or mental disabilities.[6] The ADA's goals are the following:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against

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1 *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal[.]").

2 Kathryn Johnson-Monfort, *To Bar or Not to Bar: Title I of the ADA and After-Acquired Evidence of a Plaintiff's Failure to Satisfy Job Prerequisites*, 13 WM. & MARY BUS. L. REV. 267, 273, 295 n.223 (2021) (citing *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1234 (3d Cir. 1994)) (noting the prevalence of discriminatory employment practices).

3 42 U.S.C. § 12101(b)(2).

4 Presidential Statement on Signing the Americans with Disabilities Act of 1990, 1 PUB. PAPERS 933 (July 26,1990), https://www.archives.gov/research/americans-with-disabilities/transcriptions/naid-6037493-statement-by-the-president-americans-with-disabilities-act-of-1990.html (last visited Oct. 10, 2023).

5 *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N., *Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA*, https://www.eeoc.gov/laws/guidance/fact-sheet-eeocs-final-regulations-implementing-adaaa (noting that the Amendment's primary purpose was to make it easier for people with disabilities to obtain protection under the ADA) (last visited Oct. 10, 2023) [hereinafter ADAAA Fact Sheet].

6 Schmidt v. Methodist Hosp. of Indiana, Inc., 89 F.3d 342, 344 (7th Cir. 1996).

> individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.[7]

Despite Congress' sweeping intent, the ADA suffered from loopholes in enforcement through which disability discrimination has slipped "unhindered, or at least unremedied."[8] Today, discriminatory practices continue to preclude Americans with disabilities from fully enjoying and participating in society. This preclusion is particularly true in employment, where complaints of discrimination persist at an alarmingly high rate.[9] Prior to the passage of the ADA, a disabled individual often had no legal recourse for employment discrimination.[10] Under the ADA, however, a victim of employment discrimination may invoke their statutory right to bring a lawsuit against an employer.[11] One critical caveat to invoking ADA protection is that a plaintiff must be a "qualified" individual.[12] The ADA's qualified individual requirement differs from other civil rights legislation.[13] The ADA-qualified individual requirement arose from concerns that the ADA would require employers to hire individuals with disabilities, regardless of whether that disability made it impossible for a person to perform a specific job.[14]

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7 42 U.S.C. § 12101(b)(1)–(4).

8 Johnson-Monfort, *supra* note 2, at 271 (citing Melissa Hart, *Retaliatory Litigation Tactics: The Chilling Effects of After-Acquired Evidence*, 40 ARIZ. ST. L.J. 401, 401–02 (2008)).

9 *See* Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Release Fiscal Year 2020 Enforcement and Litigation Data (Feb. 26, 2021), https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2020-enforcement-and-litigation-data#:~:text=EEOC%20legal%20staff%20resolved%20165,in%20the%20past%2016%20years (noting that disability discrimination suits accounted for 36.1 percent of all discrimination charges filed).

10 42 U.S.C. § 12101(a)(4).

11 *See generally Filing a Charge of Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N., https://www.eeoc.gov/filing-charge-discrimination (last visited Oct. 10, 2022) [hereinafter Filing a Charge].

12 42 U.S.C. § 12111(8).

13 *Compare* 42 U.S.C. § 12111(8) (limiting the Act's application to qualified individuals), *with* 29 U.S.C. 623(a)(1) (describing general prohibition of age-related discrimination in employment); *see also* Emma Schwab, *Employers' Secret Weapon: How the After-Acquired Evidence Doctrine Allows Employers to Get Away with Disability Discrimination*, 43 CARDOZO L. REV. 313, 322 (2021).

14 Schwab, *supra* note 13, at 337–38.

The ADA defines a qualified individual as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[15] The ADA's definition of qualified individual gives "consideration . . . to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, th[at] description shall be considered evidence of the essential functions of the job."[16]

The Equal Employment Opportunity Commission ("EEOC") is the agency responsible for the ADA's enforcement.[17] The EEOC further defines "the term' qualified,' with respect to an individual with a disability" to mean "that the individual satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires and with or without reasonable accommodation, can perform the essential functions of such position."[18] The EEOC also issues Interpretive Guidance on Title I of the Americans with Disabilities Act ("Interpretive Guidance"), which puts forth a two-step inquiry for the qualified individual requirement based on the EEOC definition, discussed in Part II of this Comment.[19]

Notably, the ADA definition focuses on the essential functions requirement while the EEOC definition and Interpretive Guidance broaden the focus.[20] Whether an individual can satisfy all the prerequisites of a position is a separate, threshold consideration from an individual's capability to perform essential functions.[21] A consequence of this expansion is that a situation may arise where a tenured employee with a disability is deemed unqualified to file an action under the ADA. Thus, based solely on a missing credential not discovered until the parties are in the midst of litigation, an employee who has demonstrated the ability to perform the essential functions of the position through the course of employment can be terminated for blatantly discriminatory reasons, but may find no recourse in the ADA. The individual's status as an employee, no matter the duration of that employment, bears no weight in the qualification inquiry.

15 42 U.S.C. § 12111(8).

16 *Id.*

17 29 C.F.R. pt. 1630, app.

18 29 C.F.R. § 1630.2(m).

19 29 C.F.R. pt. 1630, app. § 1630.2(m).

20 42 U.S.C. § 12111(8).

21 29 C.F.R. § 1630.2(m); 29 C.F.R. pt. 1630 app. § 1630.2(m).

One such case recently ascended to the Ninth Circuit after Trax International Corporation fired Sunny Anthony, a technical writer employed by Trax for two years.[22] Prior to her employment, Anthony suffered from post-traumatic stress disorder, depression, and anxiety.[23] Anthony alleged that Trax informed her it had a "[one hundred percent] healed" return to work policy, which Anthony was unable to satisfy following a leave under the Family and Medical Leave Act ("FMLA").[24] Despite Anthony's status as a two-year Trax employee, the Ninth Circuit affirmed the district court's decision. The court held that Anthony did not have standing to bring suit under the ADA because she did not hold a bachelor's degree, an educational prerequisite for Trax's technical writer position.[25] Anthony's lack of a degree was after-acquired evidence discovered in the course of the litigation five years following her termination.[26] This Comment asks whether the *Trax* decision was correct and in line with the commitments of the ADA.

