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Turning From a Hire Power: Employment Discrimination and Faulty Ninth Circuit Procedure

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NOTE

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Skipps v. Mayorkas, No. 21-56184, 2023 WL 3477835 (9th Cir. May 16, 2023).

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I. INTRODUCTION

You just applied for your dream job. As anticipation for a response amounts, you become overwhelmed with a sense of optimism. You know you are overqualified, yet a few days later, you receive notification that the employer is no longer considering you for the position. Despite meeting all requisite qualifications, you feel slighted. You wonder if another factor is at play. Conversely, imagine you actually get the job. You accept, and you work at the company for a few years only to one day have your boss inform you that your employer is terminating your employment. Again, you feel slighted. This seems unfair. You have been working hard in your role while consistently receiving positive feedback on work assignments. At this point, your qualifications become irrelevant, as your termination hinges entirely on something else: your job performance.

In the first instance, if you believe you were not hired for an unjust cause—perhaps even due to a discriminatory motive—you would argue that you were not hired despite your qualifications. However, in the second instance, if you believe you were unjustly fired, you would not argue that you were fired despite your qualifications; rather, you would argue that you were fired despite your excellent track record. In either event, the court would likely apply the three-part, burden-shifting

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McDonnell Douglas test—a test courts often apply when evaluating federal employment discrimination claims.[1]

This Note explores the implications of the concurring opinion in *Skipps v. Mayorkas*.[2] The concurrence presents issues concerning judicial procedure and interpretation with respect to precedent and intra-circuit splits that have long plagued the U.S. Court of Appeals for the Ninth Circuit. Further, it highlights potential challenges faced by both employees and employers stemming from unclear guidance regarding a Title VII claim for discriminatory discharge. Part II of this Note summarizes the facts and procedural history of *Skipps*. Part III explains intra-circuit splits and the Ninth Circuit's current process for resolving them. Part III also details employment discrimination in the context of Title VII of the Civil Rights Act of 1964, including how this area of law has evolved over time to encompass a wide variety of claims. Part IV discusses the instant decision, with a specific focus on the concurring opinion by Judge Lee, which emphasizes the issue of confounding the language of failure-to-hire and discriminatory discharge claims. Finally, Part V considers why the Ninth Circuit's intra-circuit split on this issue will likely persist and offers potential solutions to the problem.

II. FACTS AND HOLDING

In *Skipps v. Mayorkas*, plaintiff Margaret Skipps initiated an action against the Department of Homeland Security as the personal representative of Alexander Reagan Ma'alona's estate.[3] Skipps alleged that Ma'alona was improperly removed from his job as a Transportation Security Officer for the Transportation Security Administration (the "TSA") because of his race, color, and sex, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII").[4] Alejandro Mayorkas, Secretary of the Department of Homeland Security (the "Department"), served as defendant on behalf of the Department, the agency that oversees the TSA.[5]

Congress passed the Aviation and Transportation Security Act of 2001 ("ATSA") in response to the September 11, 2001, terrorist attacks.[6] The ATSA granted the TSA expansive enforcement powers regarding security protocol at airports, and it required all Transportation Security

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

[2] Skipps v. Mayorkas, No. 21-56184, 2023 WL 3477835, at *2 (9th Cir. May 16, 2023) (Lee, J., concurring).

[3] Skipps v. Mayorkas, No. 219CV10557ODWAGRX, 2021 WL 3849705, at *1 (C.D. Cal. Aug. 27, 2021), *aff'd*, No. 21-56184, 2023 WL 3477835 (9th Cir. May 16, 2023). Margaret Skipps brought this action on behalf of Ma'alona because Ma'alona died before the commencement of this action. *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

Officers to pass an annual proficiency review by attaining a minimum threshold score.[7] In 2012, the TSA conducted these annual proficiency reviews through a process called the Performance Accountability and Standards System ("PASS").[8] The 2012 PASS assessed several categories, and each category gave a failing employee additional opportunities to remediate and improve his performance if he did not pass the first time by attaining the minimum score.[9] If an employee did not pass after three attempts, then his employment was subject to termination.[10]

As a Transportation Security Officer at the Los Angeles Airport, Ma'alona signed a form acknowledging these requirements.[11] He failed his first PASS attempt on August 1, 2012, and he received up to fifteen days to prepare for his next attempt. After some mild preparation, he retook the assessment the following day and failed once more.[12] He again received up to fifteen days to prepare for his third and final attempt.[13] Ma'alona opted to retake the final assessment on August 10 and, once again, he failed.[14]

Ma'alona subsequently submitted a letter to the Assistant Federal Security Director for Screening at the Los Angeles Airport on August 28, 2012, requesting more training and a fourth attempt at the assessment.[15] On October 1, 2012, the Assistant Federal Security Director for Screening issued a Notice of Proposed Non-Disciplinary Removal, to which Ma'alona responded by again requesting additional training and a fourth attempt through written and oral responses.[16] Upon review of Ma'alona's statements, the Acting Deputy Assistant Federal Security Director, Geoff Shearer, determined that TSA properly followed its internal procedures and issued a Notice of Decision on Proposed Non-Disciplinary Removal on December 4, 2012.[17] Ma'alona's employment with the agency was subsequently terminated.[18]

