No. 18-15662

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUNNY ANTHONY,
Plaintiff-Appellant,
v.

TRAX INTERNATIONAL CORP.,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Arizona
The Honorable Eileen S. Willett, Magistrate Judge
No. 2:16-cv-02602- ESW

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND IN FAVOR OF REVERSAL

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STATEMENT OF INTEREST

The Equal Employment Opportunity Commission is the agency charged by Congress with interpreting, administering, and enforcing Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* ("ADA"), as well as other federal anti-discrimination statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et. seq.* ("Title VII"), and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq*. ("ADEA"). All of these statutes, including the ADA, are designed to eliminate discrimination in the workplace. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 358 (1995). A rule barring all recovery for violation of these laws would subvert the statutory purposes of obliging employers to correct discriminatory practices and penalizing them for violating the law. *Id.* at 362.

Yet that is exactly the rule the district court adopted in this case. The court held that because the plaintiff misrepresented her educational credentials when she applied for work some years before, she was barred from pursuing a claim of disability discrimination and the employer, accordingly, bore no responsibility for any discriminatory actions. This was true even though the plaintiff's lack of a college degree had nothing to do with the alleged discriminatory conduct. In the Commission's view, this ruling cannot be reconciled with *McKennon* and, if upheld on appeal, would seriously undermine enforcement of the ADA and other

federal anti-discrimination statutes. The Commission is authorized to participate as amicus curiae in federal court appeals (Fed. R. App. P. 29(a)), and we therefore offer our views to this Court.

STATEMENT OF THE ISSUES[1]

(1) Consistent with *McKennon*, 513 U.S. 352, and its progeny, may an employer use after-acquired evidence of a plaintiff's wrongdoing to defeat her prima facie case of disability discrimination even though the employer concededly may not use such evidence to negate its liability in any other way?

(2) To state a claim under the ADA, must an employee like Anthony show not only that she can do the essential functions of the job but also that she satisfies the stated "skill, experience, education, and other job-related requirements" of the job even where such qualifications had nothing to do with the alleged discrimination?

STATEMENT OF THE CASE

1. Nature of the Case and Course of Proceedings

This is an appeal from a judgment dismissing the plaintiff's claims under the ADA. In pertinent part, the plaintiff alleged that her employer failed to reasonably accommodate her when she needed time off to recuperate from a flare-up of post-traumatic stress disorder ("PTSD") and related conditions. While granting her

[1] The Commission takes no position on any other issue in the case.

request for leave, the employer told her she could not return with any restrictions, and then terminated her when her leave expired and she did not provide a full release, without restrictions. Verified Complaint, district court docket number ("R.") 1, Volume III of Excerpts of Record ("III-ER:") 293-303. After discovery, the defendant moved for summary judgment, arguing that evidence unearthed during discovery and having nothing to do with the alleged discriminatory conduct conclusively showed that the plaintiff was not "qualified" for the job she had been doing for two years without incident. R.44. Over the plaintiff's objections (R.50-51), the district court granted the defendant's motion (I-ER:2-12 (R.61)), and judgment was entered on April 17, 2018. I-ER:1 (R.62). The plaintiff immediately appealed. II-ER:15 (R.63).

2. Statement of Facts

Sunny Anthony began working as a Technical Writer for Trax International in April 2010. R.47-2 at 73-74 (Anthony Dep. 71-72). Her duties consisted mainly of compiling and formatting information into a "usable" technical document, based on data provided to her by test engineers. II-ER:31 (Schaefer Dep. 8). The job required Anthony to obtain a security clearance. R.47-2 at 87-89 (Anthony Dep. 85-87); III-ER:196 (offer letter, "secret clearance"). Her supervisor, Andrew Schaefer, admitted that her performance was satisfactory. II-ER:32 (Schaefer Dep. 9).