Part II of this Comment will provide additional background on the ADA, the EEOC, the qualified individual requirement, the after-acquired evidence doctrine, and the facts of the *Trax* case. Part III of this Comment will consider *Trax* under the Supreme Court opinion *McKennon v. Nashville Banner Publishing Company*,[27] review how *Trax* applied the after-acquired evidence doctrine and qualified individual inquiry, and analyze whether *Trax* is at odds with the ADA's purpose. Part IV will put forth a conclusion and recommendations.

II. BACKGROUND

A. The Americans with Disabilities Act

Modeled after the Civil Rights Act of 1964,[28] the ADA is a comprehensive piece of civil rights legislation.[29] Deemed a "declaration of independence" for Americans with disabilities,[30] the ADA "shares

22 Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1126 (9th Cir. 2020).

23 *Id.*

24 *Id.*; Pl.'s Mot. for Summ. J. and Mem. of P. & A. in Supp. at 1, 4, Anthony v. Trax Int'l Corp., 2:16-CV-02602-ESW (Oct. 3, 2017), 2017 WL 11540718 [hereinafter MSJ Br.].

25 *Anthony*, 955 F.3d at 1134.

26 *Id.* at 1126–27; Appellant's Opening Br. at 3–4, Anthony v. Trax Int'l Corp., No. 18-15662 (July 18, 2018), 2018 WL 3602314 [hereinafter Appellant's Op. Br.].

27 McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995).

28 42 U.S.C. § 2000e; ADA.gov Beta Homepage, https://beta.ada.gov/ (last visited Dec. 28, 2022).

29 *Introduction to the ADA*, U.S. DEP'T OF JUST. C.R. DIV., https://www.ada.gov/ada_intro.htm (last visited Oct. 10, 2023).

30 Schwab, *supra* note 13, at 314.

many similarities with other 20th-century civil rights struggles by those who have been denied equality, independence, autonomy, and full access to society."[31] The ADA stated that "unlike individuals who ha[d] experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who ha[d] experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination."[32] In drafting the ADA, Congress sought to provide clear, comprehensive, and enforceable standards that would allow the judicial system to enforce the ADA and thus eradicate disability discrimination.[33] Eighteen years after passing the ADA, Congress unanimously passed the ADAAA to increase accessibility to ADA protection.[34]

The ADA offers a myriad of protections in employment (Title I), public services, including state and local governments (Title II), public accommodations and services operated by private entities (Title III), telecommunications (Title IV), and other miscellaneous provisions (Title V).[35] Title I, the title relevant to this Comment, protects qualified individuals with disabilities from discrimination in all aspects of employment, including hiring, advancement, discharge, "compensation, job training, and other terms, conditions, and privileges of employment."[36]

1. Title I: Employment

The purpose of Title I of the ADA is to ensure that individuals with disabilities have the same access to equivalent employment opportunities as those without disabilities.[37] Title I applies to employers with fifteen or more employees and includes private employers, state and local government agencies, employment agencies, labor organizations, and labor-management committees.[38] The ADA requires employers to provide reasonable accommodations to qualified

31 *The Disability Rights Movement*, https://americanhistory.si.edu/disabilityrights/exhibit.html (last visited Oct 10, 2023); 42 U.S.C. § 12101(a)(2).

32 42 U.S.C. § 12101(a)(4).

33 42 U.S.C. § 12101(b)(1)–(2).

34 ADAAA Fact Sheet, *supra* note 5; 29 C.F.R. pt. 1630 app.

35 *An Overview of the Americans With Disabilities Act*, ADA NAT. NETWORK, https://adata.org/factsheet/ADA-overview (last visited Dec. 28, 2022) [hereinafter ADA Overview].

36 42 U.S.C. § 12112(a).

37 ADA Overview, *supra* note 35.

38 *Fact Sheet: Disability Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/fact-sheet-disability-discrimination (last visited Oct. 10, 2023).

applicants or current employees.[39] A reasonable accommodation is a change that accommodates an employee with a disability, allowing them to do the job without causing the employer "undue hardship."[40] Undue hardship may be evidenced by excessive difficulty or expense.[41]

In enacting the employment provisions of the ADA, Congress did not intend to "interfere with personnel decisions within an organizational hierarchy."[42] Rather, "Congress intended simply that disabled persons have the same opportunities available to them as are available to nondisabled persons."[43] At the time Congress passed the ADA, "census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally."[44]

2. The Role of the Equal Employment Opportunity Commission

The EEOC enforces Title I of the ADA.[45] The EEOC enforces other federal antidiscrimination laws, including the Age Discrimination in Employment Act ("ADEA"), the Rehabilitation Act, and Title VII of the Civil Rights Act of 1964.[46] To enforce the ADA, the EEOC promulgates official regulations,[47] puts forth Interpretive Guidance,[48] and offers other resources for individuals who believe they have an ADA claim.[49]

The EEOC provides guidance to both employees and employers and advises individuals who suspect they have been discriminated against that they may file a "Charge of Discrimination."[50] Filing a charge is a prerequisite to later filing a job discrimination lawsuit against an

39 *Id.*

40 *Id.*

41 *Id.*

42 Gaul v. Lucent Techs., 134 F.3d 576, 581 (3d Cir. 1998) (citing Werner v. Federal Reserve Bank of N.Y., 91 F.3d 379, 384 (2d Cir. 1996)).

43 *Id.*

44 42 U.S.C. § 12101(a)(6).

45 *Laws Enforced by the EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statutes/laws-enforced-eeoc (last visited Oct. 10, 2023).

46 *Id.*

47 *Id.*

48 29 C.F.R. pt. 1630, app.

49 *See Disability Discrimination,* U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/disability-discrimination (last visited Oct. 10, 2023).