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[7] *Id.* The annual proficiency reviews included several categories, such as standard operating procedures, image mastery, practical skills, and alarm protocol mastery. *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at *2.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

Years later, in 2019, Skipps initiated an employment discrimination action on behalf of Ma'alona.[19] Mayorkas moved for summary judgment on all counts, arguing that Skipps could not establish a *prima facie* claim of disparate treatment under Title VII, because Ma'alona did not discharge his duties in accordance with the legitimate expectations set forth for Transportation Security Officers.[20]

The District Court for the Central District of California granted Mayorkas's motion for summary judgment, concluding that Skipps failed to raise a triable issue of material fact as to the second element of his *prima facie* case of disparate-treatment discrimination, which requires the employee to show he was "performing according to his employer's legitimate expectations."[21] The court reasoned that by failing his assessments, and in light of the imperative nature of the TSA's role of ensuring public safety, Ma'alona failed to perform in accordance with the TSA's expectations at the time of his discharge.[22]

Skipps appealed the district court's grant of summary judgment,[23] and the Ninth Circuit affirmed the district court's decision.[24] The Ninth Circuit analyzed the claim using the *McDonnell Douglas* burden-shifting framework.[25] Under this framework, courts analyze Title VII claims in a three-step manner. First, a plaintiff must establish a *prima facie* claim of discrimination.[26] The burden then shifts to the employer to articulate a "legitimate, nondiscriminatory" reason for its decision.[27] If the employer proffers a reason, the burden shifts back to the plaintiff to show the proffered reason is pretextual, masking a true discriminatory motive.[28]

In the case at bar, the Ninth Circuit determined that TSA met its burden at step two because Ma'alona's failure to pass his assessments was a legitimate, nondiscriminatory reason for discharge.[29] The burden then shifted back to Skipps to show that TSA's proffered reason for discharge was pretextual.[30] Skipps argued that there were six other similarly situated employees who, despite failing, were not discharged after their annual assessments.[31] However, the court distinguished the circumstances of

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[19] *Id.*

[20] *Id.* at *3.

[21] *Id.*

[22] *Id.*

[23] Skipps v. Mayorkas, No. 21-56184, 2023 WL 3477835, at *1 (9th Cir. May 16, 2023).

[24] *Id.*

[25] *Id.*

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

[27] *Id.*

[28] *Id.* at 804.

[29] *Skipps*, 2023 WL 3477835, at *1.

[30] *Id.*

[31] *Id.* at *2.

these other six employees from Ma'alona's position: four employees were dual-function employees converted to single-function employees, one opted to retire, and the last employee was given an additional chance because of improperly documented procedures surrounding one of his assessment failures.[32] Accordingly, the Ninth Circuit held that Mayorkas was entitled to summary judgment on Skipps's Title VII disparate treatment discrimination claim because Skipps failed to establish sufficient evidence that the employer's reason for discharging Ma'alona was pretextual.[33]

III. LEGAL BACKGROUND

To better understand the issues within this Note, it is important to first discuss the Ninth Circuit's nuances surrounding its approach to an intra-circuit split and how Title VII has evolved to include a wide variety of claims, including failure-to-hire and discriminatory discharge claims. This Part details the Ninth Circuit's unique approach to resolving intra-circuit splits. It then explains that, because of this process and diverging opinions in the circuit, conflicting authority surrounds the distinction between a failure-to-hire claim and a discriminatory discharge claim.

A. Resolving an Intra-Circuit Split in the Ninth Circuit

An intra-circuit split occurs when different district courts in the same judicial circuit reach contradictory conclusions on the same issue.[34] Under these circumstances, federal courts of appeal are permitted to decide cases with three-judge panels that speak on behalf of the circuit.[35] Panels of this sort handle a majority of cases in the courts of appeal because *en banc* decisions are disfavored due to their extraordinary nature, namely the difficulty in bringing so many decision-makers together to come to an agreed-upon resolution.[36] Generally, a later panel of judges may not

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[32] *Id.*

[33] *Id.* An employee may establish an employer's decision is pretextual in two different ways. Chuang v. Univ. of Cal. Davis, Bd. of Trs., 225 F.3d 1115, 1127 (9th Cir. 2000). First, they may do so indirectly by showing that the reason the employer gave is either not believable or internally inconsistent. *Id.* Second, they may do so directly by showing that unlawful discrimination more likely than not motivated the employer. *Id.*

[34] *See* Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987) (en banc).

[35] 28 U.S.C. § 46(b).

