MINIMAL RELEVANCE: NON-DISABLED REPLACEMENT EVIDENCE IN ADA DISCRIMINATION CASES

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I. INTRODUCTION

In the almost twenty-five years since passage of the Americans with Disabilities Act of 1990 (ADA),[1] hundreds of thousands of job applicants and employees have filed disability discrimination claims against their employers.[2] Over the last ten years, the Equal Employment Opportunity Commission (EEOC), as the federal administrative agency that enforces the ADA (in addition to Title VII of the Civil Rights Act of 1964 (Title VII)[3] and the Age Discrimination in Employment Act of 1967 (ADEA)[4]) has seen

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[1] Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. § 12101 (2006)). The Americans with Disabilities Act of 1990 (ADA) generally prohibits employment discrimination against a "qualified individual" because of "disability." 42 U.S.C. § 12112(a)-(b) (2006). The Act also prohibits retaliatory action against a person for having "opposed any act or practice made unlawful" by the ADA or having "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under the ADA. *Id.* § 12203(a).

The ADA defines the term "qualified individual" as a person "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). The Act defines the term "disability" as (i) a "physical or mental impairment that substantially limits one or more major life activities of such individual," (ii) having "a record of such an impairment," or (iii) "being regarded as having such an impairment." *Id.* § 12102(2).

[2] *See* U.S. Equal Employment Opportunity Comm'n, Charge Statistics: FY 1997 through FY 2012 (2013), http://www1.eeoc.gov/eeoc/statistics/enforcement/charges.cfm?renderforprint=1.

[3] *See* 42 U.S.C. §§ 2000e-4, e-5 (2006). Title VII of the Civil Rights Act of 1964 (Title VII) generally prohibits employment discrimination because of race, color, religion, sex, or national origin. *See id.* § 2000e-2(a)(1); *see also* Pregnancy Discrimination Act of 1967, Pub. L. No. 95-555, § 1, 192 Stat. 2076, 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2006)) (amending Title VII to clarify that unlawful discrimination "because of sex" includes "because of or on the basis of pregnancy, childbirth, or related medical conditions"). Title VII also contains an anti-retaliation provision similar to that of the ADA. *See* 42 U.S.C. § 2000e-3(a) (2006); *supra* note 1 (describing the ADA's anti-retaliation provision).

[4] *See* 29 U.S.C. §§ 621–634 (2006). The Age Discrimination in Employment Act of 1967 (ADEA) generally prohibits employment discrimination because of age (forty years old or older). *Id.* §§ 623(a), 631(a) (limiting the ADEA's scope to persons "at least 40 years of age"). The ADEA also contains an anti-retaliation provision similar to those of the ADA and Title VII. *See*

a dramatic increase in these ADA claims. For example, in 2003, only 18.9% (or, 15,377) of the 81,293 total claims filed with the EEOC alleged disability discrimination.[5] But, in 2012, 26.5% (or, 26,379) of the 99,412 total filed claims involved such discrimination.[6] These recent statistics for ADA claims are all-time highs.[7]

How our federal courts view circumstantial evidence of an employer's purported discriminatory intent in ADA "disparate treatment" claims[8] can be, and often is, critical to their success. For example, consider a disabled job applicant whom an employer rejects for a position; or, a disabled employee whom an employer rejects for a promotion or whom it selects for layoff. If the employer ultimately decides to hire, promote, or retain a person who is *not* disabled (the "non-disabled replacement") for the position at issue, how relevant is this non-disabled replacement evidence in any ensuing ADA claim?

Legal Necessity. The first relevance-related question regarding this evidence is its legal necessity—namely, should non-disabled replacement evidence be a *legally necessary element* of an ADA plaintiff's claim? Currently, the federal circuit courts are split on this issue. Some federal

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id. § 623(d); *supra* notes 1, 3 (describing the ADA's and Title VII's anti-retaliation provisions, respectively).

[5] U.S. Equal Employment Opportunity Comm'n, *supra* note 2.

[6] *Id.*

[7] *See id*. In 2012, only race and sex discrimination claims were more prevalent than disability discrimination claims. *See id*. (stating that 33.7% (or, 33,512) of the 99,412 total filed claims alleged race discrimination and that 30.5% (or, 30,356) of these claims alleged sex discrimination).

[8] Employer intent is the key inquiry in discrimination cases that rely on disparate-treatment (rather than disparate-impact) theory. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical. . . . Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate impact theory.") (Internal citations omitted); *see also* MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 191 (8th ed. 2013) ("While disparate treatment discrimination is the purposeful exclusion of protected class members from jobs, disparate impact discrimination exists when employment policies, regardless of [neutral] intent, adversely affect one group more than another and cannot be adequately justified.").

circuits follow a "mandatory prima facie element approach."[9] This view includes non-disabled replacement evidence as a legally necessary element of an ADA plaintiff's prima facie case.[10] Under this first approach, an ADA plaintiff automatically loses if this evidence is lacking.

In contrast, other federal circuits follow a "non-mandatory prima facie element approach."[11] This view excludes (or omits) non-disabled replacement evidence as a legally necessary element of an ADA plaintiff's prima facie case. Under this second approach, an ADA plaintiff can still prevail even if this evidence is lacking (i.e., by using other circumstantial evidence of the employer's discriminatory intent).

Legal Sufficiency. The second relevance-related question regarding non-disabled replacement evidence is its legal sufficiency—namely, should this evidence (if present) be *legally sufficient* to create a genuine dispute or issue of material fact regarding the employer's purported discriminatory intent at the Rule 56 summary judgment stage?[12] Unfortunately, the few federal courts to have addressed this issue in the ADA context have offered little guidance or explanation regarding their conclusions on it.

Part II of this article presents applicable Supreme Court precedent regarding the prima facie case of employment discrimination and the relevance of replacement evidence in *age* discrimination cases.[13] This part then discusses applicable circuit and district court precedent regarding the above-referenced legal necessity and legal sufficiency issues as to non-disabled replacement evidence in ADA cases.[14]

Part III of this article proposes a unique, two-pronged "Minimal Relevance Approach" to bring uniformity and clarity to these legal necessity and legal sufficiency issues under the ADA. The two concrete features of this proposed approach are:

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[9] *See infra* Part II.B.1.a (discussing the mandatory prima facie element approach).

[10] *See infra* Part II.A.1 (discussing the now-familiar, burden-shifting framework in employment discrimination cases (which includes the plaintiff's prima facie case), as set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973)).

[11] *See infra* Part II.B.1.b (discussing the non-mandatory prima facie element approach).

[12] FED. R. CIV. P. 56(a) ("A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

[13] *See infra* Part II.A.1–2 (discussing applicable Supreme Court precedent).

[14] *See infra* Part II.B.1–2 (discussing applicable precedent on each of these issues).

(1) Unnecessary Prima Facie Element: non-disabled replacement evidence is not a legally necessary element of an ADA plaintiff's prima facie case; and

(2) Insufficient Proof of Discriminatory Intent: non-disabled replacement evidence (if present) is legally insufficient to create a genuine dispute or issue of material fact regarding the employer's purported discriminatory intent at the Rule 56 summary judgment stage.

The first feature is warranted for three reasons: (a) it is consistent with black letter law from applicable Supreme Court precedent; (b) it promotes the ADA's anti-discrimination policy; and (c) it reflects Supreme Court philosophy regarding the prima facie case and its proper role.[15] The second feature is justified based on probability theory and statistical evidence regarding disabled workers in the United States.[16]

II. PRIMA FACIE CASE, REPLACEMENT EVIDENCE, AND THE ADA

An understanding of certain foundational concepts of federal employment discrimination law can be useful when evaluating the relevance of non-disabled replacement evidence in ADA cases.

First, this part presents applicable Supreme Court precedent regarding the prima facie case of employment discrimination and the relevance of replacement evidence in *age* discrimination cases. Second, this part discusses applicable circuit and district court precedent regarding the legal necessity and legal sufficiency issues as to non-disabled replacement evidence in ADA cases.

A. Supreme Court Precedent Regarding the Prima Facie Case and Replacement Evidence

In 1973, the Supreme Court established the foundational concepts of the prima facie case and the burden-shifting framework in federal employment discrimination cases.[17] Then, in 1996, the Court addressed the more specific

[15] *See infra* Part III.A.1–3 (discussing these defenses of the approach's first feature).

[16] *See infra* Part III.B.1–2 (discussing this defense of the approach's second feature).

[17] *See generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

issue of the relevance of replacement evidence in discrimination cases under the ADEA.[18]

1. Prima Facie Case and Its Rationale

Over forty years ago, the Supreme Court forever changed the landscape of employment discrimination law with its 1973 decision in *McDonnell Douglas Corp. v. Green.*[19] There, the Court confronted a Title VII race discrimination claim, in which the plaintiff alleged that the employer had refused to rehire him because of his race.[20] The Court specifically focused upon the "critical issue . . . concern[ing] the order and allocation of proof in a private, non-class action challenging employment discrimination."[21]

A unanimous Court then established the now-familiar, three-step "order and allocation of proof" framework for disparate treatment cases that involve only circumstantial (rather than direct) evidence of discriminatory intent.[22] First, the Court stated that the plaintiff "must carry the initial burden under the statute of establishing a prima facie case of racial discrimination."[23] Outlining this burden, the Court enumerated four standard elements to this "prima facie case":

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[18] *See generally* O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996).

[19] *See generally McDonnell Douglas Corp.*, 411 U.S. at 792.

[20] *Id.* at 794–97.

[21] *Id.* at 800; *see id.* at 793–94 ("The case before us raises significant questions as to the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964 . . . .").

[22] *McDonnell Douglas Corp.*, 411 U.S. at 802–04. "Direct evidence" is that which "does not require the finder of fact to draw an inference of discrimination; in other words, the evidence, by itself, establishes an intent to discriminate." MARION G. CRAIN, PAULINE T. KIM & MICHAEL SELMI, WORK LAW: CASES AND MATERIALS 567 (2d ed. 2010); *see* ZIMMER ET AL., *supra* note 8, at 82 ("The classic notion of 'direct' evidence is evidence that, if believed, proves the ultimate question at issue without drawing any inferences.").

For example, direct evidence includes "statements by the decision-maker in the context of the decision that manifests bias." ZIMMER ET AL., *supra* note 8, at 34 n.3; *see id*. at 6 (noting that this "admissions-against-interest testimony is sometimes described as 'direct evidence' of discrimination"); *id.* at 90–91 (noting that these statements—to be "admissions of a party opponent"—must "show illegitimate considerations" and be "connected closely . . . with the at-issue decision"); CRAIN ET AL., *supra* note 22, at 567 (noting that direct evidence would include an employer's decision-making agents "explicitly stat[ing] that they want to hire younger employees, or that a particular individual is 'too old' to do this job"). As one would expect, such direct evidence is "relatively rare," and most disparate treatment cases involve mere circumstantial evidence. *Id.*

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

> [Establishing the prima facie case] may be done by showing (i) that he [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[24]

The Court evidenced a flexible philosophy regarding this prima facie case and mentioned the possibility of variable elements: "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations."[25]

Second, if the plaintiff satisfies his or her burden under the first step, the Court explained that "[t]he burden must [then] shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[26] This articulation, said the Court, "suffices to meet"[27] and serves to "successfully rebut[]"[28] the plaintiff's prima facie case.

Third, if the employer satisfies its burden under the second step, the Court explained that "the inquiry must not end"[29] and described a third step—namely, that the plaintiff demonstrate the employer's stated reason to be a pretext-based cover for actual, discriminatory intent:

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[24] *Id.* The Court concluded that Green, an African-American, had established this prima facie case. *Id.* at 802–03.

[25] *Id.* at 802 n.13*; see also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575 (1978) (noting that the *McDonnell Douglas* prima facie case "was not intended to be an inflexible rule"); *id.* at 577 ("The method suggested in *McDonnell Douglas* . . . was never intended to be rigid, mechanized, or ritualistic."); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977) ("The company and union seize upon the *McDonnell Douglas* pattern as the only means of establishing a prima facie case of individual discrimination. Our decision in that case, however, did not purport to create an inflexible formulation.").

[26] *McDonnell Douglas Corp*., 411 U.S. at 802. The Court concluded that McDonnell Douglas had articulated a legitimate, nondiscriminatory reason for its refusal to rehire Green—namely, his "participation in unlawful conduct against it." *Id.* at 803.

[27] *Id.* at 804.

[28] *Id.* at 807; *see also* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) ("A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence [via the prima facie case].").

[29] *McDonnell Douglas Corp*., 411 U.S. at 804.

> [The plaintiff] must . . . be afforded a fair opportunity to show that [the employer's] stated reason for [his] rejection was in fact pretext.
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> In short, . . . [the plaintiff] must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover[-]up for a racially discriminatory decision.[30]

For purposes of this third step, the Court mentioned types of "evidence that may be relevant to any showing of pretext."[31] For example, the Court noted that this proof may include "evidence that white employees involved in acts against [the employer] of comparable seriousness . . . were nevertheless retained or rehired.[32] (This evidence is commonly referred to as "comparator" evidence.[33]) In addition, the Court noted that this proof may include the employer's "general policy and practice with respect to minority employment,"[34] with "statistics . . . [being] helpful to a determination of whether [its] refusal to rehire [the plaintiff] in this case conformed to a general pattern of discrimination against blacks."[35]

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[30] *Id.* at 804; *id.* at 805 n.18 ("[Green] must be given a full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for his rejection, the decision was in reality racially premised."); *id.* at 807 ("[Green] must be afforded a fair opportunity to demonstrate that [McDonnell Douglas's] assigned reason for refusing to re-employ was a pretext or discriminatory in its application.").

[31] *Id.* at 804.

[32] *Id.* ("[McDonnell Douglas] may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.").

[33] *See* ZIMMER ET AL., *supra* note 8, at 43 n.4 ("[A] plaintiff prevails by proving that she was treated differently than a 'comparator' (a similarly situated person of the other sex or a different race). . . . [I]t can be argued that the difference in treatment of a sufficiently close comparator is enough to infer discrimination."); *id.* at 50 n.1 (highlighting "[c]omparators as proof of pretext" and noting that "proof of the plaintiff's superior qualifications . . . may be sufficient evidence of pretext to go to a jury" because it raises "the inference that discrimination motivated the choice of less qualified [persons]"); CRAIN ET AL., *supra* note 22, at 582 n.7 ("[M]any claims of discrimination are proved by establishing that other similarly situated individuals were treated differently.").

[34] *McDonnell Douglas Corp*., 411 U.S. at 804–05.

[35] *Id.* at 805; *see id.* at 805 n.19 ("The District Court may, for example, determine . . . that 'the (racial) composition of [McDonnell Douglas's] labor force is itself reflective of restrictive or exclusionary practices.'") (internal punctuation omitted) (citing Alfred W. Blumrosen, *Strangers*

While the *McDonnell Douglas* decision set forth this three-step framework for disparate treatment cases, the Court did not offer any rationale for the above-referenced prima facie elements.[36] This explanation appeared in Supreme Court decisions from 1977 through 1981.[37]

In its 1977 decision in *International Brotherhood of Teamsters v. United States*, the Court addressed a Title VII race discrimination class action, in which the federal government alleged that the employer had engaged in a "systemwide pattern or practice" of refusing to hire applicants for line driver jobs because of their race.[38] After noting the *McDonnell Douglas* burden-shifting framework, the Court explained that the role of the prima facie case was to raise a discriminatory "inference" as to the employer's decision:

> The importance of *McDonnell Douglas* lies . . . in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.
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> . . . .
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> Although the *McDonnell Douglas* formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: [1] an absolute or relative lack of qualifications or [2] the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.[39]

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in Paradise: Griggs v. Duke Power Co., and the Concept of Employment Discrimination, 71 MICH. L. REV. 59, 92 (1972)); *infra* Part III.B.1 (discussing statistical evidence and probability theory in employment discrimination cases).