Anthony had a history of anxiety, depression, and PTSD dating from before her employment at Trax. II-ER:48, 52-53 (Anthony Dep. 110, 235-36). In 2011, she was assigned to a work station next to that of a test engineer who was "extremely aggressive." R.47-2 at 102-03 (*id.* at 100-01). In January 2012, Anthony formally complained about the engineer. III-ER:174 (*id.* at 132); III-ER:219-23 (complaint letter). Shortly thereafter, he was terminated. III-ER:175, R.47-2 at 134-42 (Anthony Dep. 133-40). However, at least in part because of the stress she experienced from the coworker's behavior, Anthony missed a lot of work. In April 2012, she applied for leave under the Family and Medical Leave Act ("FMLA"). Her point of contact with the company was Agnese Burnau, the benefits coordinator. R.47-2 at 130 (Anthony Dep. 128) (stating she was "dealing specifically with [Burnau]"); R.47-4 at 41 (Batsford Dep. 40) ("any information regarding employees' needs for any medical leave or return to work will have to be done through [Burnau]"). Anthony's doctor estimated that she would be out from April 9 through April 16; thereafter until approximately May 30, she would need a reduced work schedule, consisting of a two- to three-hour reduction, one day per week. The doctor also indicated that Anthony's condition would likely continue to flare up periodically over the next six months, necessitating approximately one day off every three weeks. R.47-2 at 162-63 (Anthony Dep. 160-61); II-ER:81-84 (FMLA certification).

During her deposition, Burnau conceded that she knew very little about the ADA and had had no training on the statute. II-ER:71-72 (Burnau Dep. 76-77). According to Burnau, she knew there was a law but did not know "any specifics." II-ER:71 (*id.* at 76). Thus, for example, her "interpretation of the interactive process" was "communicating," more than problem-solving. R.47-3 at 88-90 (*id.* at 82-84) (adding that she and Anthony "were communicating" though not "specifically regarding ADA").

Burnau attributed her lack of knowledge about the ADA to the fact that the "person that was handling all ADA questions or requests was Rosalinda Batsford," the Human Resources director. R.47-3 at 90 (Burnau Dep. 84); *see* R.47-3 at 94-95 (*id.* at 88-89) (noting Batsford decided that Anthony could not work at home). Batsford, however, had very little interaction with Anthony, since she did not receive any specific requests for accommodation beside working from home. R.47-3 at 32-33 (*id.* at 26-27) (agreeing that she did not propose any accommodations or instruct Burnau to do so because she never received any requests from Anthony). Aside from the generic nondiscrimination statement, Batsford could not recall any written policies on the ADA (R.47-3 at 68-69 (*id.* at 62-63)), and the company provided ADA training only after Anthony's discharge, in November 2012. R.47-3 at 70 (*id.* at 64).

In mid- to late April, Anthony asked Burnau about the possibility of returning to work. Burnau answered that she would need a letter from her doctor stating that she had "no restrictions." III-ER:181, R.47-2 at 175-76, 190-91 (Anthony Dep. 173-74, 188-89) (Burnau said Anthony must be "100 percent cured"). Burnau also told Anthony's boss about this communication, but he did not respond. II-ER:106 (4/25/2012 email from Burnau to Schaefer, noting Anthony will need "a full release with no restrictions"). Schaefer agreed that a full release with no restrictions "is Trax's policy, yes," although he later added that the employee must be able to "do their job." *See* II-ER:40-41 (Schaefer Dep. 22-23).

Although Anthony's initial prognosis indicated that she could return to work with a reduced work schedule (two to three hours off each week), Burnau misunderstood these restrictions, believing that Anthony would be able to work for only two to three hours each week. R.47-3 at 65-66 (Burnau Dep. 59-60); *cf.* R.47-2 at 160, 172-73 (Anthony Dep. 158, 170-71) (agreeing that language was confusing but assuming it meant 2-3 hours, one day a week). Burnau could not recall attempting to clarify this arguably implausible interpretation of a return-to-work authorization with Anthony or her doctor. *See* R.47-3 at 66-70 (Burnau Dep. 60-64). Moreover, although Burnau acknowledged that employees could return to work with restrictions as long as they could do their jobs (R.47-3 at 105 (*id.* at 99)), she admits telling Anthony that Anthony could return only with a "full

release," "without restrictions." *See, e.g.*, II-ER:63 (*id.* at 42) (means what it says: Anthony could not come back to work if she had any restrictions).