[36] FED. R. APP. P. 35(a); *see* United States v. American-Foreign Steamship Corp., 363 U.S. 685 (1960) (noting that an extraordinary circumstance is one which "call[s] for authoritative consideration and decision by those charged with the administration and development of the law of the circuit.").

overrule a decision made by an earlier panel because the conclusion and reasoning of the earlier panel serves as precedent;[37] however, this does not preclude later panels from reaching differing conclusions on the same or similar issues without overruling the earlier decision.[38] Later panels may come to different conclusions for a variety of reasons, including a lack of awareness of an earlier decision or a doctrinal disagreement with a previously reached conclusion.[39] A true intra-circuit split arises when conflicting cases, specifically those with similar issues and facts, cannot be reconciled, resulting in incongruity.[40]

Most jurisdictions follow the traditional doctrine of *stare decisis*. Under *stare decisis*, the earliest decision controls when a court faces an intra-circuit split.[41] *Stare decisis* is rooted in English common law, and it has been followed in a majority of circuits and jurisdictions since the country's founding.[42] Famous jurist William Blackstone importantly discussed the critical role of precedent over two hundred years ago, noting that precedent provides the imperative foundation for judicial opinions: certainty.[43] Like Blackstone, jurists historically recognized that deferring to precedent provides certainty by ensuring the law is not altered with every judicial opinion.[44]

The Ninth Circuit, however, does not follow the conventional approach of resolving intra-circuit splits.[45] In most circuits, the resolution of an intra-circuit split is simple: the earliest decision controls the court's prospective view.[46] In jurisdictions that follow this approach, the third panel, which discovers the contradiction, must follow the decision of the

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[37] Miller v. Gammie, 335 F.3d 889, 899 (9th Cir. 2003).

[38] Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, 3 FED. CTS. L. REV. 17, 20 (2009).

[39] *Id.* at 18.

[40] *See* Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir.1987) (en banc).

[41] Duvall, *supra* note 38, at 17–18; *see also* McMellon v. United States, 387 F.3d 332–33 (4th Cir. 2004); Hiller v. Oklahoma, 327 F.3d 1247, 1251 (10th Cir. 2003); Walker v. Mortham, 158 F.3d 1177, 1188 (11th Cir. 1998); Newell Cos. v. Kenney Mfg. Co., 864 F.2d 757, 765 (Fed. Cir. 1988); Alcorn Cnty. v. United States Interstate Supplies, Inc., 731 F.2d 1160, 1166 (5th Cir. 1984).

[42] Randy J. Kozel, *Stare Decisis As Authority and Aspiration*, 96 NOTRE DAME L. REV. 1971, 1978 (2021).

[43] *Id.* at 1978–79. In the early descriptions of precedent and stare decisis, Blackstone opined that the presumption should be respect for available precedent, with a rebuttal only being relevant if the precedential decision is dubious in its reasoning or results. *Id.*

[44] *Id.* at 1979 n.40 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *69).

[45] Duvall, *supra* note 38, at 20.

[46] *See McMellon*, 387 F.3d at 332–33; *Hiller*, 327 F.3d at 1251; *Walker*, 158 F.3d at 1188; *Newell Cos.*, 864 F.2d at 765; *Alcorn Cnty.*, 731 F.2d at 1166.

first panel to resolve the split.[47] However, the Ninth Circuit takes a different, less traditional route.

When the Ninth Circuit addresses an intra-circuit split on a material issue, the panel calls for *en banc* review.[48] *En banc* review is normally permitted unless a prior decision clearly dealt with a different issue.[49] Under this approach, a Ninth Circuit panel that discovers an intra-circuit split may not resolve the issue itself; rather, it must resort to the "extraordinary" measure and call for a panel with every judge in the circuit to resolve the issue by weighing the alternatives and deciding which conclusion proves most appropriate.[50] Though it may be argued that this approach leads to more uniform decisions, this Note later details how the Ninth Circuit's process often delays resolution of issues in which a clear difference in opinion exists.

B. Title VII's Evolution to Encompass Failure-to-Hire and Discriminatory Discharge Claims

Congress adopted the Civil Rights Act of 1964 to address persistent discrimination against minority groups in the United States.[51] Title VII of the Civil Rights Act prevents discrimination in the employment context, and it codifies protections against discrimination in both discriminatory hiring procedures and discriminatory discharge.[52] Under Title VII, an employer may not fail to hire, nor terminate, an employee based on the employee's "race, color, religion, sex, or national origin."[53] Several cases clarify and provide guidance regarding employment discrimination cases under Title VII but, arguably, none have been more profound than

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[47] Duvall, *supra* note 38, at 20.

[48] United States v. Hardesty, 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc).

[49] *See* Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1479 (9th Cir. 1987) (en banc).

[50] *See, e.g.*, *Hardesty*, 977 F.2d at 1348. It is also worth noting that the Ninth Circuit Court of Appeals currently has twenty-nine active circuit judges, which is more than any other federal circuit court. *A Short History of the Ninth Circuit Court of Appeals*, UNITED STATES CTS. FOR THE NINTH CIR., https://www.ca9.uscourts.gov/information/ninth-circuit-history/ [https://perma.cc/EHW2-CY94] (last visited Feb. 9, 2024). With so many circuit judges, this likely exacerbates the problem, especially with the requirement of en banc review of an intra-circuit split. *Id.*

[51] Christina M. Sautter, *A Matter of Class: The Impact of* Brown v. McLean *on Employee Discharge Cases*, 46 VILL. L. REV. 421, 424–25 (2001); *see* H.R. Rep. No. 88-914, at 18 (1963) (highlighting the prevalence of discrimination against minority groups in America).