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

[37] *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977).

[38] *Id.* at 325.

[39] *Id.* at 358, 358 n.44.

Similarly, in its 1981 decision in *Texas Department of Community Affairs v. Burdine*,[40] the Court reiterated this rationale for the prima facie case. There, the Court addressed a Title VII sex discrimination claim, in which the plaintiff alleged that the employer had failed to promote (and later fired) her because of her sex.[41] While mostly focusing on the employer's burden under the second step of the framework,[42] the Court echoed its earlier explanation regarding the role of the prima facie case:

> The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection. . . . [T]he prima facie case 'raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.' Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee.[43]

Consequently, in *McDonnell Douglas*, the Court set forth its now-familiar, burden-shifting framework in employment discrimination cases, the first step of which is the plaintiff's prima facie case.[44] Subsequently, the Court explained the role of this prima facie case—namely, to remove the two most typical reasons for an employer's adverse action (i.e., the lack of job qualifications and/or the absence of an available job), thereby raising a suspicion or inference of discrimination.[45]

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[40] 450 U.S. 248 (1981).

[41] *Id.* at 249–50.

[42] *See id.* at 250 ("The narrow question presented is whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to *persuade* the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed.") (emphasis added). The Court concluded that the employer is merely under a burden of production (not of persuasion) when articulating the nondiscriminatory reason for its action. *Id.* at 257–58.

[43] *Id.* at 253–54 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)); *see also id.* at 254 n.7 ("The phrase 'prima facie case' . . . denote[s] the establishment of a legally mandatory, rebuttable presumption . . . .").

[44] *See* 411 U.S. 792, 802 (1973).

[45] *See also Furnco Constr. Corp.*, 438 U.S. at 577 ("A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts [of the employer], if otherwise unexplained, are more likely than not based on the consideration of

2. Replacement Evidence and the Prima Facie Case

In the decades following *McDonnell Douglas*, the Supreme Court (and lower courts) clarified a number of issues regarding this burden-shifting framework and the prima facie case.[46] For example, the courts extended and applied these concepts beyond Title VII to the ADEA and ADA.[47] In addition, the vast majority of the federal circuits—relying on the *McDonnell Douglas* court's flexible philosophy regarding the prima facie case[48]—adopted their own versions of the prima facie case by varying or tweaking its elements.[49]

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impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who[m] we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race."); ZIMMER ET AL., *supra* note 8, at 20 n.3 ("[T]he *McDonnell Douglas* prima facie case proves discrimination by eliminating the most common, nondiscriminatory reasons for an employer's action False In the case itself, a refusal to hire, the most common legitimate reasons would have been the lack of a job opening or plaintiff's lack of qualifications."); ZIMMER ET AL., *supra* note 8, at 22 n.4 ("[T]he purpose of the prima facie case is to eliminate at least some common nondiscriminatory reasons."); CRAIN ET AL., *supra* note 22, at 571 nn.1–2 ("[T]he *prima facie* case eliminates the two most common reasons an employer does not hire an applicant—the employee is not qualified and no job was available . . . .").

[46] *See, e.g.*, O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 309 (1996).

[47] *See, e.g.*, *id.* at 311 ("We have never had occasion to decide whether . . . application of the Title VII rule [i.e., the "basic evidentiary framework set forth in *McDonnell Douglas*"] to the ADEA context is correct, but since the parties do not contest that point, we shall assume it."); *id*. at 311 n.2 (enumerating applicable precedent in which federal courts applied the *McDonnell Douglas* framework to ADEA cases); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 n.1 (1993) ("[W]e shall assume that the *McDonnell Douglas* framework is fully applicable to racial-discrimination-in-employment claims under 42 U.S.C. § 1983."); Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989) ("We agree with the Court of Appeals that this scheme of proof [per *McDonnell Douglas*] . . . should apply to claims of racial discrimination under § 1981."); *infra* Part II.B.1.a-b (discussing applicable precedent in which federal courts applied the *McDonnell Douglas* framework to ADA cases).

[48] *See supra* note 25 and accompanying text (discussing this point from the *McDonnell Douglas* decision).

[49] *See infra* Part II.B.1.a-b (discussing the different versions of an ADA plaintiff's prima facie case); ZIMMER ET AL., *supra* note 8, at 21–22 n.4 ("The circuits that purport to apply the *McDonnell Douglas* prima facie case in fact adapt it in big and small ways that often vary between circuits and even within circuits.").

However, prior to the mid-1990s, the Supreme Court had not addressed whether replacement evidence could be—or should be—an element of a plaintiff's prima facie case of employment discrimination. The Court considered this specific issue in its 1996 decision in *O'Connor v. Consolidated Coin Caterers Corp*.[50] There, the Court addressed an ADEA age discrimination claim, in which the plaintiff alleged that the employer had fired him because of his age.[51]

At the lower court level, the Fourth Circuit had affirmed the district court's grant of summary judgment in favor of the employer.[52] In support of its decision, the Fourth Circuit explained that replacement evidence was, in fact, a mandatory part of an ADEA plaintiff's prima facie case: "To establish a *prima facie* case on an ADEA claim under the *McDonnell Douglas* rubric, O'Connor must prove . . . [that] following his discharge or demotion, [he] was replaced by someone of comparable qualifications outside the protected class."[53] Noting that both the plaintiff (who was fifty-six years old) and his replacement (who was forty years old) were within the ADEA's protected class of "at least forty years of age,"[54] the Fourth Circuit quickly concluded that the plaintiff "cannot establish a *prima facie* case because he fails to satisfy the fourth element, *i.e*., he was not replaced by someone outside the protected class."[55]

On certiorari, the Supreme Court specifically addressed whether an ADEA plaintiff "must show that he was replaced by someone outside the age group protected by the ADEA to make out a prima facie case under the framework established by *McDonnell Douglas Corp. v. Green*."[56] The Court bluntly said no to this question: "[T]he fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case."[57]

In support of this decision, the Court reasoned that the Fourth Circuit's prima facie element of "outside-the-protected-group" replacement evidence

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[50] 517 U.S. 792, 308 (1973).

[51] *Id.*

[52] *Id.* at 310.

[53] O'Connor v. Consol. Coin Caterers Corp., 56 F.3d 542, 546 (4th Cir. 1995), *rev'd*, 517 U.S. at 308.

[54] *Id.*; *see* 29 U.S.C. § 631(a) (2006) (limiting the ADEA's scope to persons "at least 40 years of age").

[55] *O'Connor*, 56 F.3d at 546.

[56] *O'Connor*, 517 U.S. at 309.

[57] *Id.* at 312.

in ADEA cases "lacks probative value"[58] and was an "utterly irrelevant factor."[59] Explaining how and why this evidence lacked relevance, the Court highlighted the possibility that age discrimination could have originally occurred against an individual, even if the subsequent replacement was also forty years old or older: "The fact that one person in the protected class has lost out to another person in the protected class is . . . irrelevant, so long as he had lost out *because of his age*."[60]

Consequently, in *O'Connor*, the Court concluded that an "outside-the-protected-group" replacement could not—and should not—be a legally necessary element of an ADEA plaintiff's prima facie case: "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.' The element of replacement by someone under 40 fails this requirement."[61]

B. Lower Court Approaches to Non-Disabled Replacement Evidence in ADA Cases

In the ADA context, our federal circuit and district courts continue to face two important issues regarding non-disabled replacement evidence: (a) its legal necessity—whether this evidence should be a legally necessary element of an ADA plaintiff's prima facie case; and (b) its legal sufficiency—whether this evidence should be legally sufficient to create a

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[58] *Id.*

[59] *Id.*

[60] *Id.* The Court explained that the *age difference* between an ADEA plaintiff and his or her replacement is the more relevant evidence in ADEA disparate treatment cases. *Id*. at 312–13. To illustrate this point, the Court used a pair of hypotheticals: (a) "when a 40-year-old is replaced by a 39-year-old" and (b) "when a 56-year-old is replaced by a 40-year-old." *Id*. at 312.

Under the Fourth Circuit's approach, the 40-year-old plaintiff in the first scenario (who is barely ADEA-protected and was replaced by someone scarcely younger) could establish a prima facie case; yet, the 56-year-old plaintiff in the second scenario (who is much older and was replaced by someone substantially younger) could not. *Id.*; *O'Connor*, 56 F.3d at 546. The Court bristled at these outcomes, explaining that the 56-year-old plaintiff in the second scenario would seem the more likely victim of age discrimination. *O'Connor*, 517 U.S. at 312–13 ("[T]here can be no greater inference of age discrimination . . . when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old. . . . [T]he fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.").

[61] *Id.* at 311–12 (citing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981)).

genuine dispute or issue of material fact regarding the employer's purported discriminatory intent at the Rule 56 summary judgment stage.[62]

1. Legally Necessary Prima Facie Element?

The federal circuit courts are split on whether non-disabled replacement evidence is (and should be) a legally necessary element of an ADA plaintiff's prima facie case. Some federal circuits follow a "mandatory prima facie element approach."[63] This view includes non-disabled replacement evidence as a legally necessary element of an ADA plaintiff's prima facie case.[64] In contrast, other federal circuits follow a "non-mandatory prima facie element approach."[65] This view excludes (or omits) non-disabled replacement evidence as a legally necessary element of an ADA plaintiff's prima facie case.[66]

a. Mandatory Prima Facie Element Approach

The First and Fifth Circuits follow a mandatory prima facie element approach. For example, in the First Circuit's 2011 decision in *Ramos-Echevarria v. Pichis, Inc.*,[67] the court addressed an ADA disability discrimination claim, in which the plaintiff (who had epilepsy) alleged that the employer had failed to promote him (or otherwise offer a full-time position to him) because of his disability.[68] After noting the *McDonnell Douglas* burden-shifting framework,[69] the First Circuit expressly included non-disabled replacement evidence as a legally necessary element in its version of an ADA plaintiff's prima facie case: "The *McDonnell Douglas* analysis requires the plaintiff to offer evidence sufficient to establish that he . . . 'was replaced by a non-disabled person or was treated less favorably than non-disabled employees . . . .'"[70]

Similarly, in the Fifth Circuit's 2012 decision in *Amsel v. Texas Water Development Board*, the court addressed an ADA disability discrimination

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[62] *See infra* Part II.B.1-2 (discussing applicable precedent as to these two issues).

[63] *See infra* Part II.B.1.a (discussing the mandatory prima facie element approach).

[64] *See infra* Part II.B.1.a (discussing the mandatory prima facie element approach).

[65] *See infra* Part II.B.1.b (discussing the non-mandatory prima facie element approach).

[66] *See infra* Part II.B.1.b (discussing the non-mandatory prima facie element approach).

[67] 659 F.3d at 186.

[68] *Id*. at 184.

[69] *Id*. at 186.

[70] *Id*. (citing Jacques v. Clean-Up Group, Inc., 96 F.3d 506, 511 (1st Cir. 1996)).

claim, in which the plaintiff (who had heart disease and cancer) alleged that the employer had discharged him because of his disability.[71] After noting the *McDonnell Douglas* burden-shifting framework,[72] the Fifth Circuit also expressly listed non-disabled replacement evidence as a legally necessary element in its version of an ADA plaintiff's prima facie case: "To make out his prima facie case, [the plaintiff] must . . . show that he . . . was replaced by a non-disabled person or was treated less favorably than non-disabled employees."[73]

A superficial glance at this precise language from the *Ramos-Echevarria* and *Amsel* decisions could suggest that these two circuits merely make non-disabled replacement evidence an *optional* part of an ADA plaintiff's prima facie case.[74] Specifically, in these decisions, the First and Fifth Circuits required an ADA plaintiff to demonstrate that he or she "was replaced by a non-disabled person *or* was treated less favorably than non-disabled employees" as part of the prima facie case.[75] So, a quick glance at these courts' use of the disjunctive ("or") could suggest that non-disabled replacement evidence is not a legally necessary element of the prima facie case.[76]

This impression would be misplaced. Employment discrimination cases can (and often do) lack evidence of the second alternative—namely, being "treated less favorably than non-disabled employees" (comparator evidence).[77] For example, in a case alleging discriminatory discipline or discharge, an ADA, Title VII, or ADEA plaintiff may have practical difficulties in ascertaining the identity, work performance, and work-related misconduct of non-disabled persons who avoided such discipline or discharge for comparator evidence purposes.[78] And, even if and when the plaintiff uncovers this information, it can be common that the non-disabled

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[71] 464 Fed. App'x 395, 397–98 (5th Cir. 2012).

[72] *Id*. at 399–400.

[73] *Id*. at 399.

[74] *See id.*; *Ramos-Echevarria*, 659 F.3d at 182.

[75] *Amsel*, 464 Fed. App'x, at 399; *Ramos-Echevarria*, 659 F.3d at 186.

[76] *See Amsel*, 464 Fed. App'x, at 399; *Ramos-Echevarria*, 659 F.3d at 186.

[77] *See supra* notes 32–33 and accompanying text (discussing comparator evidence).

[78] *See, e.g.*, Leffel v. Valley Fin. Servs., 113 F.3d 787, 794 (7th Cir. 1997) ("A branch manager like Leffel, for example, occupies a position of significantly greater responsibility and discretion than that of most other bank employees. When cited for purported shortcomings in her performance, she may find it difficult to find evidence of disparate treatment in criticisms that are intertwined with the unique aspects of her position.").

persons who avoided such discipline or discharge were not even "comparable" or "similarly situated" due to variations in work performance, misconduct, position, and/or responsibility.[79]

Similarly, in a case alleging a discriminatory failure to hire or promote, an ADA, Title VII, or ADEA plaintiff may also have practical difficulties in ascertaining the identity, credentials, and qualifications of the non-disabled person who received the job for comparator evidence purposes.[80] And, even if and when the plaintiff uncovers this information, it can again be common that the non-disabled person who received the job was comparably (or better) qualified than the ADA, Title VII, or ADEA plaintiff.

Given that non-disabled comparator evidence can be (and often is) absent in many discrimination cases, the end result of the above-referenced "or" language is to leave the ADA plaintiff with only one option in the First and Fifth Circuits—namely, to prove non-disabled replacement evidence as a legally necessary element of the prima facie case.[81] For evidence of this

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[79] *See id.*; ZIMMER ET AL., *supra* note 8, at 43 n.4 ("[T]he problem is . . . how close a comparator must be in order to count. Some lower courts seem to require the comparator to be 'nearly identical' to the plaintiff."); CRAIN ET AL., *supra* note 22, at 582 n.7 ("Courts have also struggled to define what constitutes a 'similarly situated' comparator. A common standard is that developed in the Seventh Circuit . . . [which] required the same supervisor, the same job duties, experience, performance, and whatever other relevant factors were at issue. . . . The absence of a similarly situated individual can pose significant problem at the summary judgment stage . . . ."); *see generally* Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191 (2009) (generally discussing how courts use comparator evidence in employment discrimination cases).

[80] *See* CRAIN ET AL., *supra* note 22, at 582 n.7 ("Because plaintiffs challenging a hiring decision will usually not have access to comparative information before discovery, the requirement [of comparator evidence] is not applied to a hiring claim . . . .").