50 *See Filing a Charge of Discrimination With the EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM'N https://www.eeoc.gov/filing-charge-discrimination (providing tabs with guidance for both "Employees and Job Applicants" and "Employers / Small Businesses.") (last visited Oct. 10, 2023).

employer.[51] The typical time limit for filing a discrimination charge is 180 days from the time of the discrimination.[52] The time limits are event-specific; if multiple discriminatory events occur, the deadlines follow each event.[53] If and when a charge is filed against an employer, the EEOC is required to notify said employer.[54]

Once the EEOC accepts a charge for investigation, the filer can track the status of their claim[55] and notify the EEOC if he or she obtains legal representation or uploads evidence.[56] In some instances, the EEOC will request mediation for a voluntary settlement between the parties.[57] If a charge is not sent to mediation, or if mediation fails, the EEOC requests a "Position Statement" from the employer.[58] The plaintiff will then have an opportunity to respond to the employer's written statement.[59] This entire pre-litigation process can take anywhere from three to ten months.[60] If the EEOC does not resolve a charge within 180 days, the charging party will be issued a "Notice of Right to Sue."[61] If the charging party receives that notice, he or she must file the lawsuit within ninety days or be statutorily barred from proceeding.[62] Plaintiff in the *Trax* case received such a notice.[63]

The goals of this process are twofold: (i) to put the victim of the discrimination in the same (or nearly the same) position that he or she would have been in if the discrimination had never occurred; and (ii) to ensure that "[t]he employer will . . . be required to stop any discriminatory practices and take steps to prevent discrimination in the

51 *Id.*

52 *Time Limits For Filing a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/time-limits-filing-charge (last visited Oct. 10, 2023).

53 *Id.*

54 Filing a Charge, *supra* note 11.

55 *What You Can Expect After You File a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/what-you-can-expect-after-you-file-charge (last visited Oct. 10, 2023).

56 *Id.*

57 *Id.*

58 *Id.*

59 *See id.*

60 *Id.*

61 *What You Can Expect After You File a Charge*, *supra* note 55; *Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/filing-lawsuit (last visited Oct. 10, 2023) (stating that if a charge is filed "[u[nder the Americans with Disabilities Act (ADA) based on disability, you must have a Notice of Right to Sue from EEOC before you can file a lawsuit).

62 *Id.*

63 Verified Compl. at ¶ 9, Anthony v. Trax Int'l Corp., 2:16cv2602 (filed Aug. 2, 2016) [hereinafter Compl.].

future."[64] The EEOC's lengthy investigation process presumably weeds out weak or unsubstantiated charges, reduces the number of lawsuits brought before the courts, and ensures that the cases brought forth have merit.

3. The Qualified Individual Requirement

Differing from other civil rights legislation, the ADA mandates that only a "qualified individual" can initiate an ADA lawsuit.[65] "Some scholars argue that . . . 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.'"[66] The ADA defines a qualified individual as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[67] The ADA's qualified individual requirement arose from concern that the ADA would require employers to hire individuals with disabilities, even if their disabilities made it impossible for them to perform a particular job.[68]

The EEOC Regulations to Implement Equal Employment Provisions of the Americans with Disabilities Act contains definitions of ADA terms ("EEOC Regulations").[69] In the EEOC Regulations, "the term 'qualified,' with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position."[70] The EEOC Regulations also include exceptions to the definition of "Qualified Individual with a Disability."[71] The exceptions are primarily used to note that illegal drug

64 *Remedies for Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/remedies-employment-discrimination (last visited Jan. 3, 2023) (explaining that in a lawsuit, monetary remedies may be appropriate and include compensatory and punitive damages, with limits on punitive damages relative to the number of employees. (15-100 employees, $50,000 limit; 101-200 employees, $100,000 limit; 201-500 employees, $200,000 limit; 500+ employees, $300,000 limit)).

65 *Compare* 42 U.S.C. § 12112(a), *with* 29 U.S.C. 623(a)(1); *see also* Schwab, *supra* note 13, at 322.

66 Johnson-Monfort, *supra* note 2, at 283.

67 42 U.S.C. § 12111(8).

68 Schwab, *supra* note 13, at 337–38.

69 29 C.F.R. § 1630.2(m).

70 *Id.*

71 29 C.F.R. § 1630.3.

use, sexual behavior disorders, gambling, kleptomania, pyromania, homosexuality, and bisexuality are not considered disabilities.[72]

The EEOC also issues "Interpretive Guidance" which puts forth a two-step inquiry for the qualified individual requirement.[73] The first step is to "determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc." and the second step is to "determine whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation."[74] The inquiry into "whether an individual with a disability is qualified" for a position must "be made at the time of the employment decision, based on the capabilities of the individual at that time."[75]

The ADA's definition of qualified individual is focused on one's ability to perform essential functions.[76] Accordingly, the EEOC has issued additional guidance on what constitutes an "essential function."[77] However, the *Trax* court stopped its analysis at the "prerequisites" step because it determined that Anthony did not meet the educational prerequisites for the technical writer position.[78] For that reason, this Comment will not undertake an essential functions analysis.

C. The After-Acquired Evidence Doctrine

After-acquired evidence is evidence obtained after the initiation of litigation through discovery; the after-acquired evidence doctrine is the rule that:

> If an employer discharges an employee for an unlawful reason and later discovers misconduct sufficient to justify a lawful discharge, the employee cannot win reinstatement. The doctrine either shields the employer from liability or limits the available relief when, after an employee has been terminated, the employer learns for the first time that the

72 29 C.F.R. § 1630.3(a)–(e).

73 29 C.F.R. pt. 1630.2(m), app.

74 *Id.*

75 *Id.*

76 42 U.S.C. § 12111(8) ("[A]n individual who, with or without reasonable accommodation, can perform the *essential functions* of the employment position that such individual holds or desires.") (emphasis added).

77 29 C.F.R. § 1630.2(n).

78 Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1134 (9th Cir. 2020).

> employee engaged in some wrongdoing that would have resulted in a discharge anyway.[79]

"The after-acquired evidence doctrine applies principally in two factual contexts: first, in refusal to hire cases, and second, in wrongful discharge cases where the evidence either shows serious employee misconduct on the job or misrepresentation of qualifications."[80] Employee misconduct and misrepresentation of qualifications are valid areas of concern for employers. Disability discrimination eradication is a public policy matter of national concern,[81] but the law must balance its goal of eradicating that discrimination with the condemnation of activities like misrepresentation.[82] Currently, after-acquired evidence of misconduct or misrepresentation can limit a plaintiff's remedy, or, as *Trax* held, rebut a plaintiff's status as a qualified plaintiff.[83]

The after-acquired evidence doctrine was first announced by the Tenth Circuit in *Summers v. State Farm Mutual Automobile Insurance Co*.[84] In *Summers*, the plaintiff brought a claim alleging that he was terminated based on his age and religion.[85] During his employment, the plaintiff forged documents, including loss-of-wage claims, medical, and pharmacy bills.[86] He was caught by his employer in the course of employment, disciplined, and warned that future infractions would result in discharge.[87] During discovery, the employer found a multitude of additional falsified records.[88] The court allowed the after-acquired

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79 *After-acquired Evidence Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019) (citing McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995)).