[52] Sautter, *supra* note 51, at 425–26.

[53] *See* 42 U.S.C. § 2000e-2(a)(2).

McDonnell Douglas Corp. v. Green in establishing pretext jurisprudence.[54]

The United States Supreme Court decided *McDonnell Douglas Corp. v. Green* in 1973.[55] This decision marked the first time the Court set forth a burden-shifting, evidentiary framework in the context of employment discrimination, holding that a plaintiff proceeding under a Title VII claim for employment discrimination based solely on circumstantial evidence could nevertheless state a claim through a three-step framework.[56] This framework has been applied ever since in different types of employment discrimination claims.[57] First, a plaintiff must establish a *prima facie* claim of discrimination.[58] The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action.[59] Finally, if the employer proffers such a reason, the plaintiff generally must show that the employer's reason is pretext for a true discriminatory motive.[60] If and when an employer proffers a legitimate and nondiscriminatory reason for the discharge, the presumption of unlawful discrimination is negated.[61] In effect, the *McDonnell Douglas* test ultimately forces an employer to respond to the employee's *prima facie* case.[62]

The elements of a *prima facie* case are intended to be "neither rigid nor mechanistic."[63] The goal underlying the burden-shifting framework is to give plaintiffs with legitimate claims a way to overcome initial obstacles inherently intertwined with bringing an employment discrimination claim.[64] A plaintiff bringing a failure-to-hire case ultimately has a much different experience than a plaintiff bringing a harassment claim, who in

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[54] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[55] *Id.*

[56] *Id.* at 802.

[57] *See* Sautter, *supra* note 51, at 425 n.22.

[58] Weil v. Citizens Telecom Servs. Co., 922 F.3d 993, 1002 (9th Cir. 2019).

[59] *Id.*

[60] *Id.* An employee may demonstrate pretext to rebut an employer's proffered nondiscriminatory purpose for its action either (1) by showing that the employer was more likely motivated by unlawful discrimination, or (2) by showing that the employer's proffered reason is not consistent or otherwise not believable and is therefore unworthy of credence. Dominguez-Curry v. Nev. Transp. Dep't, 424 F.3d 1027, 1037 (9th Cir. 2005). Additionally, it is worth mentioning that the plaintiff can also prevail on the third step by offering other evidence that suggests the protected trait caused the adverse outcome. *Id.*

[61] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510 (1993).

[62] Dédé Koffie-Lart & Christopher J. Tyson, *Title VII of the Civil Rights Act of 1964*, 6 GEO. J. GENDER & L. 615, 636 (2005).

[63] Bennett v. Windstream Commc'ns, Inc., 792 F.3d 1261, 1266 (10th Cir. 2015) (quoting Adamson v. Multi Cmty. Diversified Servs., Inc.,514 F.3d 1136, 1146 (10th Cir. 2008)).

[64] *Id.*

turn has a different experience than someone bringing a discharge claim, and so on. Accordingly, courts have generally held that the *prime facie* elements for a discrimination claim under Title VII are flexible, and litigants can tailor the elements to accurately reflect the unique circumstances accompanying each type of claim.[65] The second element intuitively has the greatest latitude because it specifically deals with the plaintiff's situation. It is this element where the claim-specific "tailoring" occurs.[66]

For example, the difference between a failure-to-hire claim and a discriminatory discharge claim lies in the language of the second element because of the situation-specific analysis it commands.[67] For a plaintiff to establish a *prima facie* case of discrimination related to failure-to-hire, a plaintiff must demonstrate: (1) he belongs to a protected class; (2) he applied for and was qualified for a job in which an employer was seeking applicants; (3) despite his qualifications, he was rejected by the employer; and (4) after rejecting the plaintiff, the position remained vacant and the employer continued receiving applications from persons with similar qualifications to those of the plaintiff.[68]

Conversely, in a discriminatory discharge claim, many courts require a plaintiff to show: (1) he belongs to a protected class; (2) he was performing according to his employer's legitimate expectations; (3) he suffered an adverse employment action; and (4) similarly situated individuals outside of the plaintiff's protected class were treated more favorably."[69] The difference between the two claims is that in a failure-to-hire case a plaintiff must simply establish—under the second element—that he or she was qualified for the position,[70] whereas, in a discriminatory discharge case, the plaintiff must show he was performing his job in accordance with the objective, minimum requirements for the position.[71] Notably, although the Supreme Court has previously recognized

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[65] Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002). This is one iteration of the prima facie case that the Ninth Circuit uses in their decisions. *See generally* Skipps v. Mayorkas, No. 21-56184, 2023 WL 3477835, at *2 (9th Cir. May 16, 2023) (Lee, J., concurring). However, there multiple iterations of the elements that differ slightly in their wording and order. SANDRA SPERINO, MCDONNELL DOUGLAS: THE MOST IMPORTANT CASE IN EMPLOYMENT DISCRIMINATION LAW, ch. 5, § 5.I (Bloomberg Law 2022). Additionally, many jurisdictions have varying degrees of flexibility when it comes to the test, with some allowing broad uses of the test and others tailoring the test to a fact-specific inquiry. *Id.*

[66] *See* Sumner v. San Diego Urb. League, Inc., 681 F.2d 1140, 1142 n.2 (9th Cir. 1982).