[81] *See, e.g.*, Palacios v. Cont'l Airlines, Inc., Civ. A. No. 11-3085, 2013 WL 499866, at *3–5 (S.D. Tex. Feb. 11, 2013) (after noting the non-disabled replacement element and that the ADA plaintiff had not submitted any such evidence, granting summary judgment to the employer because the plaintiff "fail[ed] to satisfy this required element to raise a prima facie case of ADA discrimination"); Carbaugh v. Unisoft Int'l, Inc., Civ. A. No. 10-0670, 2011 WL 5553724, at *5–10 (S.D. Tex. Nov. 15, 2011) (after noting the non-disabled replacement element and that the ADA plaintiff had not submitted any such evidence, granting summary judgment to the employer because the plaintiff "failed to establish a prima facie case that Unisoft terminated his employment because of his disability"); Ross v. Baylor Coll. of Med., Civ. A. No. H-08-3080, 2010 WL 2710397, at *5–6 (S.D. Tex. July 7, 2010) (after noting the non-disabled replacement element and that the ADA plaintiff had not submitted any such evidence, granting summary judgment to the employer because the plaintiff "failed to make out a prima facie case of disability discrimination"); Amato v. St. Luke's Episcopal Hosp., 987 F. Supp. 523, 529–33 (S.D. Tex. 1997) (after noting the non-disabled replacement element and that the ADA plaintiff had not

point, one need only look at the numerous federal district court decisions in the First and Fifth Circuits that have granted summary judgment to an employer simply because the ADA plaintiff could not prove the non-disabled replacement element.[82] For these reasons, it would be inaccurate to view the "or" language in the above-referenced decisions as suggesting that non-disabled replacement evidence is merely an *optional* part of an ADA plaintiff's prima facie case.[83]

Thus, at present, the First Circuit, as evidenced in *Ramos-Echevarria* and other recent decisions,[84] and the Fifth Circuit, as evidenced in *Amsel* and other recent decisions,[85] follow a mandatory prima facie element

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submitted any such evidence, granting summary judgment to the employer because the plaintiff "failed to establish a prima facie case"); Bunevith v. CVS/Pharmacy, 925 F. Supp. 89, 93–94 (D. Mass. 1996) (after noting the non-disabled replacement element and that the ADA plaintiff had not submitted any such evidence, granting summary judgment to the employer because the plaintiff "failed to establish the fourth element of his prima facie case"); Aikens v. Banana Republic, Inc., 877 F. Supp. 1031, 1036–37 (S.D. Tex. 1995) (after noting the non-disabled replacement element and that the ADA plaintiff had not submitted any such evidence, granting summary judgment to the employer because the plaintiff "failed to establish a prima facie case of handicap discrimination").

[82] *See, e.g.*, *Palacios*, 2013 WL 499866 at *3–5; *Carbaugh*, 2011 WL 5553724 at *5–10; *Ross*, 2010 WL 2710397 at *5–6; *Amato*, 987 F. Supp. at 529–33; *Bunevith*, 925 F. Supp. at 93–94; *Aikens*, 877 F. Supp. at 1036–37.

[83] *See, e.g.*, *Palacios*, 2013 WL 499866 at *3–5; *Carbaugh*, 2011 WL 5553724 at *5–10; *Ross*, 2010 WL 2710397 at *5–6; *Amato*, 987 F. Supp. at 529–33; *Bunevith*, 925 F. Supp. at 93–94; *Aikens*, 877 F. Supp. at 1036–37.

[84] *See, e.g.*, Rosado v. Wackenhut P.R., Inc., 160 Fed. App'x 5, 10 (1st Cir. 2005) (noting that an ADA plaintiff's prima facie case includes the element of being "replaced by a non-disabled person or treated less favorably than non-disabled employees"); Jacques v. Clean-Up Group, Inc., 96 F.3d 506, 511 (1st Cir. 1996) (same); Torres v. House of Representatives of the Commonwealth of P.R., 858 F. Supp. 2d 172, 185–86 (D.P.R. 2012) (same); Reyes-Ortiz v. Valdes, Civ. A. No. 09-1933, 2011 WL 1743152, at *3 (D.P.R. Apr. 28, 2011) (same); Santiago v. GMD Airline Servs., Inc., 681 F. Supp. 2d 120, 127 (D.P.R. 2010) (same); Roman-Basora v. Potter, Civ. A. No. 08-1096, 2010 WL 5677118, at *13 (D.P.R. Nov. 1, 2010) (noting that an ADA plaintiff's prima facie case includes the element that "a non-disabled person replaced [plaintiff]"); Rivot-Sanchez v. Warner Chilcott Co., 707 F. Supp. 2d 234, 244–45 (D.P.R. 2010) (same as *Rosado*); Saunders v. Webber Oil Co., No. Civ. 99-246, 2000 WL 1781835, at *5 (D. Me. Nov. 17, 2000) (same).

[85] *See, e.g.*, EEOC v. Chevron Phillips Chem. Co., 570 F.3d 606, 615 (5th Cir. 2009) (noting that an ADA plaintiff's prima facie case includes the element of being "replaced by or treated less favorably than non-disabled employees"); Crews v. Dow Chem. Co., 287 Fed. App'x 410, 412 (5th Cir. 2008) (same); Milton v. Nicholson, 256 Fed. App'x 655, 657 (5th Cir. 2007) (same); Arredondo v. Gulf Bend Ctr., 252 Fed. App'x 627, 630 (5th Cir. 2007) (same); Arrington v. Sw. Bell Tel. Co., 93 Fed. App'x 593, 596 (5th Cir. 2004) (same); Gowesky v. Singing River Hosp.

approach by including non-disabled replacement evidence as a legally necessary element of an ADA plaintiff's prima facie case.[86]

b. Non-Mandatory Prima Facie Element Approach

In contrast, the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits follow a non-mandatory prima facie element approach. These circuits exclude (or omit) non-disabled replacement evidence as a legally necessary element of an ADA plaintiff's prima facie case.[87]

As an initial point, it is interesting to note that, despite the common ground that these circuits share on the legal necessity issue, they have varying versions of a prima facie case of disability discrimination.[88] For example, some circuits opt for a version of the prima facie case that includes the fairly broad or open-ended element that the circumstances surrounding the adverse action give rise to "an inference of unlawful discrimination."[89] The Fourth,[90] Seventh,[91] Eighth,[92] and Tenth[93] Circuits

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Sys., 321 F.3d 503, 511 (5th Cir. 2003) (same); Clouatre v. Runyon, 82 Fed. App'x 972, 973 n.3 (5th Cir. 2003) (same); Geraci v. Tex. Mun. League Intergovernmental Risk Pool, 61 Fed. App'x 119, 119 (5th Cir. 2003) (noting that an ADA plaintiff's prima facie case includes the element that the plaintiff "was replaced by a non-disabled person").

[86] *Cf.* Jeannette Cox, *Disability Stigma and Intraclass Discrimination*, 62 FLA. L. REV. 429, 437 (2010) ("[Some] courts concluded that to prove disability discrimination in a termination case, a plaintiff must show that 'he or she was replaced by a non-disabled person.'"); *id.* at 446–48 ("[S]ome lower courts [after *O'Connor*] still refused to embrace its application to intraclass disability discrimination claims [i.e., in which both the plaintiff and the replacement are disabled]. Accordingly, . . . the current scope of intraclass disability discrimination litigation remains unclear in at least two circuits."); Jessica Lynne Wilson, Note, *Technology as a Panacea: Why Pregnancy-Related Problems Should Be Defined Without Regard to Mitigating Measures Under the ADA*, 52 VAND. L. REV. 831, 838 n.39 (1999) ("Other courts have listed the requirements of a prima facie case under Title I of the ADA as requiring plaintiff to prove that . . . she was replaced by a non-disabled person."); Thomas Simmons, *The ADA Prima Facie Plaintiff: A Critical Overview of the Eighth Circuit Case Law*, 47 DRAKE L. REV. 761, 808 n.280 (1999) ("A second phrasing of the prima facie case is a showing by the plaintiff . . . [that he or she] was replaced by a non-disabled person or was treated less favorably than non-disabled employees."); Kathleen M. Sheil, Note, *The Americans with Disabilities Act: Are* Your *Wrists Protected?*, 23 J. CORP. L. 325, 332 (1998) ("In some jurisdictions, a prima facie case of employment discrimination due to disability requires the plaintiff to establish that . . . the employer replaced her with a non-disabled person or treated her less favorably than non-disabled employees.").

[87] *See infra* notes 90–93, 95–98 and accompanying text (enumerating applicable precedent).

[88] *See infra* notes 90–93, 95–98 and accompanying text (enumerating applicable precedent).

[89] *See infra* notes 90–93 (enumerating applicable precedent).

have chosen this version. Next, some circuits opt for a version of the prima facie case that includes the fairly broad or open-ended element that the adverse action was otherwise "because of the plaintiff's disability."[94] The Second,[95] Third,[96] Ninth,[97] and Eleventh[98] Circuits have chosen this

[90] *See, e.g.*, Haneke v. Mid-Atl. Capital Mgmt., 131 Fed. App'x 399, 400 (4th Cir. 2005) (requiring as a prima facie element that the discharge "occurred under circumstances that raise a reasonable inference of unlawful discrimination"); Reynolds v. Am. Nat'l Red Cross, 701 F.3d 143, 150 (4th Cir. 2012) (same); Rohan v. Networks Presentations, L.L.C., 375 F.3d 266, 272 n.9 (4th Cir. 2004) (same); Haulbrook v. Michelin N. Am., Inc., 252 F.3d 696, 702 (4th Cir. 2001) (same); Ennis v. Nat'l Assoc. of Bus. & Educ. Radio, Inc., 53 F.3d 55, 58 (4th Cir. 1995) (same).

[91] *See, e.g.*, Germano v. Int'l Profit Assoc., Inc., 544 F.3d 798, 806 (7th Cir. 2008) (requiring as a prima facie element that "the circumstances surrounding the adverse action support the inference that his disability was a determining factor behind the adverse action"). Prior to *Germano*, the Seventh Circuit had used another fairly broad or open-ended element in an ADA plaintiff's prima facie case—namely, that "that the circumstances surrounding the adverse action indicate it is more likely than not that his disability was the reason for it." Lawson v. CSX Transp., Inc., 245 F.3d 916, 922 (7th Cir. 2001); *see also* Robin v. Espo Eng'g Corp., 200 F.3d 1081, 1090 (7th Cir. 2000) (same); Leffel v. Valley Fin. Servs., 113 F.3d 787, 794 (7th Cir. 1997) (same); Weigel v. Target Stores, 122 F.3d 461, 465 (7th Cir. 1997) (same). But, the *Germano* court explained that the fairly broad or open-ended "inference" element was clearer and thus preferable. *Germano*, 544 F.3d at 806 ("Although this court has sometimes described the last factor [in the prima facie case] as requiring the plaintiff to show that discrimination is 'more likely than not,' . . . [w]e think it is less confusing to speak . . . of evidence supporting an 'inference' that discrimination was 'a determining factor.'").

[92] *See, e.g.*, Ryan v. Capital Contractors, Inc., 679 F.3d 772, 777 (8th Cir. 2012) (requiring as a prima facie element that the adverse action occurred "under circumstances giving rise to an inference of unlawful discrimination"); Kozisek v. Cnty. of Seward, Neb., 539 F.3d 930, 934 (8th Cir. 2008) (same); Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1135 (8th Cir. 1999) (same); Miners v. Cargill Commc'ns, Inc., 113 F.3d 820, 823–24 (8th Cir. 1997) (same); Price v. S-B Power Tool, 75 F.3d 362, 365 (8th Cir. 1996) (same).

[93] *See, e.g.*, Trujillo v. PacifiCorp, 524 F.3d 1149, 1154 (10th Cir. 2008) (requiring as a prima facie element that the adverse action occurred "under circumstances raising a reasonable inference that the disability . . . was a determining factor in the employer's decision"); Rakity v. Dillon Cos., 302 F.3d 1152, 1164 (10th Cir. 2002) (same); Selenke v. Med. Imaging of Colo., 248 F.3d 1249, 1259 (10th Cir. 2001) (same); Butler v. City of Prairie Vill., Kan., 172 F.3d 736, 748 (10th Cir. 1999) (same); Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997) (same); Zimmerman v. AHS Tulsa Reg'l Med. Ctr., L.L.C., No. 11-CV-0073, 2011 WL 6122629, at *7 (N.D. Okla. Dec. 8, 2011) (same).

[94] *See infra* notes 95–98 (enumerating applicable precedent).

[95] *See, e.g.*, Shepheard v. N.Y.C. Corr. Dep't, 360 Fed. App'x 249, 250 (2d Cir. 2010) (requiring as a prima facie element that the adverse action was "because of [the plaintiff's] disability"); Mastrolillo v. Conn., 352 Fed. App'x 472, 474 (2d Cir. 2009) (same); VandenBroek v. PSEG Power Conn. L.L.C., 356 Fed. App'x 457, 459 (2d Cir. 2009) (same); Rios v. Dep't of

version.[99] And, finally, some circuits simply opt for the standard *McDonnell Douglas*-based prima facie case.[100] The Sixth Circuit has chosen this version.[101]

Educ., 351 Fed. App'x 503, 505 (2d Cir. 2009) (same); Brady v. Wal-Mart Stores, Inc., 531 F.3d 127, 134 (2d Cir. 2008) (same).

[96] *See, e.g.*, Lescoe v. Pa. Dep't of Corr.–SCI Frackville, 464 Fed. App'x 50, 52 (3d Cir. 2012) (requiring as a prima facie element that the plaintiff "suffered an otherwise adverse employment decision as a result of discrimination"); Keyes v. Catholic Charities of the Archdiocese of Phila., 415 Fed. App'x 405, 408–09 (3d Cir. 2011) (same); Sulima v. Tobyhanna Army Depot, 602 F.3d 177, 185 (3d Cir. 2010) (same); Shaner v. Synthes, 204 F.3d 494, 500 (3d Cir. 2000) (same); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999) (same).

[97] *See, e.g.*, Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030, 1033 (9th Cir. 2002) (requiring as a prima facie element that the employer "terminated or refused to rehire him because of his disability"); Hutton v. Elf Atochem N. Am., Inc., 273 F.3d 884, 891 (9th Cir. 2001) (same); Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d 1080, 1087 (9th Cir. 2001) (same); Nunez v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1246 (9th Cir. 1999) (same); Brown-Younger v. Salvation Army, No. 2:11-CV-01036, 2013 WL 1334267, at *4 (D. Nev. Mar. 29, 2013) (same); EEOC v. Evergreen Alliance Golf Ltd., 2013 WL 1249127, at *5 (D. Ariz. Mar. 26, 2013) (same); Maharaj v. Cal. Bank & Trust, 909 F. Supp. 2d 1198, 1203 (E.D. Cal. 2012) (same).

[98] *See, e.g.*, Knowles v. Sheriff, 460 Fed. App'x 833, 835 (11th Cir. 2012) (requiring as a prima facie element that the plaintiff was "discriminated against because of his disability"); Lopez v. AT&T Corp., 457 Fed. App'x 872, 874 (11th Cir. 2012) (same); Holly v. Clairson Indus., L.L.C., 492 F.3d 1247, 1255–56 (11th Cir. 2007) (same); Smith v. Fed. Express Corp., 191 Fed. App'x 852, 854 (11th Cir. 2006) (same); Rossbach v. City of Miami, 371 F.3d 1354, 1356–57 (11th Cir. 2004) (same).