80 Kenneth R. Davis, *The After-Acquired Evidence Doctrine: A Dubious Defense in Employment Discrimination Cases*, 22 PEPP. L. REV. 365 (1995) (explaining resume fraud typically consists of misrepresentation of educational or work experience qualifications, concealment of misconduct from a previous job, or failure to report previous criminal convictions); *see also* Jenny B. Wahl, *Protecting the Wolf in Sheep's Clothing: Perverse Consequences of the McKennon Rule*, 32 AKRON L. REV. 577, 578–79 n.3 (1999) (describing resume fraud as "rampant" in the United States).

81 Davis, *supra* note 80, at 369.

82 Davis, *supra* note 80, at 399.

83 *See* Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1134 (9th Cir. 2020) (noting that "at the very least, *McKennon* permits the use of after-acquired evidence to limit damages" and dismissing plaintiff's claim based on her lack of status as a qualified individual, based on after-acquired evidence).

84 Kenneth A. Sprang, *After-Acquired Evidence: Tonic for an Employer's Cognitive Dissonance*, 60 MO. LAW REV. 89, 96 (1995); Summers v. State Farm Mut. Auto. Ins., 864 F.2d 700 (10th Cir. 1988).

85 Summers v. State Farm Mut. Auto. Ins., 864 F.2d 700, 702 (10th Cir. 1988).

86 *Id.*

87 *Id.*

88 *Id.* at 703 (noting that defendant found evidence of 150 additional falsifications).

evidence of falsified records into the record to support a motion for summary judgment which resulted in dismissal.[89]

In *Summers*, the court noted that ignoring after-acquired evidence was akin to the hypothetical wherein a company doctor is fired because of his age, race, religion, and sex, and the company, in defending a civil rights action, thereafter, discovers that the discharged employee was not a doctor. In the Court's view, the masquerading doctor would be entitled to no relief, and Summers was in no better position.[90]

The masquerading doctor's rationale does not adequately consider that the goal of civil rights legislation is to eradicate discrimination, not punish employee wrongdoing. It also puts no onus on employers to take reasonable steps to verify employee credentials.

Following *Summers*, employers were at liberty to use after-acquired evidence as a total bar to liability in civil rights litigation. The Supreme Court overruled *Summers* in *McKennon v. Nashville Banner Publication Company*.[91]

1. The *McKennon* Court Overruled *Summers* and Rebuked the Use of After-Acquired Evidence as a Total Bar to Liability

Following *Summers*, after-acquired evidence was "a potent weapon for employer-defendants."[92] "[I]t was a goldmine or a godsend. All you ha[d] to do [was] take an employee and find out something that they ha[d] done wrong, some misconduct that you never knew about and, boom, there goes their civil rights claim."[93] Recognizing the lack of relation between an employee's bad acts discovered in the course of litigation and the employer's pre-litigation discriminatory conduct, the Supreme Court ultimately admonished this practice and overruled *Summers* in *McKennon v. Nashville Banner Publication Company*.[94] In *McKennon*, the question before the Court was whether "an employee discharged in violation of the Employment Act of 1967 [wa]s barred from all relief when, after her discharge, the employer discover[ed] evidence of wrongdoing that, in any event, would have led to the employee's termination on lawful and legitimate grounds."[95]

The plaintiff, Christine McKennon, worked for Nashville Banner Publishing Company ("Banner") for thirty years prior to her termination

89 *Id.*

90 *Id.* at 708.

91 McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 359, 363 (1995).

92 Johnson-Monfort, *supra* note 2, at 284.

93 Johnson-Monfort, *supra* note 2, at 284.

94 *McKennon*, 513 U.S. at 359, 363.

95 *Id.* at 354.

at sixty-two years old.[96] After she was fired, McKennon brought suit under the ADEA for various legal and equitable remedies, including back pay.[97] During her depositions, McKennon admitted to stealing confidential documents during her last year for "insurance" and "protection" in case she was let go.[98] Invoking a common defense at the time, Banner claimed that "had it known of McKennon's misconduct, it would have discharged her at once for that reason."[99] Showing a brazen display of the defendant's confidence in the efficacy of the after-acquired evidence doctrine, Banner admitted that it had discriminated against McKennon for purposes of its summary judgment motion.[100] The District Court granted summary judgment for Banner, holding that "McKennon's misconduct was grounds for her termination and that neither backpay nor any other remedy" was available to her.[101] The Sixth Circuit affirmed.[102]

The Supreme Court reviewed the case "to resolve conflicting views among the circuits as to whether *all relief* must be denied when an employee has been discharged in violation of the ADEA and the employer later discovers some wrongful conduct that would have led to discharge if it had been discovered earlier."[103] The Supreme Court noted the Court of Appeals' determination that McKennon's conduct was essentially supervening, but that did not make the question of whether or not she was discriminated against irrelevant.[104] A violation of the ADEA could not "be so altogether disregarded."[105] The Court also noted:

> The objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her.
>
> The disclosure through litigation of incidents or practices that violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of the Act's operation or entrenched

96 *Id.*
97 *Id.* at 354–55.
98 *Id.* at 355.
99 *Id.*
100 *McKennon*, 513 U.S. at 355 .
101 *Id.*
102 *Id.*
103 *Id.* at 355–56 (emphasis added).
104 *Id.* at 356–57.
105 *Id.* at 357.