[67] *Skipps*, 2023 WL 3477835, at *2 (Lee, J., concurring).

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

[69] Gowdin v. Hunt Wesson, Inc., 150 F.3d 1217, 1220 (9th Cir. 1998).

[70] *See infra* examples in Part V.

[71] Sengupta v. Morrison-Knudsen Co., 804 F.2d 1072, 1075 (9th Cir. 1986).

discriminatory discharge claims, the Court has not articulated the Title VII elements of a *prima facie* claim for discriminatory discharge in the detail circuit courts have.[72]

These distinctions may appear intuitive, but the decision and concurrence in *Skipps v. Mayorkas*, considered in light of Ninth Circuit precedent, indicate that the difference may not be as clear as it seems.

IV. INSTANT DECISION

In resolving this case, the Ninth Circuit held that Skipps failed to provide sufficient evidence to demonstrate that the TSA's proffered reason for discharging Ma'alona was pretextual.[73] The Court concluded that Skipps' proffered evidence of employees in similar positions receiving disparate treatment was not enough because the similarly situated employees had to be "similarly situated . . . in all material aspects."[74] Because the employees were not similar in all material aspects, Skipps failed to show that the TSA's proffered reason was pretextual, and her claim on behalf of Ma'alona failed as a matter of law.[75]

The court based its ultimate decision on the pretext prong of the *McDonnell Douglas* test. In a concurring opinion, Judge Lee highlighted a collateral issue related to the Title VII *prima facie* case.[76] Lee emphasized the ambiguity in the Ninth Circuit's reasoning concerning the *prima facie* elements for discriminatory discharge under the first prong of the *McDonnell Douglas* framework.[77] He recognized that the *McDonnell Douglas* test is flexible,[78] and the second element is normally adapted to different factual situations.[79] He also highlighted the fact that the distinction between failure-to-hire and discriminatory discharge claims is intuitive.[80] According to Judge Lee, once an employee has been working for an employer, the employer is not as concerned about the employee's qualifications but is instead focused on the performance of the employee on the job.[81] Therefore, Judge Lee reasoned that an employee may be

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[72] Sautter, *supra* note 51, at 422.

[73] Skipps v. Mayorkas, No. 21-56184, 2023 WL 3477835, at *1 (9th Cir. May 16, 2023).

[74] *Id.* (quoting Moran v. Seling, 447 F.3d 748, 755 (9th Cir. 2006)).

[75] *Id.* at *2.

[76] *See id.* (Lee, J., concurring).

[77] *Id.*

[78] *Id.* (citing McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1123 n.17 (9th Cir. 1986)).

[79] *Id.* (citing Sumner v. San Diego Urb. League, Inc., 681 F.2d 1140, 1142 n.2 (9th Cir. 1982)).

[80] *Id.* at *3.

[81] *Id.*

qualified to do the job, but that does not necessarily mean he is doing the job adequately to avoid discharge.[82]

Even though this may seem instinctual, Judge Lee stated that there are conflicting opinions in the Ninth Circuit surrounding this element.[83] Some cases continue to use the "qualified" language for the second element of the claim, even in cases of discriminatory discharge.[84] In these instances, the court required the employee only show that he was qualified for the job to establish the *prima facie* element because it merely necessitates a "minimal inference" of discrimination.[85] He concluded his concurrence by stating that this intra-circuit split need not be resolved in this case since Skipps failed to provide evidence showing the TSA's proffered reason for discharging Ma'alona was pretextual.[86] However, his concurrence emphasizes the need for clarification on the second element of the discriminatory discharge claim for the sake of future litigants and courts.[87]

V. COMMENT

The Ninth Circuit Court of Appeals came to the right conclusion in the instant case: Ma'alona was properly discharged because he failed to pass the mandatory safety assessments.[88] The facts of this case were relatively simple, so the court could easily conduct its analysis. However, Judge Lee's concurrence highlights that on more ambiguous facts, or different assertions by a plaintiff, the Ninth Circuit's unsettled issue of "qualified" would come to the forefront.[89] In leaving this issue to be decided at a later date, the court sidestepped a decision that will inevitably need to be resolved in a future case when the facts specifically entail the discharge of an employee, despite his or her qualifications.

There are strengths in the Ninth Circuit's intra-circuit split resolution methodology, but alternatives exist that would allow the court to swiftly

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[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* (quoting Aragon v. Republic Silver State Disposal Inc., 292 F.3d 654, 658–69 (9th Cir. 2002)).

[86] *Id.*

[87] *Id.* ("Notably, none of our opinions appear to expressly recognize this split in authority. We need not resolve this intra-circuit split here because the Title VII claim fails, regardless of which prima facie standard applies, because Skipps failed to provide evidence showing that the employer's proffered reason for the discharge was pretextual. In a future case, we should clarify the standard for assessing the second prima facie element for a discriminatory-discharge claim under the McDonnell Douglas framework.").