[99] Interestingly, some older precedent in the First Circuit (which now follow a mandatory prima facie element approach, *see supra* notes 67–70, 84 and accompanying text) had used this fairly broad or open-ended "because of" element in an ADA plaintiff's prima facie case. *See, e.g.*, Orta-Castro v. Merck, Sharp & Dohme Quimica P.R., Inc., 447 F.3d 105, 111 (1st Cir. 2006) (requiring as a prima facie element that the plaintiff "was discharged or adversely affected, in whole or in part, because of her disability"); Phelps v. Optima Health, Inc., 251 F.3d 21, 24–25 (1st Cir. 2001) (same).

Similarly, some older (or other) precedent in the Eighth and Tenth Circuits (which still follow a non-mandatory prima facie element approach, but with the fairly broad or open-ended "inference" element, *see supra* notes 92–93 (respectively)) had used this fairly broad or open-ended "because of" element in an ADA plaintiff's prima facie case. *See, e.g.*, Kosmicki v. Burlington N. & Santa Fe Ry. Co., 545 F.3d 649, 651 (8th Cir. 2008) (requiring as a prima facie element that the plaintiff "suffered an adverse employment action because of his disability"); Thompson v. Bi-State Dev. Agency, 463 F.3d 821, 825 (8th Cir. 2006) (same as *Kosmicki*); EEOC v. Wal-Mart Stores, Inc., 202 F.3d 281, *2 (10th Cir. 1999) (requiring as a prima facie element that the plaintiff was "discriminated against because of his disability"); Butler v. City of Prairie Vill., 172 F.3d 736, 748 (10th Cir. 1999) (same as *Wal-Mart*); Siemon v. AT&T Corp., 117 F.3d 1173, 1175 (10th Cir. 1997) (same as *Wal-Mart*).

Nonetheless, while all of these circuits commonly exclude (or omit) non-disabled replacement evidence from an ADA plaintiff's prima facie case, some of them have gone the further step of explaining *why* they opted to follow a non-mandatory prima facie element approach.[102]

For example, in the Seventh Circuit's 1997 decision in *Leffel v. Valley Financial Services*, the court generally addressed an ADA disability discrimination claim, in which the plaintiff (who had multiple sclerosis) alleged that the employer had discharged her because of her disability.[103] On the issue of non-disabled replacement evidence, the Seventh Circuit noted that some federal courts had "suggested that as part of her prima facie case, a plaintiff . . . typically must show that she was rejected in favor of or

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[100] *See, e.g.*, Gecewicz v. Henry Ford Macomb Hosp. Corp., 683 F.3d 316, 321 (6th Cir. 2012) (using the elements from *McDonnell Douglas* for an ADA plaintiff's prima facie case); Whitfield v. Tenn., 639 F.3d 253, 259 (6th Cir. 2011) (same); Thompson v. Henderson, 226 Fed. App'x 466, 472 (6th Cir. 2007) (same); Brenneman v. MedCentral Health Sys., 366 F.3d 412, 417 (6th Cir. 2004) (same); Hedrick v. W. Reserve Care Sys., 355 F.3d 444, 453 (6th Cir. 2004) (same).

Prior to *Whitfield*, the Sixth Circuit had occasionally referenced a different version of an ADA plaintiff's prima facie case—namely, one that included the element that the adverse action be "solely because of the disability." Mahon v. Crowell, 295 F.3d 585, 589 (6th Cir. 2002); *see also* Spees v. James Marine, Inc., 617 F.3d 380, 395 (6th Cir. 2010) (same). But, the *Whitfield* court concluded that a *McDonnell Douglas*-based prima facie case was "the proper test" that "properly tracks" the Supreme Court's 1973 decision. *Whitfield*, 639 F.3d at 259 (also reasoning that the "solely because of the disability" element "makes little sense" because it "requires at the prima facie stage what the *McDonnell Douglas* burden-shifting framework seeks to uncover only through two additional burden shifts, thereby rendering that framework wholly unnecessary").

Interestingly, some older precedent in the First Circuit (which now follows a mandatory prima facie element approach, *see supra* notes 67–70, 84 and accompanying text) had used the *McDonnell Douglas*-based prima facie case in ADA cases. *See, e.g.*, Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 30 (1st Cir. 2002) ("[T]he appellant presented evidence that she is disabled; that she applied and was qualified for the EMT position; that she was rejected despite her qualifications; and that FAS thereafter continued to hire EMTs. This was enough to satisfy the prima facie case requirement.").

Similarly, some older (or other) precedent in the Third Circuit (which still follows a non-mandatory prima facie element approach, but with the fairly broad or open-ended "because of" element, *see supra* note 96) had used the *McDonnell Douglas*-based prima facie case in ADA cases. *See, e.g.*, Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 938–40 (3d Cir. 1997) (listing the *McDonnell Douglas* prima facie elements); Olson v. Gen. Elec. Astrospace, 101 F.3d 947, 951 (3d Cir. 1996) (same).

[101] *See supra* note 100 (enumerating applicable precedent).

[102] *See, e.g.*, Leffel v. Valley Fin. Servs., 113 F.3d 787, 792–94 (7th Cir. 1997).

[103] *Id.* at 789.

replaced by someone of a different race or sex, . . . or in a case like this one, by someone who is not disabled."[104]

Importantly, however, the court issued a "cautionary word . . . as to what kind of evidence the plaintiff must produce in order to establish a prima facie case."[105] Evidencing a non-mandatory prima facie element approach, the Seventh Circuit warned that this outside-the-protected-group replacement evidence was "not inevitably necessary," "is not required to make out a prima facie case," and "should not be understood as the only means" of satisfying a prima facie case of employment discrimination.[106] In support of this view, the court leaned heavily on the Supreme Court's *O'Connor* decision:

> The Supreme Court's opinion in *O'Connor* makes clear . . . that such proof is not inevitably necessary. There the Court rejected the notion that a person contending that he was discharged in violation [of] the [ADEA] must show that he was replaced by someone outside the group of persons protected by the statute (in other words, someone under the age of 40) in order to make out a prima facie case of discrimination[.]
>
> . . . .
>
> We take the opportunity to reiterate here what we believe to be the central point of . . . the Supreme Court's opinion in *O'Connor* . . . : that the nature of the proof giving rise to the requisite inference of discrimination cannot be reduced to a formula that will serve any and all discrimination cases. . . . Evidence of disparate treatment . . . should not be understood as the only means of doing so.[107]

Next, in the Fourth Circuit's 1995 decision in *Ennis v. National Ass'n of Business and Educational Radio, Inc*., the court generally addressed an ADA disability discrimination claim, in which the plaintiff (who had adopted an HIV-infected child) alleged that the employer had discharged

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[104] *Id.* at 793.

[105] *Id.* at 792.

[106] *Id.* at 793–94.

[107] *Id.*

her because of her association or relationship with that disabled child.[108] Evidencing a non-mandatory prima facie element approach, the Fourth Circuit concluded that an ADA plaintiff's prima facie case that included the fairly broad or open-ended "inference of discrimination" element was "preferable"[109] to one that imposed a specific requirement that the plaintiff be "replaced by an individual . . . outside the protected class."[110]

In support of this view, the court alluded to the possibility that disability discrimination could have originally occurred against an individual, even if the subsequent replacement was also disabled: "[R]equiring a showing that the replacement was outside the protected class would lead to the dismissal of many legitimate disability discrimination claims . . . ."[111]

Finally, in the Sixth Circuit's 1996 decision in *Monette v. Electronic Data Systems Corp*., the court generally addressed an ADA disability discrimination claim, in which the plaintiff (who had back and shoulder impairments) alleged that the employer had discharged him because of his purported disability.[112] Evidencing a non-mandatory prima facie element approach, the Sixth Circuit bluntly stated: "We do not believe that the plaintiff need necessarily establish that he or she was replaced by a person outside the protected class as an element of his or her prima facie case."[113]

In support of this view, the court—like the Fourth Circuit in *Ennis*—highlighted the possibility that disability discrimination could have originally occurred against an individual, even if the subsequent replacement was also disabled:

> [D]isabilities are diverse. Given the somewhat unique characteristics of various disabilities, and the differences between individuals afflicted with a particular disability, replacement of one disabled individual with another disabled individual does not necessarily weaken the

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[108] 53 F.3d 55, 56–57 (4th Cir. 1995). The ADA also prohibits "association"-based discrimination—namely, "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4) (2006); *see supra* note 1 (discussing the ADA's general prohibitions).

[109] *Ennis*, 53 F.3d at 58.

[110] *Id.* at 58 n.2.

[111] *Id.* at 58.

[112] 90 F.3d 1173, 1176 (6th Cir. 1996).

[113] *Id.* at 1185 n.11.

> inference of discrimination against the former individual that arises through establishment of the [prima facie case] set forth above.[114]

Thus, at present, the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits follow a non-mandatory prima facie element approach by excluding non-disabled replacement evidence as a legally necessary element of an ADA plaintiff's prima facie case.[115]

2. Legally Sufficient Proof of Discriminatory Intent?

In contrast to the often-addressed legal necessity issue, not many of our federal courts have expressly discussed the legal sufficiency issue in ADA cases—specifically, whether non-disabled replacement evidence (if present) is legally sufficient to create a genuine dispute or issue of material fact regarding the employer's purported discriminatory intent at the Rule 56 summary judgment stage?

The few courts to have addressed this issue have offered little guidance or explanation regarding their conclusions on it.[116] For example, in the Eighth Circuit's 1999 decision in *Kiel v. Select Artificials, Inc*., the court generally addressed an ADA disability discrimination claim, in which the

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[114] *Id.* While not necessarily explaining *why* they opted to follow a non-mandatory prima facie element approach, other circuits have nonetheless expressly discussed *that* they exclude or omit non-disabled replacement evidence from an ADA plaintiff's prima facie case. *See, e.g.*, EEOC v. Wal-Mart Stores, Inc., 202 F.3d 281, *2 (10th Cir. 1999) ("Wal-Mart's argument is based on its contention that absent evidence that [the plaintiff] was replaced by a non-disabled person, this claim should not have been submitted to the jury. . . . There is no requirement imposed upon a plaintiff alleging a violation of the ADA in this circuit to show replacement by a person outside of the protected class, and Wal-Mart has cited no persuasive authority which holds otherwise."); Butler v. City of Prairie Village, 172 F.3d 736, 748 (10th Cir. 1999) ("The final element of a prima facie case of disability discrimination is distinct from the parallel requirement in cases involving race, gender, or age, which calls for a showing that the plaintiff was replaced by a person outside the protected class."); Schaeffer v. Independence Blue Cross, Inc., No. Civ. A. 03-CV-5897, 2005 WL 181896, at *6 (E.D. Pa. Jan. 26, 2005) ("While courts sometimes add a fourth [prima facie] element requiring [ADA] plaintiffs to establish that . . . [the] plaintiff was replaced by a person outside her protected class . . . the Third Circuit has instructed that such a requirement is not always necessary.").

[115] *Cf.* Cox, *supra* note 86, at 444 ("In *O'Connor*'s wake, many courts concluded that intraclass claims [i.e., in which both the plaintiff and the replacement are disabled] were also available under the ADA.").

[116] Francis v. Lehigh Univ., No. 10-CV-4300, 2013 WL 787089, at *1–4 (E.D. Pa. Mar. 1, 2013); Kiel v. Select Artificials, Inc.,169 F.3d 1131, 1131 (8th Cir. 1999).

plaintiff (who was deaf) alleged that the employer had discharged him because of his disability.[117] In support of this claim, the plaintiff relied exclusively on the fact that "he was replaced by a hearing employee."[118] The district court granted summary judgment in favor of the employer, concluding that the plaintiff's evidence did not create a genuine issue of material fact regarding the employer's purported discriminatory intent (i.e., that the employer's stated reason for adverse action (insubordination) was a pretext-based cover for actual discrimination).[119]

Affirming the district court, the Eighth Circuit discussed the legal sufficiency of non-disabled replacement evidence at two different steps of the *McDonnell Douglas* burden-shifting framework: (a) the prima facie case step; and (b) the pretext for discrimination step.[120] First, the court concluded that the plaintiff had established the requisite prima facie case, which included the fairly broad or open-ended element that the circumstances surrounding the adverse action give rise to "an inference of unlawful discrimination."[121] Specifically, the Eighth Circuit noted that non-disabled replacement evidence was, at the very least, legally sufficient to satisfy this fairly broad or open-ended element at *the prima facie case step*.[122]

But, the Eighth Circuit then turned to the legal sufficiency of non-disabled replacement evidence at *the pretext for discrimination step*.[123] The court concluded—with little guidance or explanation—that this evidence was *legally insufficient* to create a genuine dispute or issue of material fact regarding the employer's purported discriminatory intent at the Rule 56 summary judgment stage:

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[117] *Id.* at 1134.

[118] *Id.* at 1135.

[119] *Id.* at 1134.

[120] *Id.* at 1135–36; *see supra* Part II.A.1 (discussing the *McDonnell Douglas* burden-shifting framework in employment discrimination cases).

[121] *Kiel*, 169 F.3d at 1135; *see supra* note 92 (discussing the Eighth Circuit's version of an ADA plaintiff's prima facie case that includes this fairly broad or open-ended element that the circumstances surrounding the adverse action give rise to "an inference of unlawful discrimination").

[122] *Kiel*, 169 F.3d at 1135. ("Generally, evidence that a plaintiff was replaced by a similarly situated employee who is not disabled is sufficient to support an inference of discrimination. . . . Kiel established that he was replaced by a hearing employee. Thus, Kiel met his initial burden under *McDonnell Douglas*.") (citation omitted).

[123] *Id.* at 1135.

> The bare assertion that Select hired a hearing employee to replace Kiel did not raise a genuine factual issue regarding Select's discriminatory intent, for Kiel did not point to any conduct or statements by the Frys [the co-owners] that would permit a reasonable jury to find that insubordination was a mere pretext for his termination. . . . In short, there is simply no evidence that discrimination was a motivating factor in Kiel's termination.[124]

In addition, in a Pennsylvania district court's 2013 decision in *Francis v. Lehigh University*, the court generally addressed an ADA disability discrimination claim, in which Francis (who had foot, back, and hand impairments) alleged that the employer had discharged him because of his disability.[125] In support of this claim, the plaintiff relied, in part, on the fact that "Lehigh replaced [his] position with a non-disabled employee."[126] The district court granted summary judgment in favor of the employer, concluding that the plaintiff's evidence did not create a genuine issue of material fact regarding the employer's purported discriminatory intent (i.e., that the employer's stated reason for adverse action (violation of its harassment policy) was a pretext-based cover for actual discrimination).[127]

The district court—like the Eighth Circuit in *Kiel*—discussed the legal sufficiency of non-disabled replacement evidence at two different steps of the *McDonnell Douglas* burden-shifting framework: (a) the prima facie case step and (b) the pretext for discrimination step.[128] First, the court concluded that the plaintiff had established the requisite prima facie case, which included the fairly broad or open-ended element that the adverse action was otherwise "because of the plaintiff's disability."[129] Specifically, the district court—like the *Kiel* court—noted that non-disabled replacement evidence

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[124] *Id*.

[125] No. 10 CV 4300, 2013 WL 787089, at *1–4 (E.D. Pa. Mar. 1, 2013).

[126] *Id*. at *6.

[127] *Id*. at *7–9.