> resistance to its commands, either of which can be of industry-wide significance.106

Thus, the *McKennon* Court felt that furthering the purpose of the "national polic[y] respecting nondiscrimination" was of paramount concern in issuing its decision.[107] The Supreme Court also noted that the "employer could not have been motivated by knowledge it did not have" and that Banner could not now claim that McKennon was fired for nondiscriminatory reasons when those reasons were not discovered until the litigation.[108] *McKennon* noted the importance of identifying an employer's motive behind terminating an employee.[109] That motive is an essential element used in the determination of whether the employer violated a federal antidiscrimination law.[110]

Though it overruled *Summers*, the *McKennon* Court did not render after-acquired evidence entirely inconsequential.[111] Instead, the Supreme Court held that courts may take an employee's misconduct into account when fashioning a remedy.[112] Specifically, a district court can authorize "reinstatement, backpay, injunctive relief, declaratory judgment, and attorney's fees" and, in cases of will violation, liquidated damages may be appropriate.[113] The *McKennon* Court also sought to balance the rights of employers and employees, noting that:

> we must recognize 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. The employee's wrongdoing must be taken into account, we conclude, lest the employer's legitimate concerns be ignored.[114]

Accordingly, the Court found the proper bounds of remedial relief in cases like *McKennon* to be fact-specific.[115] "As a general rule," in cases alleging that after-acquired evidence would have led to termination at the time it was discovered, "neither reinstatement nor front pay is an appropriate remedy."[116] Both remedies would be "pointless" considering that an "employer would have terminated, and will

106 *McKennon*, 513 U.S. at 358–59.
107 *Id.*
108 *Id.* at 357.
109 *Id.* at 360.
110 *Id.* at 359,
111 *Id.* at 360.
112 *McKennon*, 513 U.S. at 360.
113 *Id.* at 357.
114 *Id.* at 361 .
115 *Id.* at 361.
116 *Id.* at 361–62.

terminate, in any event on lawful grounds." [117] However, backpay may still be available, and the "beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered."[118] Despite *Trax's* distinguishing features, *McKennon's* rebuff of after-acquired evidence as a total bar on liability in actions brought under a national antidiscrimination policy, and its remedial principles, should have been applied to further the statutory scheme of the ADA in *Trax.*

D. The Factual Background of the Anthony v. Trax Decision

1. The Root of Anthony's ADA Claim

The facts of the *Anthony* case, many of which are not discussed in the Ninth Circuit's opinion, are relevant to this analysis.[119] The information below is taken from various court filings at both the trial and appellate court levels. As is appropriate on a motion for summary judgment, this Comment views the allegations in a light most favorable to the plaintiff.[120]

Trax hired plaintiff Anthony as a technical writer in April 2010.[121] At the time Trax hired Anthony, "Anthony had a history of posttraumatic stress disorder and related anxiety and depression."[122] Anthony worked at Trax for two years as a technical writer.[123] During her employment, Anthony alleged she sat next to an aggressive coworker who swore at her, threw objects at her, and generally displayed an aggressive and hostile demeanor towards her.[124] Anthony submitted a written complaint to management about her coworker's behavior.[125] Resulting in part from this harassment, Anthony's post-traumatic stress disorder, anxiety, and depression worsened, and she obtained leave

117 *Id.* at 362.

118 *Id.*

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

120 *Id.* at 1127 (discussing the court's requirement to view the evidence in a light most favorable to Anthony on a motion for summary judgment).

121 *Id.* at 1126.

122 *Id.*

123 *Id.*; Br. of the EEOC as Amicus Curiae in Support of Plaintiff-Appellant and in Favor of Reversal, at 3, Anthony v. Trax Int'l Corp., No. 18-15662 (July 25, 2018), 2018 WL 3716868 ("EEOC Br.") (Anthony maintained "satisfactory" job performance the duration of her employment); Tr. of Oral Arg. at 2, Anthony v. Trax Int'l Corp., No. 18-15662 (Nov. 15, 2019), 2019 WL 8685837 ("Oral Arg. Tr.") (Anthony was "perfectly capable of doing the job and she did a fine job.").

124 EEOC Br., *supra* note 123, at 4; Compl. at 3.

125 Compl. at 4.

pursuant to the FMLA in April 2012.[126] Anthony's physician estimated her full disability would continue until May 30, 2012.[127]

On June 1, 2012, Anthony submitted a request to Trax to work from home, but Trax denied the request without explanation.[128] Trax extended Anthony's FMLA absence for thirty days, but notified her that she would be fired unless she provided a full work release by the end of July.[129] Trax's Benefit Coordinator told Anthony that she would not be permitted to return to work if she "had one single restriction" and that "if she was not 100-percent cured, she c[ould not] go back to work."[130] Anthony's manager also noted that a "100 percent healed policy [wa]s standard Trax policy."[131] Anthony did not submit the work release and Trax fired her on July 30, 2012.[132]

Following her termination, Anthony filed a charge with the EEOC.[133] After a lengthy investigation, the EEOC issued a cause determination and notice of right to sue in Anthony's favor.[134] In issuing the cause determination, the EEOC determined there was probable cause that Trax discriminated against Anthony on the basis of her disability and violated the ADA.[135] The EEOC felt that Trax had failed to provide reasonable accommodations (such as working from home) and that Trax's "100% cured" policy was a per se violation of the ADA.[136] Following the EEOC determination, Anthony filed an ADA claim in federal court.[137]

2. The After-Acquired Evidence

When the parties were "halfway through the [ADA] litigation,"[138] five years after Anthony's termination,[139] Trax learned that Anthony lacked a bachelor's degree, contrary to her representation on her employment application.[140] Trax's technical writer position required a

126 Compl. at 3; Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1126 (9th Cir. 2020).
127 *Trax*, 955 F.3d at 1126.
128 *Id.*
129 *Id.*
130 Appellant's Op. Br., *supra* note 26, at 5.
131 Appellant's Op. Br., *supra* note 26, at 6.
132 *Trax*, 955 F.3d at 1126.
133 *See id.*
134 Appellant's Op. Br., *supra* note 26, at 3.
135 Appellant's Op. Br., *supra* note 26, at 3.
136 Appellant's Op. Br., *supra* note 26, at 3–4; MSJ Br., *supra* note 24, at 1.
137 Appellant's Op. Br., *supra* note 26, at 3–4.
138 Oral Arg. Tr., *supra* note 123, at 2.
139 Appellant's Op. Br., *supra* note 26, at 3.
140 Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1126–27 (9th Cir. 2020).

bachelor's degree, specifically one in "English, Journalism, or a related field."[141] This educational prerequisite was one of eight minimum qualifications for the position.[142] Following the discovery, the parties cross-moved for summary judgment.[143] The district court entered judgment in favor of Trax, reasoning that in light of the after-acquired evidence, Anthony lacked the prerequisite bachelor's degree.[144] Therefore, when she was terminated, she was not a "qualified individual" protected under the ADA.[145]