[88] *Id.* at *2 (majority opinion).

[89] *Id.* at *4 (Lee, J., concurring).

address convoluted issues rather than fostering their confusion. In adopting a new procedure, the Ninth Circuit could easily address the issue highlighted by Judge Lee. The tests for failure-to-hire and discriminatory discharge are meant to be distinct, and the court has further muddied the waters by not addressing the distinction. This Part offers solutions to the Ninth Circuit's inadequate procedure, addresses the reasons why failure-to-hire and discriminatory discharge claims are different, and highlights the importance of the Ninth Circuit addressing this issue in the timeliest manner possible.

A. How the Ninth Circuit Should Resolve Circuit Splits to Maximize Efficiency and Certainty

The Ninth Circuit is certainly unique in the way it resolves intra-circuit splits. As noted, generally when a circuit is faced with an intra-circuit split, the earliest decision controls.[90] However, the Ninth Circuit must call an *en banc* panel when faced with a true intra-circuit split, and the *en banc* panel evaluates the alternatives to determine which one should be precedent.[91] Under its approach, uncertainty is mitigated by calling an *en banc* panel to review and resolve the issue as quickly as possible.[92] In this regard, the panel which discovered the apparent split does not have to unilaterally decide which precedent to follow; rather, that decision is reserved for the full group.[93] The Ninth Circuit likely adheres to this process to increase the stability and certainty of circuit law upon discovering a discrepancy.[94]

However, the negatives of the Ninth Circuit's approach, especially in cases like *Skipps* where the issue is discovered but cannot presently be resolved, tend to outweigh the benefits. One of the main disadvantages is that the court may tend to err on the side of caution, resulting in overuse of the *en banc* process to resolve even minor inconsistencies.[95] *En banc* review has an "extraordinary" nature,[96] and the general rule in federal courts is that *en banc* hearings are "not favored."[97] *En banc* review is typically only proper when "consideration [by the full court] is necessary to secure or maintain uniformity of [its] decisions."[98] If there is precedent in the circuit which already provides the proper decision, calling for *en*

[90] *See* supra Part III.A.
[91] *See* supra Part III.A.
[92] Duvall, *supra* note 38, at 22.
[93] *Id.* at 23.
[94] *Id.*
[95] *Id.*
[96] United States v. Am.-Foreign S.S. Corp., 363 U.S. 685, 689 (1960).
[97] FED. R. APP. P. 35(a).
[98] FED. R. APP. P. 35(a)(1).

banc review wastes time and resources.[99] The only way to resolve an intra-circuit split in the Ninth Circuit without calling for *en banc* review requires looking to Supreme Court precedent;[100] however, the Supreme Court lacks precedent in many areas of law given its limited docket and review that is discretionary. Importantly, as previously noted, the Supreme Court has never set forth the official elements for discriminatory discharge under Title VII in as much detail as the circuit courts.[101]

The method in which the Ninth Circuit addresses intra-circuit splits also contravenes the widely renowned doctrine of *stare decisis*.[102] In *Skipps*, the court could have easily addressed the issue by adhering to *stare decisis*. Specifically, the court could have easily adhered to the earliest precedent in the Ninth Circuit, articulated in *Sengupta v. Morrison Knudsen Co.*,[103] affirming with a simple acknowledgement that while several decisions differ in their analyses of the second element, the earliest precedential decision should control going forward. Judge Lee acknowledges the *stare decisis* problem in his concurrence,[104] but he does not offer a solution because the issue is not particularly material to the instant decision. Despite the immateriality of the issue,[105] the panel could have offered guidance for future controversies where the issue will surely arise again if it was operating in a circuit where the earliest decision controls. The first precedential Ninth Circuit decision on the issue of discriminatory discharge, discussed more fully below, is not clearly erroneous. Further, it tracks with similar language and cases from other circuits.[106] Thus, an acknowledgment of this decision as precedent going forward would have easily resolved the discrepancy.

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[99] Duvall, *supra* note 38, at 23.

[100] *See* United States v. Lancellotti, 761 F.2d 1363, 1366–67 (9th Cir. 1985); United States v. Nachtigal, 507 U.S. 1, 2–6 (1993); LeVick v. Skaggs Cos., 701 F.2d 777, 778 (9th Cir. 1983); Piedmont Label Co. v. Sun Garden Packing Co., 598 F.2d 491, 495 (9th Cir. 1979); Miller v. Gammie, 335 F.3d 889, 899 (9th Cir. 2003).

[101] Sautter, *supra* note 51, at 422.

[102] Black's Law Dictionary defines the doctrine of stare decisis as "[t]o stand by decided cases; to uphold precedents; to maintain former adjudications." 1 Kent, Comm. 477.

[103] 804 F.2d 1072, 1075 (9th Cir. 1986).

[104] Skipps v. Mayorkas, No. 21-56184, 2023 WL 3477835, at *2 (9th Cir. May 16, 2023) (Lee, J., concurring).