[128] *Id*. at *6–7, *9; *see supra* Part II.A.1 (discussing the *McDonnell Douglas* burden-shifting framework in employment discrimination cases).

[129] Francis v. Lehigh Univ., No. 10-CV-4300, 2013 WL 787089, at *1–4 (E.D. Pa. Mar. 1, 2013); s*ee supra* note 96 (discussing the Third Circuit's version of an ADA plaintiff's prima facie case that includes this fairly broad or open-ended element that the adverse action was otherwise "because of the plaintiff's disability").

was, at the very least, legally sufficient to satisfy this fairly broad or open-ended element at *the prima facie case step*.[130]

But, the district court then turned to the legal sufficiency of non-disabled replacement evidence at *the pretext for discrimination step*.[131] Like the *Kiel* court, the district court concluded, also with little guidance or explanation, that this evidence was *legally insufficient* to create a genuine dispute or issue of material fact regarding the employer's purported discriminatory intent at the Rule 56 summary judgment stage:

> Plaintiff contends that Lehigh's decision to replace him with a non-disabled individual is further evidence of pretext. 'Such an inference may be acceptable at the prima facie stage of the analysis where the inquiry is based on a few generalized factors, but not necessarily at the pretext stage where the factual inquiry into the alleged discriminatory motives of the employer has risen to a new level of specificity.' . . . [T]he Court adopts Lehigh's argument that the fact that a non-disabled employee is now

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[130] *Francis*, 2013 WL 787089 at *6 ("Plaintiff . . . argu[es] that the fourth element of the prima facie test is met by the fact that Lehigh replaced Plaintiff's position with a non-disabled employee. While scant, the Court does find that Plaintiff has adduced sufficient evidence to establish a prima facie case. Fortunately, Plaintiff's burden is not an onerous one.").

Like the Eighth Circuit in *Kiel* and the Pennsylvania district court in *Francis*, other federal courts have similarly noted that "outside-the-protected-group" replacement evidence is legally sufficient to satisfy this type of fairly broad or open-ended prima facie element. *See, e.g.*, Leffel v. Valley Fin. Servs., 113 F.3d 787, 793–94 (7th Cir. 1997) (in an ADA case, noting that "[w]e emphasized that . . . [this] kind of proof [being 'replaced by someone of a different race, sex, and so on] 'may help to raise an inference of discrimination' . . . . Evidence of disparate treatment is certainly one of the most obvious ways to raise an inference of discrimination absent direct proof of discriminatory animus.") (quoting Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1996)); Price v. S-B Power Tool, 75 F.3d 362, 365 (8th Cir. 1996) (in an ADA case, noting that "[a]n inference of discrimination may be raised by evidence that a plaintiff was replaced by or treated less favorably than similarly situated employees who are not in the plaintiff's protected class."); Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1085 (6th Cir. 1994) (in an ADEA case, noting that the fact that the plaintiff "was over forty years old when he was fired and that he was replaced by someone under forty years old . . . . may be sufficient to force [the employer] to come forward with a nondiscriminatory reason for having fired him . . . ."); *cf.* Ennis v. Nat'l Assoc. of Bus. & Educ. Radio, Inc., 53 F.3d 55, 58–59 (4th Cir. 1995) (in an ADA case, implying that non-disabled replacement evidence was "affirmative evidence that disability was a determining factor in the employer's decision").

[131] *Francis*, 2013 WL 787089 at *7.

> performing Plaintiff's job cannot alone sufficiently support Plaintiff's pretext burden.[132]

Interestingly, more of our federal courts have addressed this legal sufficiency issue as to replacement evidence in the ADEA and Title VII contexts. For example, in the ADEA context, several courts have noted that "outside-the-protected-group" replacement evidence is legally insufficient to create a genuine dispute or issue of material fact regarding the employer's purported discriminatory intent at the Rule 56 summary judgment stage.[133] And, in the Title VII context, several courts have reached

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[132] *Id.* at *9 (citing Simpson v. Kay Jewelers, 142 F.3d 639, 646 (3d Cir. 1998)). In particular, the district court described this "new level of specificity" at the pretext for discrimination step as follows:

> In order to defeat Lehigh's motion for summary judgment, Plaintiff must provide evidence . . . from which a fact finder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating factor or determinative cause of the employer's action. In doing so, 'the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them "unworthy of credence" and hence infer "that the employer did not act for [the asserted] non-discriminatory reason."

Id. at *7 (quoting Fuentes v. Perskie, 32 F.3d 759, 764–65 (3d Cir. 1994)).

[133] *See, e.g.*, Thomas v. Corwin, 483 F.3d 516, 529 (8th Cir. 2007) ("Thomas 'can avoid summary judgment only if the evidence considered in its entirety (1) created a fact issue as to whether [the employer's] proffered reasons are pretextual *and* (2) created a reasonable inference that age was a determinative factor in the adverse employment decision.' Thomas fails to do so, and she presents no evidence, other than her replacement by a younger woman, indicating [the employer's] proffered reasons for her termination were a pretext for age discrimination."); Futrell v. J.I. Case, 38 F.3d 342, 348–50 (7th Cir. 1994) ("Futrell showed that his replacement, Carl Brown, was six years younger. . . . [T]his is an unremarkable phenomenon that does not, in and of itself, prove discrimination. . . . Standing alone, perhaps no one of Futrell's proofs would suffice to prove an age discrimination claim. The mere fact that George and other Case managers might have made comments about older workers may not create an inference of discrimination, nor may the fact that . . . Case replaced Futrell with someone six years his junior."); *Manzer*, 29 F.3d at 1085 ("Indeed, the only facts which separate Manzer's case from the garden-variety termination of an 'at-will' employee are that he was over forty years old when he was fired and that he was replaced by someone under forty years old. . . . [These facts] are not sufficient, by themselves, to permit a factfinder to conclude that the reasons proffered by [the employer] were a pretext for age discrimination."); La Montagne v. Am. Convenience Prods., Inc., 750 F.2d 1405, 1412–13 (7th Cir. 1984) ("The third item of evidence, Bark's hiring of Ibsen as La Montagne's replacement, is likewise too insubstantial to support an inference of age discrimination. . . . [T]he mere fact that an older employee is replaced by a younger one does not permit an inference that the replacement

a similar conclusion.[134]

Regardless, few federal courts have addressed the legal sufficiency issue in the ADA context.[135] And, those courts that have done so—such as the *Kiel* and *Francis* courts—offer little guidance or explanation regarding their ultimate conclusion that non-disabled replacement evidence is legally insufficient to create a genuine dispute or issue of material fact regarding

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was motivated by age discrimination."); *cf. Simpson*, 142 F.3d at 645 ("[T]he mere favorable treatment of one younger manager as compared to one older manager may not be sufficient to infer age discrimination.").

[134] *See, e.g.*, Pickens v. Shell Tech. Ventures, Inc., 118 Fed. App'x 842, 847 (5th Cir. 2004) ("Even if we assume, arguendo, that the district court erred in determining that Shook [an American] was replaced by an American, Shook still does not raise any genuine issue of fact as to pretext."); Lawson v. Plantation Gen. Hosp., L.P., 704 F.Supp. 2d 1254, 1287 (S.D. Fla. 2010) ("Plaintiff points only to the fact that Cruz, as a male, 'replaced' Plaintiff as Executive Secretary. Plaintiff has not set forth any other evidence that suggests that her transfer was motivated by discriminatory animus because she is female. This raises no issue of fact with regard to pretext as it relates to Plaintiff's claim of discrimination based on her gender."); Schaeffer v. Tractor Supply Co., No. 08-15000, 2010 WL 2474085, at *7 (E.D. Mich. June 9, 2010) ("The fact that [the plaintiff] was replaced by an individual outside the protected class . . . is not sufficient, standing alone, to support a finding of pretext."); Riley v. Union Parish Sch. Bd., Civ. A. No. 08-0319, 2009 WL 1806654, at *4 (W.D. La. June 24, 2009) ("The only evidence of pretext or mixed-motive Riley [an African-American] offers is that Defendants terminated [her] and replaced her with Furlow [who was white] . . . . The Court finds that this, by itself, fails to raise a genuine issue of material fact whether Defendants acted with discriminatory animus."); Porterfield v. Shoe Show of Rocky Mount, Inc., No. 08-10731, 2009 WL 1448961, at *7 (E.D. Mich. May 22, 2009) ("Porterfield's only evidence that Shoe Show's explanation is a pretext for sex-based discrimination is the fact that a man replaced her as the store manager. This, standing alone, is insufficient evidence to create a genuine issue of material fact regarding whether Shoe Show's explanation is only a pretext for sex-based discrimination."); Stahlnecker v. Sears, Civ. A. No. 08-CV-0681, 2009 WL 661927, at *7 (E.D. Pa. Mar. 11, 2009) ("The only evidence that Stahlnecker can offer in support of her claim is that she was replaced by a male employee. . . . [S]ummary judgment is proper as to Stahlnecker's Title VII claim . . . ."); Baehr v. Nw. Airlines, Inc., No. Civ. 08-CV-0681, 2005 WL 1661526, at *5 (D. Minn. July 15, 2005) ("The fact that Plaintiff was replaced by a male, without more, does not raise a reasonable inference that Northwest's articulated reason for her termination is a pretext for gender discrimination."); Bell v. Dall. Hous. Auth., No. Civ. A. 302CV1829L, 2003 WL 22455385, at *8 (N.D. Tex. Sept. 23, 2003) ("[T]hat [the plaintiff, an African-American] was replaced by a Hispanic does not carry the day for him, insofar as establishing, or raising a genuine issue of material fact, that the articulated reason by [the employer] was a pretext for intentional race discrimination.").

[135] Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1131 (8th Cir. 1999); *Francis*, 2013 WL 787089 at *9.

the employer's purported discriminatory intent at the Rule 56 summary judgment stage.[136]

III. PROPOSING A MINIMAL RELEVANCE APPROACH TO NON-DISABLED REPLACEMENT EVIDENCE

At present, our federal courts lack a uniform, clear approach on the legal necessity and sufficiency issues regarding non-disabled replacement evidence in ADA cases. This article proposes a two-pronged "Minimal Relevance Approach" to bring needed uniformity and clarity to these two distinct issues.

Specifically, the two concrete features of the Minimal Relevance Approach are:

> (1) Unnecessary Prima Facie Element: non-disabled replacement evidence is not a legally necessary element of an ADA plaintiff's prima facie case; and
>
> (2) Insufficient Proof of Discriminatory Intent: non-disabled replacement evidence (if present) is legally insufficient to create a genuine dispute or issue of material fact regarding the employer's purported discriminatory intent at the Rule 56 summary judgment stage.

Consequently, this proposed approach combines (a) a non-mandatory prima facie element approach on the legal necessity issue and (b) the *Kiel* and *Francis* courts' shared approach on the legal sufficiency issue.[137]

Two initial points regarding the Minimal Relevance Approach are important. First, this proposed approach does not seek to create a single, uniform set of prima facie elements in ADA cases. As noted above, the *McDonnell Douglas* court exhibited a flexible philosophy regarding the prima facie case, as the court noted that its enumerated "specifications . . . of the prima facie proof required . . . [are] not necessarily applicable in every respect to differing factual scenarios."[138] Relying on that flexible philosophy, our federal courts currently employ the above-referenced, varying versions of the prima facie case in ADA (and other types of)

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[136] *See Kiel*, 169 F.3d at 1135–36; *Francis*, 2013 WL 787089, at *9.

[137] *Id.*

[138] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973).

cases.[139] Some of the circuit courts simply opt for the standard *McDonnell Douglas*-based prima facie case.[140] Other circuits opt for a version that includes the fairly broad or open-ended element that (a) the circumstances surrounding the adverse action give rise to "an inference of unlawful discrimination"[141] *or* (b) the adverse action was otherwise "because of the plaintiff's disability."[142] So, the first feature of the Minimal Relevance Approach seeks only *uniform exclusion* of non-disabled replacement evidence as a legally necessary element of an ADA plaintiff's prima facie case. Otherwise, and consistent with the *McDonnell Douglas* court's flexible philosophy regarding the prima facie case, this proposed approach leaves intact these varying versions of an ADA plaintiff's prima facie case.[143]

Second, the Minimal Relevance Approach, when applied, has the practical effect of requiring an ADA plaintiff to offer *supplemental proof* beyond non-disabled replacement evidence to create a genuine dispute or issue of material fact regarding the employer's purported discriminatory intent at the Rule 56 summary judgment stage. Of course, this supplemental proof can take a variety of forms, such as comparator evidence, statistical evidence, decision-maker remark or comment evidence, or evidence that the employer's articulated reason for adverse action was false or unworthy of belief.[144] Regardless, this proposed approach compels an ADA plaintiff to

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[139] *See supra* Part II.B.1.a–b (discussing the different versions of an ADA plaintiff's prima facie case).

[140] *See supra* note 100 and accompanying text (discussing this version of an ADA plaintiff's prima facie case).

[141] *See supra* notes 90–93 and accompanying text (discussing this version of an ADA plaintiff's prima facie case).

[142] *See supra* notes 95–98 and accompanying text (discussing this version of an ADA plaintiff's prima facie case).

[143] *McDonnell*, 411 U.S. at 802 n.13.

[144] *See supra* notes 31–35 and accompanying text (discussing various forms of circumstantial evidence of an employer's purported discriminatory intent, as enumerated in *McDonnell Douglas*); Marla Swartz, Note, *The Replacement Dilemma: An Argument for Eliminating a Non-Class Replacement Requirement in the Prima Facie Stage of Title VII Individual Disparate Treatment Discrimination Claims*, 101 MICH. L. REV. 1338, 1354 (2003) ("Plaintiffs have the "full panopoly [sic] of circumstantial evidence at their disposal in meeting their initial prima facie burden of production. This collection includes statistical evidence of systematic disparate treatment, comparative personal evidence of individual disparate treatment, related comments by people in positions of authority, or evidence of replacement at work by a person not in the employee's protected class.").

combine minimally relevant non-disabled replacement evidence with supplemental proof of the employer's purported discriminatory intent to overcome an employer's Rule 56 summary judgment motion.[145]

Overall, the Minimal Relevance Approach is consistent with applicable Supreme Court precedent and philosophy, promotes the ADA's anti-discrimination policy, and dovetails with probability theory and statistical evidence regarding disabled workers in the United States.

A. First Feature—Unnecessary Prima Facie Element

The first feature of the Minimal Relevance Approach is its exclusion of non-disabled replacement evidence as a legally necessary element of an ADA plaintiff's prima facie case. This feature is warranted for three reasons: (a) it is consistent with black letter law from applicable Supreme Court precedent; (b) it promotes the ADA's anti-discrimination policy; and (c) it reflects the Supreme Court's philosophy regarding the prima facie case and its proper role.

1. Black Letter Law from *O'Connor*

The first feature of the Minimal Relevance Approach is consistent with black letter law from the Supreme Court's 1996 decision in *O'Connor v. Consolidated Coin Caterers Corp*.[146]

While the Supreme Court has not answered whether "outside-the-protected-group" replacement evidence is, or should be, a legally necessary prima facie element in the ADA context, it explicitly addressed this issue in the ADEA context in *O'Connor*.[147] There, the Fourth Circuit had required an ADEA plaintiff—as part of a prima facie case of age discrimination—to

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[145] *Cf.* Futrell v. J.I. Case, 38 F.3d 342, 348–50 (7th Cir. 1994) ("Futrell [an ADEA plaintiff] showed that his replacement, Carl Brown, was six years younger. . . . [T]his is an unremarkable phenomenon that does not, in and of itself, prove discrimination. But such evidence does contribute to an age discrimination proof when combined with other factors. . . . Standing alone, perhaps no one of Futrell's proofs would suffice to prove an age discrimination claim. The mere fact that George and other Case managers might have made comments about older workers may not create an inference of discrimination, nor may the fact that . . . Case replaced Futrell with someone six years his junior. . . . Taking the facts as a whole, a reasonable jury could have inferred that Case willfully discriminated against Futrell.").