Neither the district court nor the Ninth Circuit addressed Anthony's allegations of discriminatory treatment, Trax's failure to provide reasonable accommodations, such as working from home, or the per se discriminatory "100 percent healed" policy.[146] Contrarily, based on the EEOC's two-step inquiry, the court focused on the after-acquired evidence's impact on Anthony's status as a qualified individual.[147] Rather than apply *McKennon* to the factual circumstances at play in Trax, as was both appropriate and necessary to further the goals of the national antidiscrimination policy, the Ninth Circuit held that *McKennon's* limitation on the use of after-acquired evidence did not extend to evidence used to show that an ADA plaintiff is not a qualified individual.[148] Thus, it determined that Anthony was not qualified for the technical writer position she had held without issue for two years.[149]

This outcome is problematic because the focus of an ADA lawsuit should be on whether the employer violated its statutory duties under the ADA.[150] Under the current EEOC Interpretive Guidance, an ongoing

141 Appellant's Op. Br., *supra* note 26, at 8; Brief of Appellee Trax Int'l Corp., Anthony v. Trax Int'l Corp. (Oct. 16, 2018) (No. 18-15662), 2018 WL 5283684 ("Appellee's Ans. Br."); Oral Arg. Tr., *supra* note 123 at 7, 10, 12.

142 *See* Appellant's Op. Br., *supra* note 26, at 8–9; *see also* Appellee's Ans. Br., *supra* note 141, at 12; Oral Arg. Tr., *supra* note 123, at 11 (referring to the minimum qualifications for the proposition that, "essentially under Trax's logic and under the district court's holding, if for instance, it was revealed at some pointer later in litigation that Anthony wasn't well-versed in PowerPoint or Excel and Trax had no clue about the fact she didn't know how to do two of those Microsoft Office functions, then according to the, the holding of the, the lower court, Anthony would still be considered unqualified for her job.").

143 *Trax*, 955 F.3d at 1127.

144 *Id.*

145 *Id.*

146 *Id.* at 1126–27; MSJ Br., *supra* note 24, at 4.

147 *Trax*, 955 F.3d at 1134.

148 *Id.* at 1134.

149 *Id.*

150 29 C.F.R. pt. 1630, app. (referring to the "critical inquiry of whether a qualified person has been discriminated against on the basis of disability").

employment relationship is not sufficient to establish qualification for the purpose of establishing a prima facie case of standing.[151]

3. The EEOC's Amicus Brief

The EEOC disagreed with the court's application of the two-step inquiry based on the EEOC's definition of a "qualified individual" in *Trax*.[152] As amicus, the EEOC argued its two-step analysis should apply only when the particular qualifications are relevant to the employer's challenged decision-making (i.e., if the termination actually relates to qualifications).[153] Otherwise, the EEOC argued, the prima facie requirements in after-acquired evidence cases like *Anthony* should revert to the ADA's essential functions standard.[154] The EEOC noted that a rule entirely barring recovery would subvert the statutory purposes of the ADA, as it would not require employers to correct discriminatory practices or penalize them for violating the law.[155] The EEOC also argued that a decision consistent with *McKennon* would only allow after-acquired evidence to limit applicable relief, not entirely bar recovery.[156]

III. ANALYSIS

A. Trax Under McKennon

McKennon was brought under the ADEA, which is part of a "wider statutory scheme to protect employees in the workplace nationwide."[157] While *McKennon* was decided under the ADEA, it is also applicable to other antidiscrimination statutes, including the Americans with Disabilities Act.[158] In *Trax*, after-acquired evidence that Anthony lacked a bachelor's degree served as the backbone of Trax's successful motion

151 *See* 29 C.F.R. pt. 1630.

152 *Trax*, 955 F.3d at 1128.

153 *Id.*

154 *Id.*; Johnson-Monfort, *supra* note 2, at 273.

155 EEOC Br., *supra* note 123, at 1.

156 EEOC Br., *supra* note 123, at 16 (noting that the EEOC cited *McKennon* for support, emphasizing their compatibility with the underlying enforcement objectives of the ADA, deterrence, and compensation).

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

158 Georgia Stanaitis, *Employee Dishonesty and the After-Acquired Evidence Doctrine: Why Honesty is the Best Policy*, 42 CLEV. ST. L. REV. 539, 565 (citing *McKennon*, 513 U.S. at 354); *see also* U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance on After-Acquired Evidence and McKennon v. Nashville Banner Publ'g Co., https://www.eeoc.gov/laws/guidance/enforcement-guidance-after-acquired-evidence-and-mckennon-v-nashville-banner (last visited Oct. 10, 2023).

for summary judgment.[159] By not applying *McKennon* to prevent outright dismissal, the Court not only determined that *McKennon* did not apply to questions regarding prima facie case standing, but also distinguished *McKennon* on remedial grounds.[160]

In *McKennon*, Banner argued that McKennon's misconduct would have led to termination and therefore she had no road to a remedy.[161] In *Trax*, the issue was not the available remedy but standing.[162] Rather than claim Trax would have terminated Anthony had it known about the after-acquired evidence, Trax argued that Anthony's lack of a bachelor's degree meant she had no standing to bring suit under the ADA.[163] Both the remedial and standing arguments, however, merited the same results in the district court cases: the use of after-acquired evidence led to the wholesale dismissal of the discrimination claim.[164]

While this distinguishing feature should not go without acknowledgment, the *Trax* court should have applied *McKennon*. A major rationale behind the *McKennon* decision was furthering the statutory scheme of the national antidiscrimination policy and eradicating patterns of employment discrimination.[165] With this policy goal supplemented by the EEOC's input as amicus, the *Trax* court should have held that after-acquired evidence of employee misrepresentation or misconduct cannot stand as a total bar to liability resulting in dismissal of a claim brought by a current or former employee under the ADA. Acknowledgment of Anthony's status as a former Trax employee would indicate that Anthony was qualified for the position the court itself noted that she was "perfectly capable of doing . . . and . . . did a fine job [at]."[166] Thus, status as an employee would negate the qualification analysis in cases where termination of an employee was the issue in the litigation and there is no mixed motive claim.[167] A mixed-motive claim is when "two motives were said to be operative in the employer's decision to fire an employee. One was lawful, the other . . . [was] unlawful."[168] Such a claim is inapplicable here as Trax "could not have been motivated by knowledge it did not have," and such knowledge was

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

160 *Id.* at 1129–34.