[105] *Id.*

[106] *See Sengupta*, 804 F.2d at 1075.

B. The Earliest Case in the Ninth Circuit Got It Right by Omitting the "Qualified" Language in the Case of Discriminatory Discharge

It is important to note that *McDonnell Douglas* uses the word "qualified" when articulating its employment discrimination test.[107] However, as mentioned, the test in *McDonnell Douglas* was never intended to be a rigidly applied framework to all types of employment discrimination claims. Rather, its elements must be adapted to better reflect the nuances presented by differing claims.[108]

The earliest decision in the Ninth Circuit, *Sengupta v. Morrison Knudsen Co*., did not use the "qualified" language when articulating the elements for discriminatory discharge.[109] In addressing the second element, the court held that a plaintiff must show that he was doing the job "well enough to rule out the possibility that he was fired for inadequate job performance."[110] Therefore, if the Ninth Circuit used the earliest case as precedent under the general procedure to address intra-circuit splits, the word "qualified" would be eliminated from the second element of the test to provide clearer guidance on the issue moving forward.

Along with following the general intra-circuit split procedure and adhering to *stare decisis*, there are numerous other reasons why this result doctrinally and practically makes sense. Opinions in the Ninth Circuit that used the "qualified" language in the second element came after the *prima facie* elements were first articulated in *Sengupta*.[111] For example, in *Aragorn v. Republic Silver State Disposal Inc.*, the court stated that the plaintiff had to establish that he was qualified for his job to establish a *prima facie* claim for racial discrimination after being fired.[112] Though noting that this showing differs from the "specific, substantial showing" of pretext that the *McDonell Douglas* burden shifting framework requires,[113] the court still confused the issues. As recognized by the concurrence in *Skipps*, the issue in a discriminatory discharge case is not whether the plaintiff was qualified for the job but, rather, whether he was performing his job adequately.[114] The elements, as articulated by the

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

[108] *See id*. at 802 n.13; *see also* Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 n.6, 253–254 (1981).

[109] *See Sengupta*, 804 F.2d at 1075.

[110] *Id.*

[111] *Id.*

[112] Aragon v. Republic Silver State Disposal Inc., 292 F.3d 654, 660 (9th Cir. 2002).

[113] *Id.* at 659.

[114] *See* Skipps v. Mayorkas, No. 21-56184, 2023 WL 3477835, at *2 (9th Cir. May 16, 2023) (Lee, J., concurring); *see also Aragon*, 292 F.3d at 660 (detailing how job performance was the main factor in the discriminatory discharge claim).

Aragorn court, do not accurately reflect this distinction.[115] Numerous other Ninth Circuit decisions have subsequently relied on these elements in the discriminatory discharge context as well.[116] These cases stray from the sound precedent of *Sengupta*, unnecessarily confusing both the language and elements. Courts should not adhere to these unclear guidelines.

A survey of other judicial circuits also demonstrates that the Ninth Circuit would not be alone in eliminating the "qualified" language in the second element or in further clarifying the element. For instance, in the Eighth Circuit, courts do not use "qualified" in their articulation of the second element for discriminatory discharge claims.[117] Instead, the employee must demonstrate that he or she was meeting the "legitimate expectations" of his or her employer.[118] The Seventh Circuit also uses the "legitimate expectations" language in its articulation of the second element.[119] In some circuits, qualification is not omitted from the test; however, courts add "legitimate expectations" as an alternative requirement to satisfy the element.[120]

If another circuit includes "qualified" in its articulation of the second element without mentioning job performance or "legitimate expectations," it is usually accompanied by a citation or reference to *McDonnell Douglas Corp. v. Green*.[121] By including the identical elements articulated in *McDonnell Douglas*, it seems that these various other courts overlook the

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[115] *Skipps*, 2023 WL 3477835, at *2–3 (Lee, J., concurring). An employee would need to prove this in the prima facie case because it eliminates the most common nondiscriminatory reasons for the adverse action, and the establishment of the prima facie case creates a presumption that the employer did in fact unlawfully discriminate. *See* Int'l Bhd. Of Teamsters v. United States, 431 U.S. 324, 358 (1977).

[116] *See* Coghlan v. Am. Seafoods Co. LLC., 413 F.3d 1090, 1094 (9th Cir. 2005); Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1062 (9th Cir. 2002).

[117] *See* Cherry v. Ritenour Sch. Dist., 361 F.3d 474, 478 (8th Cir. 2004).

[118] *See id.*

[119] *See* EEOC v. Our Lady of Resurrection Med. Ctr., 77 F.3d 145, 148–49 (7th Cir. 1996).

[120] *See* Causey v. Balog, 162 F.3d 795, 802 (4th Cir. 1998) (concluding that for a plaintiff to satisfy the second element, the employee must show that he or she was "qualified for the job and met the employer's legitimate expectations").