On June 1, having again confirmed with Burnau that she could not return with any restrictions, Anthony asked if she could work from home as an accommodation. II-ER:51, R.47-2 at 202 (Anthony Dep. 188, 200); II-ER:108 (email request); *cf.* II-ER:111 (Trax's telecommuting policy). Burnau refused and did not suggest any alternatives. II-ER:63-64, 66 (Burnau Dep. 42-43, 48). At the end of June, Burnau sent Anthony a letter stating that her FMLA leave was expiring and asking that she contact Burnau immediately. II-ER:130 (letter). Burnau admitted, however, that she did not specify that Anthony's job was in jeopardy unless her doctor requested that her leave be extended. II-ER:74-76 (Burnau Dep. 93-95). The following month, Trax told Anthony she would be terminated unless she could return without restrictions. As she could not do so, she was fired. II-ER:136-37 (termination letter); *cf.* II-ER:100 (Batsford Dep. 44) (agreeing that letter says nothing about accommodation or additional leave). Trax admits that Anthony was terminated because she did not return to work when her FMLA leave expired or communicate further with Trax to see what, if anything, the company could do. II-ER:101 (Batsford Dep. 48).

After her discharge, Anthony filed an administrative charge with the EEOC. The EEOC found reasonable cause to believe discrimination had occurred and

issued a notice of right to sue in March 2016. II-ER:144-45 (cause determination). Anthony then filed suit under the ADA, alleging failure to accommodate and noting the return-without-restrictions leave policy.

During discovery, Anthony admitted that she did not have a college degree even though her resume and job application indicated that she did. III-ER:162, R.47-2 at 45-46 (Anthony Dep. 37, 43-44). Anthony explained that she had been advised by Trax employees to say she had a degree because of all the college-level courses she had taken and because otherwise her application would automatically be rejected. R.47-2 at 53-54 (*id.* at 51-52); III-ER:211 (position description, listing "bachelor's degree in English, Journalism, or related field" and "bachelor's degree in Engineering" as "minimum qualifications"). Trax takes the position that it did not know Anthony lacked a college degree and that Technical Writers must have a bachelor's degree because of how it bills for the work. III-ER:213-17 (declaration, noting that personnel records show Technical Writers all have bachelor's degrees). *See also* I-ER:6-7 (Order at 5-6). The company moved for summary judgment, arguing that Anthony could not show she was qualified because she had no college degree.

3. District Court's Decision

` The district court granted Trax's motion. The court stated that "the Ninth Circuit has instructed courts to follow a two-step inquiry in determining whether a

plaintiff is a 'qualified individual'" for purposes of establishing a prima facie case under the ADA. I-ER:6 (Order at 5). First, the plaintiff must show that she "satisfies the 'requisite skill, experience, education, and other job-related requirements' of the position." I-ER:6, 8-9 (Order at 5, 7-8) (citing *Bates v. UPS*, 511 F.3d 974, 990 (9th Cir. 2007) (en banc); *Johnson v. Bd. of Trs. of Boundary Cty. Sch. Dist. No. 101*, 666 F.3d 561, 567 (9th Cir. 2011)). Second, she must show that she can perform the essential functions of the position, with or without reasonable accommodation. I-ER:6 (Order at 5).

Here, the court continued, applicants for the Technical Writer position were required to possess a bachelor's degree, and the plaintiff has admitted she does not have one. I-ER:7 (Order at 6). Accordingly, the court concluded, "there is no genuine issue of fact that Plaintiff is not a 'qualified individual' for the Technical Writer I position." I-ER:8 (Order at 7). She therefore cannot demonstrate a prima facie case of discrimination under the ADA. I-ER:9 (Order at 8). The court added, while the plaintiff alleges a per se violation of the ADA — a 100% healed policy — she has no standing to raise that claim because she has not shown that she satisfies the "qualified individual" element of her prima facie case. I-ER:9 (Order at 8 n.4).

In a footnote, the court then considered and rejected the plaintiff's argument that the fact she has no bachelor's degree is after-acquired evidence that cannot

serve as the basis for summary judgment in the defendant's favor. The court acknowledged that the after-acquired evidence doctrine would preclude the defendant from using after-acquired evidence to show a legitimate reason for its actions, once the plaintiff has established a prima facie case. However, the court stated, the plaintiff bears the burden of proving qualifications as part of her prima facie case, and the defendant may use any otherwise admissible evidence — including after-acquired evidence — to undercut that proof without implicating the after-acquired evidence doctrine. I-ER:8 (Order at 7 n.2).