[146] 517 U.S. 308 (1996).

[147] O'Connor v. Consol. Coin Caterers Corp., 56 F.3d 542, 546 (4th Cir. 1995).

prove that he or she "was replaced by someone of comparable qualifications outside the protected class."[148]

The Supreme Court specifically focused on the propriety of that prima facie element, asking "whether a plaintiff alleging that he was discharged in violation of the [ADEA] must show that he was replaced by someone outside the age group protected by the ADEA to make out a prima facie case under the framework established by *McDonnell Douglas Corp. v. Green*."[149] Ultimately (and unanimously) rejecting the Fourth Circuit's requirement, the Court bluntly held, "the fact that an ADEA plaintiff was replaced by someone outside the protected class is *not a proper element* of the *McDonnell Douglas* prima facie case."[150] Thus, the black letter take-away from *O'Connor* is the Supreme Court's emphatic answer of "no" to the question of whether "outside-the-protected-group" replacement evidence is—or should be—a proper, legally necessary element of that prima facie case.

Unfortunately, a mandatory prima facie element approach in the ADA context flatly ignores *O'Connor*'s black letter law.[151] Under that approach, an ADA plaintiff must show non-disabled replacement evidence as a legally necessary element of a prima facie case.[152] So, a mandatory prima facie element approach views "outside-the-protected-group" replacement evidence as a "proper element" of this prima facie case; and, it thus answers the above-referenced legal necessity question with an emphatic "yes." The key problem with this view and answer, of course, is that they are polar opposites of the Supreme Court's corresponding view and answer in *O'Connor*.[153] There, the Supreme Court viewed as improper the same type of replacement evidence that a mandatory prima facie element approach views as "proper."[154] And, the Court yelled "no" to the same legal necessity question to which a mandatory prima facie element approach shouts "yes."[155] Consequently, a mandatory prima facie element approach in ADA

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[148] *Id.*

[149] *O'Connor*, 517 U.S. at 309.

[150] *Id.* at 312 (emphasis added).

[151] *Id.*

[152] *See supra* part II.B.1.a (discussing the mandatory prima facie element approach).

[153] *O'Connor*, 517 U.S. at 312.

[154] *Id.*

[155] *Id.*

cases is simply inconsistent with the black letter law from the Supreme Court's *O'Connor* decision.

In contrast, the Minimal Relevance Approach is consistent with the straightforward, black letter law from *O'Connor*. The first feature of this proposed approach is its exclusion of non-disabled replacement evidence as a legally necessary element in an ADA plaintiff's prima facie case. So, this proposed approach views "outside-the-protected-group" replacement evidence as an improper element of this prima facie case; and, it thus answers the above-referenced legal necessity question with a firm "no." This view and answer are identical to the Supreme Court's corresponding view and answer in *O'Connor*.

In fact, the Seventh Circuit recognized the significance of the Supreme Court's *O'Connor* decision in its 1997 decision in *Leffel v. Valley Financial Services*.[156] Specifically, the *Leffel* court leaned heavily on the black letter law from *O'Connor* to justify its decision to follow a non-mandatory prima facie element approach in ADA cases:

> The Supreme Court's opinion in *O'Connor* makes clear . . . that such proof ["outside-the-protected-group" replacement evidence] is not inevitably necessary. There the Court rejected the notion that a person contending that he was discharged in violation [of] the [ADEA] must show that he was replaced by someone outside the group of persons protected by the statute (in other words, someone under the age of 40) in order to make out a prima facie case of discrimination[.][157]

Consequently, the first feature of the Minimal Relevance Approach is consistent with black letter law from the Supreme Court's decision in *O'Connor*. Indeed, it is fair to view this first feature as merely restating *O'Connor*'s central holding (with a simple substitution of "ADA" for "ADEA"): "[T]he fact that an *ADA* plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case."[158]

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[156] 113 F.3d 787, 793 (7th Cir. 1997).

[157] *Id.* at 793–94.

[158] *See O'Connor*, 517 U.S. at 312.

2. ADA Anti-Discrimination Policy

Next, the first feature of the Minimal Relevance Approach (i.e., its exclusion of non-disabled replacement evidence as a legally necessary element of an ADA plaintiff's prima facie case) promotes the ADA's anti-discrimination policy.

When enacting the ADA in 1990, Congress expressed lofty and broad anti-discrimination goals. Specifically, Congress emphasized that the ADA's purpose was to create "a clear and comprehensive national mandate" against disability discrimination and "clear, strong, consistent, enforceable standards" to battle that discrimination.[159]

Two related policy concepts are important in understanding whether (and how) the Minimal Relevance Approach—via its exclusion of non-disabled replacement evidence as a legally necessary element of an ADA plaintiff's prima face case—promotes the ADA's comprehensive anti-discrimination policy. These two concepts are: (a) the "coexisting decisions possibility" and (b) "camouflaged discriminators."

The Coexisting Decisions Possibility. Can an employer (a) make an original, *discriminatory* decision to not hire, promote, or retain an ADA plaintiff because of his or her disability and (b) yet still make a subsequent decision to hire, promote, or retain a person who is also disabled? In other words, are these "coexisting decisions" possible?

A mandatory prima facie element approach and the Minimal Relevance Approach provide opposite answers to this question. A mandatory prima facie element approach answers "no"—it flatly assumes that the two above-referenced employer decisions do not (and cannot) coexist. To illustrate the point, consider an employer that has made the second decision (i.e., it subsequently hired, promoted, or retained a person who (like the ADA plaintiff) is also disabled). Under this approach, this second decision ends the case. Given that non-disabled replacement evidence is absent, the ADA plaintiff *cannot* even satisfy the requisite prima facie case and is forever foreclosed from proving the first decision (i.e., that the employer originally (and discriminatorily) did not hire, promote, or retain him or her because of disability). Thus, a mandatory prima facie approach rejects the coexisting decisions possibility.

In contrast, the first feature of the Minimal Relevance Approach answers "yes" to the question regarding the coexisting decisions

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[159] 42 U.S.C. § 12101(b)(1)–(2) (2006).

possibility—it assumes that the two above-referenced employer decisions can (and, at times, do) coexist. Again, to illustrate the point, consider the same employer that has made the second decision (i.e., it subsequently hired, promoted, or retained a person who (like the ADA plaintiff) is also disabled). Under this proposed approach, this second decision does *not* end the case. Instead, the ADA plaintiff *can* still satisfy the requisite prima facie case (via other circumstantial evidence) and retains the opportunity to prove the first decision (i.e., that the employer originally (and discriminatorily) did not hire, promote, or retain him or her because of disability). Thus, the first feature of the Minimal Relevance Approach accepts the coexisting decisions possibility.

So, which answer to the coexisting decisions possibility question is correct—a mandatory prima facie approach's "no," or the Minimal Relevance Approach's "yes"? The Supreme Court and other federal courts have opted for the latter in the ADEA, ADA, and Title VII contexts.

First, in the ADEA context, the Supreme Court recognized the coexisting decisions possibility in *O'Connor*. Specifically, and in support of its conclusion that "outside the protected class" replacement evidence is "not a proper element" of an ADEA plaintiff's prima facie case,[160] the Court explained: "The fact that one person in the protected class has lost out to another person in the protected class is . . . irrelevant, so long as he has lost out because of his age."[161]

This single sentence—especially the use of the word "irrelevant"—is a clear nod by the Supreme Court to the coexisting decisions possibility.[162] Here, the Court acknowledges the possibility of two distinct decisions that are not linked to one another: (a) an original, discriminatory decision to not hire, promote, or retain an ADEA plaintiff "because of his age" and (b) a subsequent decision to hire, promote, or retain "another person in the protected class."[163] To the Court, the subsequent decision is "irrelevant" to, and independent from, the original decision; in other words, age discrimination could have originally occurred against an ADEA plaintiff, even if the subsequent replacement was also forty years old or older.[164]

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[160] *O'Connor*, 517 U.S. at 312.

[161] *Id*.

[162] *Id.*

[163] *See id.*

[164] *See id.* (describing whether a terminated employee is replaced by a younger employee to be an "utterly irrelevant factor").

Consequently, in the ADEA context, the Supreme Court has openly acknowledged the coexisting decisions possibility.[165]

Second, in the ADA context, the federal circuit courts have also recognized the coexisting decisions possibility. For example, the Fourth Circuit, in *Ennis v. National Ass'n of Business and Educational Radio, Inc*.,[166] provided the following explanation for its decision to follow a non-mandatory prima facie element approach to non-disabled replacement evidence: "[R]equiring a showing that the replacement was outside the protected class would lead to the dismissal of many legitimate disability discrimination claims . . . ."[167] And, the Sixth Circuit, in *Monette v. Electronic Data Systems Corp*., offered a similar rationale for its decision to follow a non-mandatory prima facie element approach: "[R]eplacement of one disabled individual with another disabled individual does not necessarily weaken the inference of discrimination against the former individual . . . ."[168]

These respective sentences—especially the use of the language "many legitimate disability discrimination claims" and "does not necessarily weaken the inference of discrimination"—are definite affirmations by the Fourth and Sixth Circuits as to the coexisting decisions possibility. These courts similarly acknowledge the possibility of two distinct decisions that are not connected to one another: (a) an original, discriminatory decision to not hire, promote, or retain an ADA plaintiff because of disability and (b) a subsequent decision to hire, promote, or retain "another disabled individual."[169] To these courts, the subsequent decision is independent from, and does "not necessarily weaken" the possibility of, the original decision; thus, disability discrimination could have originally occurred

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[165] *Cf*. Christine Greenwood, Note, O'Connor v. Consolidated Coil Caterers Corporation: *Replacement by Someone Outside of the Protected Class is Not a Proper Element in Establishing a Prima Facie Case Under the ADEA*, 23 J. CONTEMP. L. 198, 210 (1997) ("[T]he *O'Connor* decision permits plaintiffs who have been replaced by persons significantly younger than themselves to maintain ADEA actions even though their replacements also fall within the protected class. Therefore, the Supreme Court's decision in *O'Connor* removes a substantial impediment to success in discrimination claims under the ADEA. . . . [T]he Supreme Court's more even-handed rationale demonstrates that [requiring an "outside-the-protected-group" replacement as a prima facie element] prevents potentially valid claims from reaching court.").

[166] 53 F.3d 55, 58 (4th Cir. 1995).

[167] *Id.*

[168] 90 F.3d 1173, 1185–86 n.11 (6th Cir. 1996).

[169] *See id.*; *Ennis*, 53 F.3d at 55, 58.

against an ADA plaintiff (triggering a "legitimate disability discrimination claim[]"), even if the subsequent replacement was also disabled.[170] Consequently, in the ADA context, federal circuits have highlighted the coexisting decisions possibility.[171]

Finally, in the Title VII context, the federal circuit courts have also recognized the coexisting decisions possibility. For example, the Third Circuit, in *Pivirotto v. Innovative Systems, Inc.*,[172] provided the following explanation for its decision to exclude an opposite-sex replacement element from a Title VII plaintiff's prima facie case: "The fact that a female plaintiff claiming gender discrimination was replaced by another woman . . . does not, as a matter of law or logic, foreclose the plaintiff from proving that the employer was motivated by her gender (or other protected characteristic) when it discharged her."[173] Moreover, the Seventh Circuit, in *Carson v.*

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[170] *See Monette*, 90 F.3d at 1185–86 n. 11; *Ennis*, 53 F.3d at 55, 58.

[171] *Cf.* Olmstead v. Zimring, 527 U.S. 581, 598 n.10 (1999) (addressing a disability discrimination claim under Title II (the public services part) of the ADA and noting: "The dissent is driven by the notion . . . that 'a plaintiff cannot prove 'discrimination' by demonstrating that one member of a particular protected group has been favored over another member of that same group.' The dissent is incorrect as a matter of precedent and logic." (citation omitted)); Prewitt v. U.S. Postal Serv., 662 F.2d 292, 307 (5th Cir. 1981) ("[W]hen assessing the disparate impact of a facially neutral criterion, courts must be careful not to group all handicapped persons into one class, or even into broad subclasses. This is because 'the fact that an employer employs fifteen epileptics is not necessarily probative of whether he or she has discriminated against a blind person.'") (citing Amy J. Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DEPAUL L. REV. 953, 972 (1978)); Boots v. Nw. Mut. Life Ins. Co., 77 F. Supp. 2d 211, 219 (D.N.H. 1999) ("It logically follows that the ADA is violated by a policy that disadvantages schizophrenics based on their disability, despite the fact that individuals confined to wheelchairs are benefitted."); EEOC v. Wal-Mart Stores, Inc., 11 F. Supp. 2d 1313, 1320 (D.N.M. 1998) ("[T]he fact that [an employer] may have hired a blind or a deaf person, for example, lacks probative value on the issue of whether [the plaintiff] was discriminated against because of his disability."); Keith R. Fentonmiller & Herbert Semmel, *Where Age and Disability Discrimination Intersect: An Overview of the ADA for the ADEA Practitioner*, 10 GEO. MASON U. CIV. RTS. L.J. 227, 266 (2000) ("[I]f an employer selects a mobility-impaired applicant over a visually-impaired applicant solely because of prejudices about sight-impaired persons, this employment action would appear to be the very type of decisionmaking that the ADA was designed to outlaw. Whether the successful applicant also happens to have a disability would seem to be of little consolation to the rejected applicant.").

[172] 191 F.3d 344, 355 (3d Cir. 1999). In *Pivirotto*, the Third Circuit opted to exclude opposite-sex replacement evidence as a legally necessary element of a Title VII plaintiff's prima facie case of sex discrimination. *Id.* at 355.

[173] *Id.* at 354; *see id.* at 353 ("[A] plaintiff's inability to prove that she was replaced by someone outside of her class is not necessarily inconsistent with her demonstrating that the

Bethlehem Steel Corp.,[174] offered a similar rationale for its decision to exclude an opposite-race replacement element from a Title VII plaintiff's prima facie case: "An employee may be able to show that his race or another characteristic that the law places off limits tipped the scales against him, without regard to the demographic characteristics of his replacement."[175] Finally, the D.C. Circuit, in its decision in *Teneyck v. Omni Shoreham Hotel*, provided a comparable explanation for its decision to exclude an opposite-race replacement element from a Title VII plaintiff's prima facie case: "[E]ven if a plaintiff is replaced by someone within her class, she could still demonstrate that the employer treated her worse than others because she was a member of the protected class."[176]

Again, these rationales are clear nods by the Third, Seventh, and D.C. Circuits to the coexisting decisions possibility.[177] These courts similarly acknowledge the possibility of two distinct decisions that are not linked to one another: (a) an original, discriminatory decision to not hire, promote, or retain a Title VII plaintiff because of sex or race and (b) a subsequent decision to hire, promote, or retain "someone within her [or his] class."[178] To these courts, the subsequent decision is independent from, and does "not, as a matter of law or logic, foreclose," the original decision; in other words, sex or race discrimination could have originally occurred against a

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employer treated her 'less favorably than others because of [her] race, color, religion, sex, or national origin.' Even if the plaintiff was replaced by someone within her own class, this simply demonstrates that the employer is willing to hire people from this class—which in the present context is presumably true of all but the most misogynistic employers—and does not establish that the employer did not fire the plaintiff on the basis of her protected status."); *id*. at 353–54 ("[E]ven if a woman is fired and replaced by another woman, she may have been treated differently from similarly situated male employees. This seems to us to be self-evident."); *id*. at 355 ("[T]he [*O'Connor*] Court's reasoning applies equally in the gender or race context: 'The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as [s]he has lost out because of [her gender.]'"); *id*. ("An employer's failure to hire someone of a different class from the plaintiff, after the plaintiff's discharge, could be explained in many ways.").