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

162 *See Trax*, 955 F.3d at 1129–34.

163 *Id.*

164 *Id.* at 1134; *McKennon*, 513 U.S. at 355.

165 *McKennon*, 513 U.S. at 358 ("The objectives of the [Act] are furthered when even a single employee establishes that an employer has discriminated against him or her.").

166 Oral Arg. Tr., *supra* note 123, at 2.

167 McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 360 (1995).

168 *Id.* at 359.

not discovered until five years following Anthony's termination.[169] Consistent with *McKennon*, acknowledgment of employee status would prevent after-acquired evidence from resulting in outright dismissal.

By rendering Anthony's status as a Trax employee meaningless, the court failed to honor the objectives of the ADA, which would be "furthered when even a single employee establishes that an employer has discriminated against him or her."[170] The court also sidestepped Anthony's assertion that Trax hired her with the knowledge that she did not have the requisite bachelor's degree.[171] The court mentioned this factual allegation at oral argument, but ultimately ignored it because Anthony admitted to misrepresentation on her résumé, and instead focused on Trax's "contractual obligation" to hire only technical writers with bachelor's degrees.[172] The court used the contractual nature of the prerequisite as a rationale for there being no way that Anthony could have been qualified for the position under any circumstances.[173] Thus, any employer with a "contractual obligation" to hire employees with specific qualifications will always be excused from ADA liability, no matter how egregious their conduct, if they hire employees, even by choice, without certain qualifications.

Trax, or other employers, may claim they would not hire employees without certain qualifications, but "[a]s has been observed, 'proving that [a] decision would have been justified . . . is not the same as proving that the same decision would have been made.'"[174] This resuscitation of *Summer's* masquerading doctor rationale overruled in *McKennon* is a dangerous precedent, one which the court could have avoided by applying *McKennon* to *Trax*. Scholars have pointed out that focusing on the qualified individual requirement as a "preferred defense strategy is particularly problematic given in that an employee's qualified individual

169 *Id.* at 359–60; Appellant's Op. Br., *supra* note 26, at 3–4.

170 *McKennon*, 513 U.S. at 358.

171 Oral Arg. Tr., *supra* note 123, at 2.

172 Oral Arg. Tr., *supra* note 123, at 3; Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1133 n.3. (9th Cir. 2020) (stating in a footnote, "Anthony does not dispute that a bachelor's degree was an actual, mandatory requirement for the Technical Writer I position. We need not and do not decide the extent to which *McKennon* might apply to circumstances in which an ostensible job prerequisite is not regularly enforced, or a technical requirement like a degree could be satisfied by the functional equivalent in experience.", which may be helpful in distinguishing future cases from *Trax* that involve reliance on a list of boilerplate prerequisites, but it still fails to acknowledge Anthony's status as an employee and how the holding protecting Trax from any liability contradicts the statutory scheme of the ADA and its purpose of rooting out employment discrimination).

173 Oral Arg. Tr., *supra* note 123, at 2.

174 McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 360 (1995) (quoting Price Waterhouse v. Hopkins 490 U.S. 228, 252 (1989)).

status is at least partially dependent on the employer's own interpretation."[175] "[T]he 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."[176]

If Anthony had been allowed to move forward in her suit, the jury would have considered the question of misrepresentation as a question of fact in the remedies phase.[177] While Trax claimed it could only be paid if its technical writers had bachelor's degrees, no one argued that Trax was not paid for Anthony's work, or that it had to repay its customers for services rendered by Anthony.[178] If the jury had determined that the misrepresentation deserved weight, under *McKennon*, Anthony's relief may have been limited to backpay since the time of the discovery of Anthony's misrepresentations.[179] This is not inconsequential since that discovery was made five years after Anthony's termination.[180]

McKennon employed a balancing act of employer and employee interests by allowing consideration of after-acquired evidence in the remedial phase of litigation.[181] This balancing act does not ignore an employee's wrongdoing but acknowledges that the after-acquired evidence has nothing to do with an employer's discriminatory conduct. Application of *McKennon* to *Trax* would have resulted in a more equitable outcome, which furthered the goals of the ADA by holding Trax accountable for discrimination while balancing the employer's legitimate interests by giving weight to Anthony's misrepresentation.

B. Trax in Subsequent Litigation

Montgomery v. Union Pacific Railroad Company[182] is a recent Ninth Circuit decision that cited to *Trax*. In *Montgomery*, the plaintiff received a conditional job offer, which was revoked when the railroad learned that the plaintiff had previously suffered from a brain aneurysm.[183] The

175 Johnson-Manfort, *supra* note 2, at 283–84.

176 Johnson-Manfort, *supra* note 2, at 284.

177 *See* MSJ Br., *supra* note 24, at 4 (noting that according to Anthony's allegations, multiple individuals at Trax knew that she did not have a bachelor's degree when Trax chose to hire her).

178 Oral Arg. Tr., *supra* note 123, at 3.

179 *McKennon*, 513 U.S. at 362 ("The beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered").

180 Appellant's Op. Br., *supra* note 26, at 3–4.

181 *McKennon*, 513 U.S. at 361.