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo, viewing the facts and drawing all reasonable inferences in the light most favorable to the non-moving party. *Earl v. Nielsen Media Research*, 658 F.3d 1108, 1111 (9th Cir. 2011). In its review, the Court determines "whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Dawson v. Entek Int'l*, 630 F.3d 928, 934 (9th Cir. 2011). Summary judgment is appropriate only where the movant proves both that no material facts are genuinely in dispute and that the movant is entitled to judgment as a matter of law. *Albino v. Baca*, 747 F.3d 1162, 1168 (9th Cir. 2014) (en banc) (quoting Fed. R. Civ. P. 56(a)) (internal quotations omitted).

ARGUMENT

The main issue in this appeal is whether an employer like Trax may avoid responsibility for any disability discrimination if, during discovery, the employer unearths evidence of wrongdoing by the plaintiff — specifically, "after-acquired" evidence that the victim of the alleged discrimination misrepresented her credentials on her resume or application whenever it was that she applied for the job. The Supreme Court resolved this issue over twenty years ago in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352. The Court unanimously held that because the employee's wrongdoing played no role in the employer's alleged discriminatory conduct and because the discrimination statutes are designed to eliminate discrimination, not punish errant employees, the evidence may affect relief, but not liability. *Id.* at 360-61. The distinction that the district court drew here — that even though the evidence may not be used as a defense to liability, the employer may use it to defeat the plaintiff's prima facie case — cannot be reconciled with *McKennon* and its progeny. Rather than advance the enforcement objectives of these laws, the district court's decision would actually undermine those same objectives. As for the so-called "two-step" test for qualifications that the court inserted into the prima facie case, it is inapplicable where, as here, the step one qualifications had nothing to do with the alleged discriminatory conduct. The decision should therefore be reversed.

Summary Judgment for Trax Was Improper Because the After-Acquired Evidence of Anthony's Misrepresentations Could At Most Be Used To Limit Relief, Not Negate Trax's Liability For Alleged Disability Discrimination.

Congress passed the ADA in 1990 to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The statute prohibits employers from discriminating against a "qualified individual" on "the basis of disability" (42 U.S.C. § 12112(a)), and defines "discrimination" to include "not making reasonable accommodation to the known … limitations" of an otherwise qualified applicant or employee with a disability, unless the employer can prove that the accommodation would cause undue hardship. *Id.* § 12112(5)(a). An individual is "qualified" if, "with or without reasonable accommodation, [she] can perform the essential functions of the employment position [she] has or desires." *Id.* § 12111(8). Thus, according to the statute and case law, to survive summary judgment on a reasonable accommodation claim, the plaintiff need show only that she is disabled, she can do the essential functions of the job, with or without accommodation, and accommodation is facially plausible. *See U.S. Airways v. Barnett*, 535 U.S. 391, 401-02 (2002) (accommodation sought must be "reasonable on its face, *i.e.*, ordinarily or in the run of cases"); *Pickens v. Astrue*, 252 F. App'x 795, 796 (9th Cir. 2007). And because the exchange of information is so central to effective accommodation, an employer has a "mandatory obligation to engage in

an informal interactive process to clarify what the individual needs and identify the appropriate accommodation." *Snapp v. United Transp. Union*, 547 F. App'x 824, 825 (9th Cir. 2013) (citation omitted); *see also Humphrey v. Mem. Hosps. Ass'n*, 239 F.3d 1128, 1139 (9th Cir. 2001) (liability would be appropriate if reasonable accommodation would have been possible without undue hardship) (citation omitted).[2]

In this case, Trax does not deny that Anthony was disabled or that she had been doing the essential functions of the Technical Writer job for two years. The only question was accommodation. Based on the evidence, there is at least a jury question whether Trax engaged in good faith in the interactive process and whether, if reasonably accommodated, Anthony could have returned to work. Nevertheless, the district court granted summary judgment to the company. In so doing, the court made two key errors, both involving "qualifications." Under proper legal standards, the judgment should be reversed.

[2] The district court mistakenly assumed that the proof scheme from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies to this case. *See* I-ER:5-6 (Order at 4-5) (stating, *e.g.*, that employer's burden is "to articulate a legitimate nondiscriminatory reason for its actions"). This is not a *McDonnell Douglas* case – that is, a case in which the employer's motives are in question. Because the claim is for failure to accommodate, once the plaintiff establishes the elements of her claim, the employer must prove, not just articulate, its defense. *See, e.g.*, *U.S. Airways v. Barnett*, 535 U.S. 391, 402 (2002) (undue hardship).