[174] 82 F.3d 157, 159 (7th Cir. 1996). In *Carson*, the Seventh Circuit opted to exclude opposite-race replacement evidence as a legally necessary element of a Title VII plaintiff's prima facie case of race discrimination. *Id.* at 159.

[175] *Id*. at 158–59.

[176] 365 F.3d 1139, 1150 (D.C. Cir. 2004). In *Teneyck*, the D.C. Circuit opted to exclude opposite-race replacement evidence as a legally necessary element of a Title VII plaintiff's prima facie case of race discrimination. *Id.* at 1150.

[177] *See id.*; *Pivirotto*, 191 F.3d at 359; *Carson*, 82 F.3d at 157 .

[178] *See Teneyck*, 365 F.3d at 1150 ; *Carson*, 82 F.3d at 159; *Pivirotto*, 191 F.3d at 353–55.

Title VII plaintiff, even if the subsequent replacement was of the same sex or race.[179] Thus, in the Title VII context, federal circuits have acknowledged the coexisting decisions possibility.[180]

In sum, applicable Supreme Court and federal circuit precedent bolsters the Minimal Relevance Approach's answer to the question regarding the coexisting decisions possibility. This proposed approach correctly assumes that these coexisting decisions are not only possible but also real in some cases. In contrast, a mandatory prima facie element approach incorrectly assumes that these coexisting decisions are neither possible nor real.

Camouflaged Discriminators. Aside from the fact that a mandatory prima facie element approach and the Minimal Relevance Approach disagree on the coexisting decisions possibility, the larger question here is: does this disagreement yield any tangible effect on the ADA's comprehensive anti-discrimination policy?

The answer is yes—one approach captures so-called "camouflaged discriminators," while the other allows them to escape scot-free and without ADA liability. To begin, consider these two hypothetical scenarios:

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[179] *Pivirotto*, 191 F.3d at 354.

[180] *See also* Miles v. Dell, Inc., 429 F.3d 480, 489 (4th Cir. 2005) ("In such cases, we are convinced that the replacement hiring decision simply does not give rise to an inference of non-discrimination with respect to the firing decision."); Stella v. Mineta, 284 F.3d 135, 146 (D.C. Cir. 2002) ("[A]lthough women and men may have been promoted to the SES positions for which Ms. Stella applied, she may nonetheless be able to demonstrate that she received unfavorable treatment in the promotion process, because she is a woman."); Goosby v. Johnson & Johnson Med., Inc., 228 F.3d 313, 321 (3d Cir. 2000) ("Clearly, an employer does not have to discriminate against all members of a class to illegally discriminate against a given member of that class."). *Cf.* Swartz, *supra* note 144, at 1349 ("Stripped to its barest essentials, an individual disparate treatment inquiry [under Title VII] asks whether a particular plaintiff employee is the victim of intentional discrimination. . . . A mandatory non-class replacement requirement at the prima facie stage exceeds the scope of this inquiry. With such a requirement, plaintiffs are forced to raise an inference not only that their employer has discriminated against them, but also that their employer discriminates against every member of their protected class."); *id.* at 1350 ("Individual [Title VII] plaintiffs are not protected under an inflexible rule requiring proof of one or more arbitrary specific factors because meritorious claims missing that particular factor are dismissed."); Elizabeth Clack-Freeman, Comment, *Title VII and Plaintiff's Replacement: A Prima Facie Consideration?*, 50 BAYLOR L. REV. 463, 488–89 (1998) ("The articulation and strict application of the replacement requirement [in the Title VII context] . . . may create a parade of horribles resulting in the dismissal of claims with merit. . . . [D]iscriminatory motive should be evaluated at the time of the discharge. Thus, a later attempt to expunge the prior discriminatory act should not be considered at the prima facie stage.").

> Scenario #1: Dylan, who has epilepsy, is interviewing for a job at Company ABC. The interviewing supervisor learns of Dylan's impairment during the interview and—assuming that Dylan will not work as productively as an unimpaired employee—refuses to hire him solely because of his disability. This supervisor later resigns, and a new supervisor subsequently selects a disabled applicant for the job.
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> Scenario #2: Peyton, who has cerebral palsy, works at Company XYZ. The supervisor learns of Peyton's impairment and—assuming that Peyton will miss more work than an unimpaired employee—fires her solely because of her disability. This supervisor then learns (via Company XYZ's Human Resources division) that his conduct was unlawful, and he subsequently selects a disabled replacement to "make things look good."

Now, let us assume that a mandatory prima facie element approach applies to the ADA claims of Dylan and Peyton against Companies ABC and XYZ, respectively. What will be the actual litigation results? Under that approach, both Dylan and Peyton will be required to prove non-disabled replacement evidence as a legally necessary element of their ADA prima facie cases. But, given that their respective replacements are also disabled, neither Dylan nor Peyton will satisfy the prima facie case step of the *McDonnell Douglas* burden-shifting framework. Consequently, and most importantly, Company ABC (in Dylan's scenario) and Company XYZ (in Peyton's scenario)—both of which clearly engaged in unlawful, disability discrimination—will escape scot-free.

So, does a mandatory prima facie element approach further or frustrate the ADA's comprehensive anti-discrimination policy? It frustrates it by allowing two discriminatory employers to escape without ADA liability. Having escaped, these employers are still free to discriminate based on disability (and/or any other protected trait or characteristic) another day. A mandatory prima facie element approach (and its incorrect assumption that coexisting decisions are neither possible nor real) has a regrettable effect on ADA anti-discrimination policy. Specifically, this approach can (and often does) allow an employer's subsequent decision to "camouflage" or conceal—whether intentionally or unintentionally—its original, discriminatory decision. Thus, a mandatory prima facie element approach

substantially frustrates the ADA's broad anti-discrimination policy by allowing camouflaged discriminators (like Companies ABC and XYZ) to escape scot-free.

In contrast, let us assume that the Minimal Relevance Approach applies to the ADA claims of Dylan and Peyton against Companies ABC and XYZ, respectively. What will be the actual litigation results? Under the first feature of this proposed approach, neither Dylan nor Peyton will be required to prove non-disabled replacement evidence as a legally necessary element of their ADA prima facie cases. Despite the fact that their respective replacements are also disabled, both Dylan and Peyton can still satisfy the prima facie case step of the *McDonnell Douglas* burden-shifting framework (via other evidence) and thereby preserve the opportunity to prove that the employer's original decision was discriminatory. Consequently, and most importantly, Company ABC (in Dylan's scenario) and Company XYZ (in Peyton's scenario) will not necessarily escape scot-free.

So, does the Minimal Relevance Approach further or frustrate the ADA's comprehensive anti-discrimination policy? It furthers it by potentially capturing two discriminatory employers which otherwise would escape without ADA liability. This proposed approach (and its correct assumption that coexisting decisions are not only possibilities but realities in some cases) has a favorable effect on ADA anti-discrimination policy. Specifically, the Minimal Relevance Approach precludes an employer's subsequent decision from camouflaging or concealing—whether intentionally or unintentionally—its original, discriminatory decision. Thus, this proposed approach substantially furthers the ADA's broad anti-discrimination policy by exposing camouflaged discriminators (like Companies ABC and XYZ). [181]

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[181] In the Title VII context, courts and commentators have offered other interesting hypothetical scenarios to justify their conclusions to exclude opposite-sex or opposite-race replacement evidence as a legally necessary element of a plaintiff's prima facie case of sex or race discrimination. *See, e.g.*, *Miles*, 429 F.3d at 488 ("One clear example of this is when the defendant hires someone from within the plaintiff's class in order 'to disguise its act of discrimination toward the plaintiff.'" (citing Brown v. McLean, 159 F.3d 898, 905–06 (4th Cir. 1998)); *id*. at 489 ("[A]nother such category of cases is . . . wherein the firing and replacement hiring decisions are made by different decisionmakers. . . . [W]hen one individual makes the decision to fire the plaintiff and another makes the replacement hiring decision, the second individual's hiring decision has no probative value whatsoever as to whether the first individual's firing decision was motivated by the plaintiff's protected status."); *Goosby*, 228 F.3d at 321 ("Within the atmosphere of the 'old boys network' that Goosby alleges, it is certainly possible that some females may have

3. Supreme Court Philosophy Regarding the Prima Facie Case

Finally, the first feature of the Minimal Relevance Approach (i.e., its exclusion of non-disabled replacement evidence as a legally necessary element of an ADA plaintiff's prima facie case) reflects Supreme Court philosophy regarding the prima facie case and its proper role.

Over the past forty years, the Supreme Court has clearly embraced a so-called "Addition by Subtraction Philosophy" regarding the prima facie case—specifically, the view that a proper prima facie case adds (or raises) the necessary inference of discriminatory intent by subtracting (or eliminating) otherwise typical reasons for the employer's adverse action. Of course, the key to this philosophy is the subtraction or elimination of these

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been preferred because they were more 'like one of the boys' than Goosby. . . . In addition, it is conceivable that an employer who harbors a discriminatory animus may nevertheless allow one or two females to advance for the sake of appearances."); *Pivirotto*, 191 F.3d at 354 ("An employer may fire a woman who makes a single mistake (while retaining men who make numerous similar mistakes), yet replace her with another woman whom the employer hopes will meet his (higher) expectations for female employees. Or an employer may fire women who fail to act in a particular manner (e.g., 'feminine,' assertively, non-assertively), but not require male employees to act in any particular way. Such a requirement would be discriminatory, although an employer applying this double-standard would not necessarily hire a male employee to replace a fired female employee."); *id.* at 355 ("[A]n employer may treat women less favorably than men, but still be willing to hire a woman to fill a position left vacant by the firing of a discriminated-against woman. Or an employer may act on gender-based stereotypes, firing women it perceives as not feminine enough (or too feminine), or discharging women who are too aggressive while not doing the same to male employees. Such an employer would not necessarily replace a discriminated-against female employee with a man. Indeed, some employers, anticipating litigation, may hire a woman solely in an attempt to defeat a sex-discrimination claim."); *Carson*, 82 F.3d at 158 ("Suppose an employer evaluates its staff yearly and retains black workers who are in the top quarter of its labor force, but keeps any white in the top half. A black employee ranked in the 60th percentile of the staff according to supervisors' evaluations is let go, while white employees similarly situated are retained. This is race discrimination, which the employer cannot purge by hiring another person of the same race."). *See also* Clack-Freeman, *supra* note 180, at 489–90 ("Consider a final example detailing the unjust result that may occur if the identity of a plaintiff's replacement is considered at the prima facie stage. A company hopes to keep Hispanic employees from reaching management level positions. To facilitate this goal, the company routinely terminates Hispanic employees when their tenure with the company approaches seven years. To protect themselves, the company hires individuals of Hispanic descent to replace the terminated employees. The result of this practice is that all Hispanic employees are terminated before they become eligible for management level positions. In this example, strict application of the replacement requirement at the prima facie stage would result in dismissal. Surely the plaintiff in this instance deserves . . . an opportunity to prove discriminatory intent.").

typical employer reasons, as these removed reasons naturally raise our suspicion that the actual reason for the adverse action was a discriminatory one. Consequently, under this Addition by Subtraction Philosophy, a proper set of prima facie case elements subtracts typical reasons for the employer's decision, thereby adding the inference of discrimination. In contrast, an improper set of prima facie elements would not subtract typical reasons for the employer's decision, thereby failing to add this discriminatory inference.

While the *McDonnell Douglas* court did not provide any rationale for the four highlighted elements of its prima facie case,[182] the Supreme Court's subsequent explanations of these elements clearly evidence its Addition by Subtraction Philosophy. For example, in its 1977 decision in *International Brotherhood of Teamsters v. United States*, the Supreme Court provided this explanation for the proper role of the prima facie case elements:

> [T]he *McDonnell Douglas* formula . . . does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: (1) an absolute or relative lack of qualifications or (2) the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.[183]

Similarly, in its 1981 decision in *Texas Department of Community Affairs v. Burdine*,[184] the Court again explained the means by which a prima facie case raises the requisite discriminatory inference:

> The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection. . . . [T]he prima facie case 'raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.' Establishment

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[182] *See supra* Part II.A.1 (discussing the *McDonnell Douglas* decision and burden-shifting framework).

[183] 431 U.S. 324, 358, 358 n. 44 (1977).

[184] 450 U.S. 248, 253–54 (1981).

> of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee.[185]

Consequently, the Supreme Court's post-*McDonnell Douglas* decisions evidence an Addition by Subtraction Philosophy for the prima facie case—namely, the view that a proper prima facie case achieves a certain end (adding the discriminatory inference) by certain means (subtracting otherwise typical reasons for the employer's adverse action).[186]

Unfortunately, a mandatory prima facie element approach, by including non-disabled replacement evidence as a legally necessary element of an ADA plaintiff's prima facie case, ignores the Supreme Court's Addition by Subtraction Philosophy. Contrary to this philosophy, this approach's key prima facie element (i.e., non-disabled replacement evidence) neither eliminates nor has any relevance to a typical employer reason for that adverse action. Indeed, if non-disabled replacement evidence exists, a mandatory prima facie element approach always refuses to add the discriminatory inference, *even if the ADA plaintiff's evidence otherwise subtracts typical reasons for the employer's adverse action*. Consequently, a mandatory prima facie element approach ignores the Addition by Subtraction Philosophy evidenced by the Supreme Court's decisions in *Teamsters* and *Burdine*—it yields an improper set of prima facie elements that neither subtracts typical reasons for adverse action nor adds any appropriate discriminatory inference.