[121] Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1065–66 (3d Cir. 1996); Baker v. Exxon Chem. Ams., 68 F.3d 467 (5th Cir. 1995); Suggs v. ServiceMaster Educ. Food Mgmt., 72 F.3d 1228, 1232 (6th Cir. 1996); Branson v. Price River Coal Co., 853 F.2d 768, 770 (10th Cir. 1988). Each of these cases deals with a discriminatory discharge action in a different circuit, and each of them includes being qualified or having the necessary qualifications as being a prima facie element that must be satisfied. However, each of these also includes a citation to *McDonnell Douglas Corp. v. Green*, and they do not address how that case dealt with a rehiring issue instead of solely a discriminatory discharge issue. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

fact that *McDonnell Douglas* was never meant to be a "one size fits all" test, and the identical framework was never meant to be applied to all disparate treatment cases.[122] By narrowing the second element to its context-specific meaning, the Ninth Circuit would be in alignment with the majority of other circuits. Further, the Ninth Circuit would follow the *McDonnell Douglas* doctrine by adapting the elements to better fit the specific issue of discriminatory discharge.

In addition to the benefit of consistency among circuits, it is practical to omit the word "qualified" from the test for discriminatory discharge. Judge Lee explained the practical impact quite well by providing an example in his concurrence.[123] In his example, he ponders the scenario of a company seeking to hire a junior engineer with a degree in engineering and at least two years of experience.[124] He mentions that, in a failure-to-hire claim, it makes logical sense to analyze these qualifications to determine whether a person faced discrimination.[125] Judge Lee then mentions that once this person has been hired, the employer becomes less focused on his or her qualifications and more concerned with whether the employee is meeting performance expectations.[126] Furthermore, the employer can justifiably dismiss the employee, despite his or her qualifications, if the employee is not performing well.[127] This example succinctly expresses the practical effect of including qualification as an element for a *prima facie* claim of discriminatory discharge. The emphasis shifts the focus from the employee's performance and places it, instead, on his or her characteristics on paper. This makes little sense in the context of claims for discriminatory discharge and further explains why courts have recognized that the second element in the test should differ based on the context.[128]

The facts of *Skipps* exemplify this discrepancy.[129] The situation in *Skipps* had nothing to do with Ma'alona's qualifications for the job.[130] Ma'alona was discharged for failing to pass the mandatory assessments required for all existing employees, thereby not meeting his employer's

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[122] *See McDonnell Douglas Corp.*, 411 U.S. at 802, 802 n.13; *see also* Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 n.6, 253–54 (1981).

[123] Skipps v. Mayorkas, No. 21-56184, 2023 WL 3477835, at *2 (9th Cir. May 16, 2023) (Lee, J., concurring).

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] Skipps v. Mayorkas, No. 2:19-CV-10557-ODW (AGRx), 2021 WL 3849705, at *1 (C.D. Cal. Aug. 27, 2021), *aff'd*, No. 21-56184, 2023 WL 3477835 (9th Cir. May 16, 2023).

[130] *Id.* at *3.

expectations.[131] While Ma'alona's qualifications would have been entirely relevant in a failure-to-hire claim, his lapsed time on the job and failure to meet expectations required of all employees ultimately led to his discharge.[132] If a plaintiff in a similar situation as Ma'alona could satisfy the second element by merely showing qualification for the job, it would make it much easier for that plaintiff to bring a claim. By contrast, if the plaintiff must show that he or she was performing to the employer's legitimate expectations, this threshold inquiry raises the bar for employees by making it harder to establish a *prima facie* case, likely discouraging frivolous claims.

As a final, practical matter, it is noteworthy to mention that the damages in failure-to-hire and discriminatory discharge cases are inherently different.[133] This distinction further lends credence to the conclusion that the elements for the *prima facie* claim should differ. A person who has worked at a job for a considerable period of time has a much greater stake in pursuing a claim than someone who was simply not hired for a position.[134] In the context of discriminatory discharge, employees have usually worked for their employer for a number of months, or even years. In that time, these employees have established significant human capital, including institutional knowledge and relationships, giving them more stability and certainty with their current employer than they would have with a new employer.[135] Contrast this capital with failure-to-hire claims in which no human capital has accumulated with a company.[136] Accordingly, in discriminatory discharge claims, the damages that employees may seek are far greater than those of individuals who have not yet been hired.[137] Additionally, the expectation damages for discriminatory discharge are usually far greater because a fired employee is much more likely to bring suit than someone who was never hired in the first place.[138] A higher likelihood of facing suit further reinforces the idea that the claims are different, and they should have different requirements.

With the landscape around these two types of claims remaining hazy, the Ninth Circuit should address and define the difference so that it can have clearer guidance going forward and avoid risking confusion of the

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[131] *Id.*

[132] *Id.*

[133] *See, e.g.*, John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991).

[134] *Id.* at 1017 n.107, 1017–18.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

two claims in a case where it would make a material difference to the parties.

VI. CONCLUSION

Skipps exemplifies the need for clearer guidance in both the context of employment discrimination claims and in the current processes which render this guidance difficult to effectuate. The Ninth Circuit needs to alter its procedure for intra-circuit splits and address the unnecessary focus on employee qualifications when handling a discriminatory discharge claim. If successfully implemented, these changes would make the judicial process smoother and provide necessary direction to employees experiencing discrimination and employers defending against discrimination claims.