182 Montgomery v. Union Pac. R.R. Co., 848 F. App'x 314, 316 (9th Cir. 2021).

183 *Id.* at 315.

plaintiff sued Union Pacific, alleging violation of the ADA.[184] The case went to trial, but the district court declared a mistrial and granted Union Pacific's renewed motion for judgment as a matter of law after it "concluded that Plaintiff had failed to put forth any evidence that Montgomery could perform the essential functions of the train crew position."[185]

The Ninth Circuit took up the appeal and held that "Union Pacific [was] entitled to JMOL because Montgomery [could not] establish that he [was] a qualified individual for purposes of the ADA."[186] Unlike the district court, the Ninth Circuit did not focus on essential functions, but rather on a prerequisite that required zero work-related safety violations in the two years prior to applying for the train crew position.[187] The record showed that Montgomery did not meet this prerequisite because he had been fired by a previous employer for failure to follow safety procedures, causing a derailment.[188] The court noted that Montgomery had "repeatedly lied . . . to obtain his conditional job offer from Union Pacific."[189] The Ninth Circuit cited *Trax* for the proposition that "[e]ven though Union Pacific discovered the derailment and Montgomery's termination after it had already revoked Montgomery's conditional job offer, the company nonetheless was entitled to rely on this after-acquired evidence to show that Montgomery was not qualified for the position."[190]

Montgomery differs from *Trax* because (i) qualifications were a central consideration in the conditional job offer, and (ii) arguably, no employment relationship had been established. While *Montgomery* invokes the qualified individual inquiry more rationally than *Trax*, where Plaintiff already performed the position as an employee, the evidence in *Montgomery* still suggested the company discriminated against Montgomery in the hiring process, an employment activity protected by the ADA.[191] The railroad did not learn about the safety violations until after revocation of the offer.[192] Thus, its determination to revoke the offer could not have been predicated on that information but was more likely predicated on its knowledge of the brain

184 *Id.*
185 *Id.*
186 *Id.*
187 *Id.*
188 *Montgomery*, 848 Fed. Appx. at 315.
189 *Id.*
190 *Id.* at 316.
191 42 U.S.C. § 12112(a).
192 *Montgomery*, 848 F. App'x at 316.

aneurysm.[193] Once again, the two-step qualified individual inquiry acted as a gatekeeping mechanism and let an employer get away with disability discrimination.

IV. CONCLUSIONS AND RECOMMENDATIONS

A. Trax Sets a Dangerous Precedent that Stands in Contravention to the ADA

Trax works against the ADA's goal of providing broad coverage.[194] Trax's "100% healed" policy is a prime illustration of a practice that violates "national policies respecting nondiscrimination in the workforce."[195] The decision ignored Anthony's status as an employee of that organization which is problematic as a policy consideration. An employer may knowingly or unknowingly hire an employee who lacks a prerequisite credential. In cases where the employer is aware of that deficiency, it is inequitable to strip the employee of ADA protection. Where an employer is unaware or the employee misrepresented her credentials, the onus of credential verification should lay with an employer, who has significantly more resources than the employee. Moreover, the employer is also the party responsible for authoring the qualifications to which a court gives deference.[196] Thus, while employees should not be given a green light to falsify credentials, an employee's unrelated wrongdoing should not serve as a complete relief from liability for an employer who engages in disability discrimination.

Because the Ninth Circuit failed to apply *McKennon* to *Trax*, the decision provides employers with an insurance policy for discrimination. If an employer intentionally or inadvertently overlooks a required credential during the hiring process, an employer can later claim a plaintiff was never qualified and be shielded from ADA liability. While "an employer's ignorance cannot create a credential,"[197] an employer's hiring and continued employment should create an employment relationship worthy of ADA protection.

B. Trax Should Have Adopted McKennon

McKennon held that "[i]t would not accord with the scheme [of policies against discrimination] if after-acquired evidence of

193 *See id.*

194 29 C.F.R. pt. 1630, app.

195 McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358–59 (1995); Appellant's Op. Br., *supra* note 26, at 3; MSJ Br., *supra* note 24, at 1.

196 *See* 42 U.S.C. § 12111(8).

197 Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1130 (9th Cir. 2020).

wrongdoing that would have resulted in termination operates, in every instance, to bar all relief for an earlier violation of the Act."[198] The Ninth Circuit should have applied *McKennon* to *Trax* to further accomplish the statutory goals of the ADA. Anthony's suit should have proceeded, but in the event that the jury found her misrepresentations relevant, her back pay should have been capped at the point in the litigation at which her wrongdoing was discovered.[199] That result would have (i) supported the statutory purpose of the ADA to hold employers accountable for discrimination, (ii) been in accordance with *McKennon's* ban on after-acquired evidence as a total bar to recovery, and (iii) balanced the interests of employees and employers in dealing with employee misconduct.

C. The EEOC Should Provide Amended Interpretive Guidance and Reject Trax

The EEOC should amend its Interpretive Guidance to reflect the stance it took in its own amicus brief.[200] The Ninth Circuit noted that "to the extent the EEOC wants us to disregard the prerequisites step of its two-step inquiry for determining who is a qualified individual under the ADA, it could reconsider its own implementing regulations and interpretive guidance that elaborated upon the statutory definition of 'qualified individual.'"[201] This would be an effective pathway to prevent *Trax* from allowing future employers to evade liability. Part one of the two-step inquiry should be amended to (i) carve out an exception where there is an existing employment relationship, and/or (ii) state that step one is only necessary where the qualifications are a factor in the alleged discriminatory conduct. Such an exception would be inserted into the Interpretive Guidance,[202] and read consistent with the following language:

> Step one of this inquiry is not required if (i) the action is brought by a current or former employee of the defendant accused of the discrimination and relates to the position the employee held at the time of the alleged discriminatory conduct, and/or (ii) in matters where qualifications are not related to the alleged discriminatory conduct. For example, in a matter where discovery of a missing qualification was not made until after the alleged discriminatory conduct, a step one

198 *McKennon*, 513 U.S. at 358.

199 *Id.* at 362.

200 *Trax*, 955 F.3d at 1133.

201 *Id.*

202 *See* 29 C.F.R. pt. 1630, app.

analysis should not be undertaken. The court should proceed directly to step two.

Further, the EEOC should expressly reject the *Trax* decision in its Interpretive Guidance, as it did with certain Supreme Court cases that narrowed the application of the ADA.[203]

Employee misconduct should not provide an employer with an insurance policy covering discrimination.[204] A combination of after-acquired evidence and the two-step qualified individual inquiry as used in the *Trax* decision may continue to allow employers to weaponize after-acquired evidence in civil rights litigation. The EEOC or the courts should take steps to prevent inequitable decisions stemming from *Trax* that undermine the national antidiscrimination policy of the ADA. While "an employer's ignorance cannot create a credential," an existing employment relationship should always be deemed worthy of ADA protection.[205]

203 *Id.*

204 Wahl, *supra* note 80, at 596 (citing Bazzi v. Western & S. Life Ins. Co., 808 F. Supp. 1306, 1310 (E.D. Mich. 1992) ("A false statement on an employment application is not an insurance policy covering bigotry.")).

205 Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1130 (9th Cir. 2020).