A. After-acquired evidence that Anthony lacks a college degree may not be used to absolve the company of liability for alleged discrimination.

The district court erred in allowing the defendant to use "after-acquired" evidence of alleged wrongdoing — that is, wrongdoing of which the employer was unaware at the time of the challenged decision — to avoid liability for the alleged discrimination. The ruling conflicts with *McKennon*, 513 U.S. 352, and later cases such as *Serrano & EEOC v. Cintas Corp.*, 699 F.3d 884 (6th Cir. 2012).

In *McKennon*, 513 U.S. at 354, the Supreme Court unanimously rejected an argument that an employee fired in violation of the ADEA should be barred from challenging that violation if, after her discharge, the employer discovered evidence of wrongdoing that, if known before the discharge, would have led to her termination based solely on that ground. The Court reasoned that barring all relief in such cases would undermine the twin objectives of all federal employment discrimination law: deterrence of illegal discrimination and compensation to victims injured by the discrimination. *Id.* at 358 (adding that "objectives ... are furthered when even a single employee establishes that an employer had discriminated against [her]"). The later-discovered wrongdoing had no bearing on the main issue in the case, which was whether the employer unlawfully discriminated against the plaintiff based on age.

The *McKennon* Court then concluded that, consistent with the statutory objectives, once liability was established, this after-acquired evidence could be considered in determining the appropriate remedies. *Id.* Specifically, if the employer proved it would have fired the plaintiff based solely on the wrongdoing uncovered in discovery, the equitable remedies of front pay and reinstatement would normally be inappropriate, and backpay might also be curtailed, although attorney's fees would still be available. *See id.* at 362-63; *see also Rivera v. NIBCO*, 364 F.3d 1057, 1067-72 (9th Cir. 2004) (suggesting damages may also be available in a Title VII suit). But, the Court stressed, an "absolute rule barring any recovery … would undermine the ADEA's objective of forcing employers to consider and examine their motives and of penalizing them for employment decisions that spring from age discrimination." *McKennon*, 513 U.S. at 362. The Court concluded that allowing the evidence to limit damages but not liability strikes the appropriate balance between the employer's "legitimate interests" and "the important claims of the employee who invokes the national employment policy mandated by the Act." *Id.* at 361.

McKennon arose under the ADEA but the same general principles govern cases under other statutes, including the ADA. *See, e.g., Rooney v. Koch Air, LLC*, 410 F.3d 376, 382 (7th Cir. 2005) (ADA, seeing "no distinction for this purpose between an age discrimination claim like the one in *McKennon* and an ADA

claim"); *Rivera*, 364 F.3d at 1071 n.15 (Title VII). And although *McKennon* involved misconduct while the plaintiff was employed, the case has been applied to resume fraud and other misrepresentations in job applications. *See, e.g.*, *Serrano*, 699 F.3d at 903-04 ("consideration of individual applicants' dishonesty [regarding education or experience] should be reserved for the remedial portion of the proceedings") (applying *McKennon*); *Wallace v. Dunn Constr. Co.*, 62 F.3d 374, 379 (11th Cir. 1995) ("the after-acquired evidence rule announced in *McKennon* applies to cases in which the after-acquired evidence concerns the employee's misrepresentations in a job application or resume"); *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1228-30 (3d Cir. 1994) (plaintiff misrepresented education on application), *aff'd in pertinent part on remand after McKennon*, 65 F.3d 1072, 1073 (3d Cir. 1995); *Burkhart v. Intuit, Inc.*, No. 07-675, 2009 WL 528603, at *12 (D. Or. Mar. 2, 2009) (plaintiff omitted criminal history).

Thus, consistent with *McKennon* and its progeny, the after-acquired evidence that Anthony lacked a college degree cannot be used to justify granting summary judgment to the employer on the merits of the case. As *McKennon* makes clear, the evidence can be used, at most, to limit the applicable relief.

In ruling to the contrary that the after-acquired evidence was admissible for purposes other than relief, the district court acknowledged *McKennon* but concluded that it did not apply. In the court's view, that decision merely

"establish[es] an affirmative defense that becomes meaningful once the plaintiff has established a prima facie case of discrimination." I-ER:8 (Order at 7 n.2). In contrast, here, the employer was seeking to use the evidence to undercut the plaintiff's prima facie case, to preclude plaintiff from showing that she is qualified. That use, the court opined, is permissible. *Id.*

This is a distinction without a difference. As noted above, courts apply the doctrine whether the employer is arguing that the evidence concerns qualifications such as resume fraud or some kind of later misconduct. *See, e.g.*¸ *Serrano*, 699 F.3d at 903. Specifically, the Third Circuit, for example, has held that, consistent with *McKennon*, "after-acquired evidence cannot be used to contest a plaintiff's qualifications for purposes of establishing a prima facie case" under the ADA. *Risk v. Burgettstown Borough*, 364 F. App'x 725, 730 (3d Cir. 2010) (discussing *Bowers v. NCAA*, 475 F.3d 524, 536-37 (3d Cir. 2007), and applying it to a Title VII case). Similarly, the Seventh Circuit "place[d] no weight" on the fact that, as the employer learned during discovery, the plaintiff, a truck driver, had not had a valid driver's license for years as a result of multiple DUI convictions. The court reasoned: "We know from *McKennon*" that "after-acquired evidence like this does not bar all relief although it can limit recoverable damages." *Rooney*, 410 F.3d at 382 (adding that plaintiff's damages likely would be limited since

employer "naturally required employees driving its vehicles to hold a valid driver's license").

This application of the *McKennon* rule makes sense. Virtually any alleged wrongdoing can be recharacterized as a violation of a qualification standard — for example, the employer could describe the theft of company documents in *McKennon* or *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 758-59 (9th Cir. 1996), as an act of dishonesty that renders the plaintiff "unqualified." But regardless of how the evidence is characterized, the result should be the same. "[L]ater discovered evidence that the employee could have been discharged for a legitimate reason does not immunize the employer from liability." *O'Day*, 79 F.3d at 759.

Significantly, the district court's decision completely ignores the enforcement concerns that drove the *McKennon* decision. *McKennon* stresses that the purpose of federal anti-discrimination laws is to eliminate discrimination in the workplace. 513 U.S. at 358. "Congress designed the remedial measures in these statutes to serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, as far as possible, the last vestiges' of discrimination." *Id.* While the employer's interests must be considered, they cannot eclipse the enforcement objectives — deterrence and compensation — of the statute. *Id.* at 361-62.

The court's decision here turns this careful balance on its head. Employers would have little incentive to reform their practices, and many victims of discrimination would have no opportunity to vindicate their rights or be compensated for their injuries. Thus, rather than spur employers to eliminate discrimination, the ruling might even encourage employers to avoid making a needed accommodation, for example, and then hope that if the employee sues, they can uncover something in discovery that would allow them to dispute her qualifications. *See McKennon*, 513 U.S. at 363 (stating that "concern that employers might as a routine matter undertake extensive discovery to resist claims under the Act is not an insubstantial one"); *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991, 994 (D. Or. 1994) (allowing use of after-acquired evidence to avoid liability "encourages an employer charged with discrimination to comb the background of the plaintiff to find any infirmities," which "may also have a chilling effect upon an employee considering whether to file a discrimination claim").

While it is curious that Anthony's security clearance apparently did not uncover the fact she lacks a college degree, we recognize that resume fraud should not be condoned. Nevertheless, the Supreme Court has already rejected the notion that plaintiffs should lose their entire cause of action as a punishment where, as here, the employer learned of the alleged wrongdoing only after the fact and the employer itself allegedly violated the law. *See McKennon*, 513 U.S. at 361 (stating

that goal is "not to punish the employee"). Thus, the Supreme Court struck the appropriate balance — retaining a cause of action for the injured employee and thereby holding the employer liable for any unlawful conduct, while also accounting for "the corresponding equities" arising from the employee's wrongdoing by limiting the available remedies in appropriate cases. *Id.*

The cases cited by the district court do not compel a different result. I-ER:8-9 (Order at 7-8 n.2). It is true that *Herron v. Peri & Sons Farms, Inc.*, 676 F. App'x 639, 639-40 (9th Cir. 2017), allowed use of what was in fact after-acquired evidence — the plaintiff's lack of a particular certification — to rebut the plaintiff's showing of qualifications. Importantly, however, *Herron* is a two-paragraph unpublished memorandum affirmance of the lower court's decision. *McKennon* is never mentioned, and the propriety of relying on after-acquired evidence is not addressed. In any event, the decision is right for the wrong reasons. The plaintiff there, a mechanic, was let go during his probationary period because he did not know how to fix the equipment he was hired to fix or otherwise do the essential functions of the job. That, as the employer learned in discovery, he also lacked a certificate of completion from a certified trade school underscored his lack of qualifications, but he had already been fired because he could not do the job.

McNemar v. Disney Store, 91 F.3d 610, 621 (3d Cir. 1996), *abrogated by Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999), is inapposite. After his termination, the plaintiff applied for disability benefits and, in his application, attested that he had been totally disabled and unable to work since before the date of his termination. *Id.* at 615. The *McNemar* court held that he was judicially estopped from arguing that he was "qualified" for purposes of establishing an ADA prima facie case because the court viewed the information in his sworn application as irreconcilable with his ADA claim of wrongful termination and his attempt to obtain benefits while pursuing an ADA claim as sanctionable conduct. The Supreme Court later effectively overruled *McNemar* and other judicial estoppel decisions, holding that applications for disability benefits do not necessarily bar individuals from proving qualifications under the ADA. *See Cleveland*, 526 U.S. at 798, 800 (mentioning *McNemar*). In short, the holding in the case does not support the district court's decision here.

As for *EEOC v. Fargo Assembly*, 142 F. Supp. 2d 1160, 1164-65 (D.N.D. 2000), the court did not grant summary judgment to the employer or hold that after-acquired evidence could be used to bar the Commission from proceeding with its discrimination claim. Rather, the court allowed the employer to use the evidence to argue to the jury that the charging party's poor performance in his previous similar job indicated that he was not qualified for the job that the

defendant had refused to hire him for. While we disagree with the decision, allowing a jury to consider the evidence at trial is less problematic than allowing the evidence to bar the plaintiff from challenging the alleged discrimination altogether. In any event, *Fargo* is simply an out-of-circuit district court decision.

We therefore urge the Court to reject the district court's lopsided ruling. Instead, this Court should hold that "after-the-fact evidence of dishonesty should be considered only in determining the amount of damages due to an individual and not in the initial liability stage" of an employment discrimination case. *Serrano*, 699 F.3d at 903 (citing cases).

B. Unless "skill, experience, education, and other job-related requirements" are relevant to the challenged decision-making, the plaintiff can prove that she is "qualified" with evidence that she can do the essential functions of her job.

While the question of *McKennon*'s applicability to qualifications has arisen elsewhere, the district court's decision here contains a wrinkle unique to this Circuit. The court plucked the "two-step" test for "qualified individual" out of cases where particular qualifications were relevant to the challenged employment action and dropped it down in this case where they concededly are not. This was error. Outside a narrow range of cases not applicable here, a disabled plaintiff can establish a prima facie case of disability discrimination and withstand summary judgment with evidence that she can do the essential functions — the standard for qualifications that Congress expressly set forth in the statute.

As noted above, the ADA prohibits employers from discriminating against a "qualified individual" on the basis of disability (42 U.S.C. § 12112(a)), and defines the term "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions" of the job. *Id.* § 12111(8). According to Congress, the ability to do essential functions is all a plaintiff has to show in order to establish that she is a "qualified individual" under the ADA.

As the district court recognized (I-ER:6), however, in *Bates v. UPS*, this Court added another step to the statutory definition of "qualified individual." 511 F.3d at 990. The Court held that the plaintiffs there were required to show not only that they could do the essential functions of the job — driving small trucks safely — but also that they "satisfie[d] the requisite skill, experience, education, and other [non-discriminatory] job-related requirements" of the position — a commercial driver's license, clean driving record, and sufficient seniority. *Id.* The Court based this two-step test on EEOC regulations defining "qualified individual." *Id.* at 989-90 (citing 29 C.F.R. § 1630.2(m)).

However, from the context, it is clear that neither this Court nor the Commission intended this two-step test to supplant Congress's test in all cases. Rather, the extra step should apply only where particular qualifications are relevant to the employer's decision-making — mainly hiring and retention cases. Thus, in *Bates*, this Court specified that it was deciding only the "question" of "what proof

is required with respect to being a 'qualified individual'" where "*an across-the-board safety 'qualification standard' is invoked*." 511 F.3d at 989 (emphasis added) (discussing claim under 42 U.S.C. § 12112(b)(6)); *see also Johnson*, 666 F.3d at 564-66 (deciding whether plaintiff should be considered "qualified" under two-step test despite the fact her state-mandated teaching credential had expired). In cases outside that context, evidence the plaintiff can do the essential functions is sufficient. *See, e.g.*, *Dunlap v. Liberty Natural Prods.*, 878 F.3d 794, 799 (9th Cir. 2017) (reasonable accommodation); *Smith v. Clark Cty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013) (same).[3]

That is also how the Commission interprets its regulation: the two-step test applies only where the individual's credentials are relevant to the employer's decision-making. *Cf. Auer v. Robbins*, 519 U.S. 452, 461-63 (1997) (EEOC's reasonable interpretation of its own regulation is entitled to deference). Thus, for example, a disabled applicant seeking a job with an accounting firm that requires all accountants to be licensed CPAs would be considered "qualified" only if she likewise were a licensed CPA. 29 C.F.R. 1630 pt. App. § 1630.2(m). The firm would not be expected to hire an unlicensed accountant with or without a disability. But the employer would not be excused for terminating the employee

[3] Of course, even where the two-step test applies, the plaintiff may dispute whether the employer actually requires a specific criterion.

based on her disability, for example, even if it turned out that, unbeknownst to the employer, the employee had at some point failed to renew her license. Since the missing credential played no role in the termination decision, the employer would not be off the hook entirely for its discriminatory action even though the employee would be unable to show that she satisfied the employer's "job-related requirements" when challenging the adverse action. *Accord* 29 C.F.R. 1630.9 pt. App. § 1630.9(a) (employer must provide reasonable accommodation to applicant who meets employer's job requirements).[4]

In denying Anthony's discrimination claims in this case, however, the district court mistakenly assumed that this Circuit "has instructed courts to follow" the two-step test in every case, whether or not the test makes sense under the particular facts of the case. Thus, even though Anthony's lack of a degree had nothing to do with the alleged discrimination, the district court applied the two-step test to her accommodations claim. The court then held that, because she could not prove under the first step that she satisfied Trax's degree requirement, she could not make out a prima facie case and should therefore be barred from challenging Trax's failure to provide reasonable accommodation.

[4] As noted above, relief would likely be limited if the employer proved that it would have fired her for allowing her license to expire.

This ruling should be rejected. The two-step test makes sense in cases like *Bates* where the alleged adverse action turns on the plaintiff's qualifications. But it makes no sense in a case like this one where the question is whether the employer violated the ADA by demanding that the plaintiff return to work without restrictions or not at all. Whether the employee actually earned a college degree or instead lied on her resume or application — two or ten or twenty years before — sheds no light on that question.

Moreover, the Commission doubts that this Court would insist on such a nonsensical interpretation of the law. "As the very name 'prima facie case' suggests, there must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a legally mandatory, rebuttable presumption." *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311-12 (1996); *cf. Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) (stating that "precise requirements of a prima facie case can vary depending on the context and were 'never intended to be rigid, mechanized, or ritualistic") (citations omitted). Here, there is none. Rather than imposing artificial barriers to coverage, "the primary object of attention in cases brought under the ADA should be whether [employers] have complied with their obligations." *See* 42 U.S.C. § 12101(b)(5) note (discussing disability).

Accordingly, we urge this Court to clarify that unless the employer's decision-making is based on the plaintiff's skill, experience, education, or other job-related requirements of the job — that is, the step one factors — the plaintiff can establish a prima facie case with step two evidence only: that she can do the essential functions of the job, with or without accommodation. Any other interpretation would require the plaintiff to come up with information that bears no logical connection to the illegal discrimination. It would also do an end-run around *McKennon* and lead to underenforcement of the law.

CONCLUSION

For the foregoing reasons, the judgment should be reversed and the case remanded to the district court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,162 words from the Statement of Interest through the Conclusion, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styles requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with Times New Roman 14-point font.

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Dated: July 25, 2018

CERTIFICATE OF SERVICE

I certify that I filed the foregoing brief of the Equal Employment Opportunity Commission as amicus curiae with the Clerk of the Court this 25th day of July, 2018, by uploading an electronic version of the brief via this Court's Case Management/Electronic Case Filing (CM/ECF) system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

s/ Barbara L. Sloan
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