In fact, in the Title VII context, the Third Circuit recognized the significance of the Supreme Court's rationale for the prima facie case in its

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[185] *Id.* at 253–54 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

[186] *See supra* Part II.A.1 (generally discussing the *Teamsters* and *Burdine* decisions). In addition, the Supreme Court's decision in *O'Connor v. Consolidated Coin Caterers Corp*., 517 U.S. 308 (1996), subtly evidences its Addition by Subtraction Philosophy. There, the Court concluded that "outside-the-protected-class" replacement evidence is "not a proper element" of an ADEA plaintiff's prima facie case of age discrimination. *Id.* at 312; *see supra* Part II.A.2 (discussing the *O'Connor* decision). In support of this conclusion, the Supreme Court reasoned that such evidence "lacks probative value," is an "utterly irrelevant factor" in the prima facie case, and lacks "a logical connection" to "the illegal discrimination for which [the prima facie case] establishes a 'legally mandatory, rebuttable presumption.'" *O'Connor*, 517 U.S. at 311–12. Of course, one of the reasons that this replacement evidence could (and does) lack "probative value," relevance, and any "logical connection" at the prima facie stage is that it fails to subtract or eliminate any of the typical reasons for the employer's adverse action. *Id.*

1999 decision in *Pivirotto v. Innovative Systems, Inc*.[187] There, the court addressed whether inclusion of an "outside-the-protected-group" replacement element in a plaintiff's prima facie case was proper.[188] In support of its decision to exclude such evidence from a Title VII plaintiff's prima facie case,[189] the Third Circuit offered the following explanation:

> As the [Supreme] Court has often noted, a major purpose of the prima facie case is to eliminate the most obvious, lawful reasons for the defendant's action (i.e., the position that an applicant sought was not filled for economic reasons, the applicant was not qualified, no adverse action such as failure to hire was actually taken, etc.).
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> . . . .
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> Requiring that a gender discrimination plaintiff prove she was replaced by a man . . . eliminates no common, lawful reasons for the discharge. If a plaintiff cannot prove that she was qualified for a position or that the employer took an adverse employment action against her, it is clear why her discrimination case should fail. By contrast, a plaintiff's inability to prove that she was replaced by someone outside of her class is not necessarily inconsistent with her demonstrating that the employer treated her "less favorably than others because of [her] race, color, religion, sex, or national origin."[190]

Thus, in *Pivirotto*, the Third Circuit clearly relied on the fact that inclusion of an "outside-the-protected-group" replacement element in an employment discrimination plaintiff's prima facie case—which

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[187] 191 F.3d 344, 352–53 (3d Cir. 1999).

[188] *Id.* at 352–53.

[189] *Id*.

[190] *Id*. Currently, with the exception of the Fourth Circuit, the federal circuit courts do not include "outside-the-protected-group" replacement evidence as a legally necessary part of a Title VII plaintiff's prima facie case. *See* Miles v. Dell, Inc., 429 F.3d 480, 486 (4th Cir. 2005) ("[E]very other circuit has held that a Title VII plaintiff does not always have to show replacement outside the protected class in order to make out a prima facie case."); *id*. at 486–87 n.3 (enumerating applicable circuit precedent).

"eliminate[d] no common, lawful reasons" for the adverse action—ignored the Supreme Court's philosophy regarding the prima facie case.[191]

In contrast, the Minimal Relevance Approach, by excluding non-disabled replacement evidence as a legally necessary element of an ADA plaintiff's prima facie case, reflects the Supreme Court's Addition by Subtraction Philosophy. Consistent with this philosophy, this proposed approach simply excludes a prima facie element (non-disabled replacement evidence) that does not eliminate, and has no relevance to, a typical reason for an employer's adverse action. Yet, the Minimal Relevance Approach otherwise leaves intact varying versions of an ADA plaintiff's prima facie case, such as (a) the standard *McDonnell Douglas*-based prima facie case,[192] (b) a version that includes the fairly broad or open-ended element that the circumstances surrounding the adverse action give rise to "an inference of unlawful discrimination,"[193] or (c) a version that includes the fairly broad or open-ended element that the adverse action was otherwise "because of the plaintiff's disability."[194] Consequently, this proposed approach reflects the Addition by Subtraction Philosophy evidenced by the Supreme Court's decisions in *Teamsters* and *Burdine*—it preserves any of these proper sets of prima facie elements that subtract typical reasons for an employer's adverse action, thereby adding the appropriate discriminatory inference.[195]

In sum, the first feature of the Minimal Relevance Approach is consistent with applicable Supreme Court precedent and philosophy and promotes the ADA's anti-discrimination policy.[196]

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[191] *Pivirotto*, 191 F.3d at 353–54.

[192] *See supra* note 100 and accompanying text (discussing this version of an ADA plaintiff's prima facie case).

[193] *See supra* notes 90-93 and accompanying text (discussing this version of an ADA plaintiff's prima facie case).

[194] *See supra* notes 95-98 and accompanying text (discussing this version of an ADA plaintiff's prima facie case).

[195] *Cf.* Swartz, *supra* note 144, at 1358 (proposing that "non-class replacement" evidence be eliminated from a Title VII plaintiff's prima facie case and arguing that this elimination would be "in harmony with [the] courts' overall commitment to interpret the *McDonnell Douglas* framework as a flexible procedural tool intended to facilitate, rather than impede, the ultimate inquiries in discrimination suits.").

[196] In addition, this first feature of the Minimal Relevance Approach eliminates practical difficulties that ADA plaintiffs may encounter in investigating and proving the actual medical status of the replacement. *See, e.g.*, Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 58 (4th Cir. 1995) ("[W]here disability. . . is at issue, the plaintiff in many, if not most, cases will

B. Second Feature—Insufficient Proof of Discriminatory Intent

The second feature of the Minimal Relevance Approach is its designation of non-disabled replacement evidence (if present) as legally insufficient to create a genuine dispute or issue of material fact regarding the employer's purported discriminatory intent at the Rule 56 summary judgment stage.[197] This feature dovetails with probability theory and statistical evidence regarding disabled workers in the U.S.'s labor force.

This part will (a) first discuss the relevance of statistics and probability theory in employment discrimination cases and (b) then argue that these principles, when combined with the small percentage of disabled individuals in the U.S.'s population and labor force, support the legal insufficiency of non-disabled replacement evidence in ADA cases.

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be unable to determine whether a replacement employee is within or without the protected class, that is, whether or not that person is disabled . . . . Under the Act, even the employer is generally forbidden from inquiring about the disability of an employee or prospective employee."); Erica Worth Harris, *Controlled Impairments Under the Americans with Disabilities Act: A Search for the Meaning of "Disability*," 73 WASH. L. REV. 575, 588 (1998) ("[I]t is often difficult to prove who has a disability[.]"). *Cf.* Meiri v. Dacon, 759 F.2d 989, 996 (2d Cir. 1985) ("From a practical perspective, requiring a [Title VII] plaintiff to demonstrate that her job was filled by a 'person outside the protected class' could create enormous difficulties involving the identification of the protected class. In this case, for example, it is unclear whether the protected class would be followers of Orthodox Judaism or followers of Judaism generally").

[197] The Minimal Relevance Approach focuses on the legal insufficiency of non-disabled replacement evidence at the *pretext for discrimination step* of the *McDonnell Douglas* burden-shifting framework, rather than the *prima facie case step*. While beyond the scope of this article, it would seem reasonable to conclude that non-disabled replacement evidence is legally *sufficient* to fulfill an applicable element of a plaintiff's prima facie case of employment discrimination. Courts appear to have reached this conclusion in the ADA, ADEA, and Title VII contexts.

For applicable ADA and ADEA precedent, see *supra* part II.B.2 (discussing the Eighth Circuit's decision in *Kiel* and the Pennsylvania district court's decision in *Francis*, both of which found non-disabled replacement evidence sufficient to establish a fairly broad or open-ended "inference" or "because of" element of an ADA plaintiff's prima facie case); *supra* note 129 (enumerating other ADA and ADEA precedent on this issue).

For applicable Title VII precedent, see Perry v. Woodward, 199 F.3d 1126, 1140 (10th Cir. 1999) ("Evidence of the seeking or hiring of a replacement to fill the position vacated by a discharged [Title VII] plaintiff who is a member of a group which has historically suffered discriminatory treatment is, by itself, sufficient to satisfy the fourth element of the plaintiff's *McDonnell Douglas* prima facie case of racial discrimination."); *id*. ("Supreme Court precedent fully supports this court's conclusion that the termination of a qualified minority employee raises a rebuttable inference of discrimination in every case in which the position is not eliminated.").

1. Statistical Evidence and Probability Theory

In the employment discrimination context, statistical evidence and probability theory can be, and often are, relevant in determining whether an employer's adverse action stemmed from unlawful intent.

"Probability is the basis of the science of statistics."[198] In employment discrimination cases, "probability theory starts with a comparison between [a] the 'observed' racial (or gender or age) distribution in the employer's work force and [b] the 'expected,' that is, the racial distribution one would anticipate if race were not a factor in the selection of employees."[199]

As legal commentators have noted, if this "observed" racial (or other) make-up of an employer's work force is an improbable, "substantial departure from what is to be expected" based on the relevant labor market, then this statistical evidence calls for an explanation and can ultimately lead the fact-finder to "conclude . . . that discrimination explains the disparity."[200]

Importantly, the Supreme Court has consistently noted the relevance of statistical evidence and probability theory in employment discrimination cases. Perhaps the best example is the Court's 1977 decision in *International Brotherhood of Teamsters v. United States*.[201] There, the

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[198] ZIMMER ET AL., *supra* note 8, at 133.

[199] *Id*.

[200] *See id*. at 117 ("Probability theory drives the use of statistics to prove systemic disparate treatment. The plaintiff first shows that a particular group, such as African Americans, Latinos, or women, is underrepresented in the employer's work force. 'Underrepresentation,' in turn, means that there are fewer of such individuals than we would expect if the employer chose his workers without regard to race, national origin, or sex. Thus, the plaintiff must also establish the percentage of such individuals who would be employed absent such discrimination."); *id*. at 135 ("[P]robability theory suggests a basis for the use of statistical evidence in disparate treatment discrimination cases. . . . When any one of these [statistical] techniques is used to conclude that the null hypothesis (that discrimination is not involved because any difference between the observed and the expected is the result of chance) should be rejected, the next step, based on reason and logic, should be to draw the inference that systemic disparate treatment discrimination has occurred."); CRAIN ET AL., *supra* note 22, at 596 ("Statistics . . . are central to proving [pattern or practice] claims, and statistics are used to establish an employer's intent to discriminate. . . . [How] would . . . statistics create an inference of discrimination? The rationale has to do with establishing an appropriate measure for statistical proof so that the statistics create an inference that the observed pattern of employment could not have occurred by chance but was likely the product of some deliberate action. In order to make this proof, courts typically require the plaintiffs to . . . show[] a statistically significant disparity attributable to the challenged practice.").

[201] *See generally* 431 U.S. 324 (1977).

Court faced a Title VII race discrimination class action, in which the federal government alleged that the employer—a nationwide freight carrier—had engaged in a "systemwide pattern or practice" of refusing to hire applicants for line driver jobs because of their race.[202] At trial, the government introduced statistical evidence and other proof in an effort to demonstrate that "racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice."[203] For example, the government established that: (a) in the employer's Atlanta terminal, all fifty-seven of the line drivers were white, despite the fact that African-Americans "composed 22.35% of the population in the surrounding metropolitan [Atlanta] area and 51.31% of the population of the city proper";[204] and (b) in the employer's Los Angeles terminal, none of the 374 line drivers were African-American, despite the fact that African-Americans comprised "10.84% of the greater metropolitan [Los Angeles] population and 17.88% of the city population."[205]

Based on the introduced evidence (statistical and otherwise), the district court concluded that the government had successfully established "a plan and practice of discrimination in violation of Title VII."[206] The Fifth Circuit agreed.[207] On certiorari, the Supreme Court considered, in part, whether the statistical and other evidence was sufficient to establish an unlawful pattern and practice of race discrimination.[208]

Concluding that the government had "carried its burden of proof" regarding this Title VII claim,[209] the Court highlighted three key statistics-related points. First, the Court explained the general relevance of statistical evidence in employment discrimination cases:

> [O]ur cases make it unmistakably clear that "(s)tatistical analyses have served and will continue to serve an important role" in cases in which the existence of

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[202] *Id.* at 328, 335–36.

[203] *Id*. at 337–38.

[204] *Id*. at 337 n.17.

[205] *Id*.

[206] *Id*. at 330–31, 342.

[207] *Id*. at 333, 342. Ultimately, the Fifth Circuit remanded the case to the district court on other grounds, as it concluded that the lower court had ordered inadequate relief in the class action. *Id*. at 333–34.

[208] *Id*. at 334.

[209] *Id*. at 337, 342–43.

> discrimination is a disputed issue. We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases. Statistics are equally competent in proving employment discrimination.[210]

Second, the *Teamsters* court offered specific guidance as to the *type* of statistical evidence that can be particularly relevant or "significant" in these cases—namely, a comparison of the compositions of an employer's work force and the general population or labor market: "Statistics showing racial or ethnic imbalance are probative in a case such as this one . . . . Evidence of long-lasting and gross disparity between the composition of a work force and that of the general population thus may be significant . . . ."[211]

Third, to support its view regarding the importance of this comparison, the Court highlighted probability theory and its concept of the statistically "expected" in light of population or labor market data: "[S]uch [racial or ethnic] imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."[212]

Thus, as recognized by the Supreme Court (in *Teamsters* and related precedent)[213] and legal commentators alike, "[t]he basis for statistical

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[210] *Id*. at 339 (citing Mayor of Phila. v. Educ. Equal. League, 415 U.S. 605, 620 (1974) (citations omitted).

[211] *Id.* at 340 n.20.

[212] *Id*.; *cf.* ZIMMER ET AL., *supra* note 8, at 134 ("[I]t should be apparent that the *Teamsters* decision is simply a commonsense conclusion that the employer's draw of a sample (*i.e*., its work force of line drivers) from the fishbowl (*i.e.*, the relevant labor market for city drivers) is so obviously unlikely as to at least require an explanation.").

[213] *See, e.g*., Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977) (discussing the general relevance of statistical evidence, the particular use of work force-to-labor force comparisons, and probability theory's concept of the "expected" in light of labor market data); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973) ("[S]tatistics as to [the employer's] employment policy and practice may be helpful to a determination of whether [its] refusal to rehire [the plaintiff] in this case conformed to a general pattern of discrimination against blacks."); *id*. at 805 n.19 ("The District Court may, for example, determine . . . that 'the (racial) composition of [McDonnell Douglas's] labor force is itself reflective of restrictive or exclusionary practices.'") (citing Blumrosen, *supra* note 35, at 92).

In *Hazelwood School District*, the federal government alleged that the employer—a school district in St. Louis—had violated Title VII by engaging in a "pattern or practice" of refusing to hire applicants for teaching jobs because of their race. 433 U.S. at 301-03. At trial, the government introduced "statistical disparities in hiring" and other proof in an effort to demonstrate this unlawful conduct. *Id*. at 303–04. For example, the government established that, over the two year period from 1972-1974, only 3.5% (fifteen out of 405) of the newly hired teachers in the school district were African-American, despite the fact that 15.4% of all teachers in St. Louis County plus the City of St. Louis (the purported "labor market area") were African-American. *Id*. at 310–11. In response, the school district argued that the proper labor market area was only St. Louis County, in which African-Americans comprised only 5.7% of the qualified teacher pool. *Id*. at 311.

Ultimately remanding the case to the district court to determine the "relevant labor market area" (only St. Louis County, or St. Louis County plus the City of St. Louis), *id*. at 312–13, the Court again highlighted three key statistics-related points. First, the Court reiterated the general relevance of statistical evidence in employment discrimination cases. *Id*. at 307 ("In [*Teamsters*], we . . . noted that statistics can be an important source of proof in employment discrimination cases . . . . Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.").

Second, the Court again emphasized the *type* of statistical evidence that is particularly relevant in these cases—namely, a comparison of the compositions of (a) an employer's work force and (b) the relevant labor market. *Id*. at 308 ("The Court of Appeals was correct in the view that a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.").

Third, the Court relied upon probability theory and its concept of the statistically "expected" when explaining why the boundaries of the "relevant labor market" (i.e., only St. Louis County (in which 5.7% of all teachers were African-American), or St. Louis County plus City of St. Louis (in which 15.4% of all teachers were African-American)) were important on remand:

> The difference between these [5.7% and 15.4%] figures may well be important; the disparity between 3.7% (the percentage of Negro teachers hired by Hazelwood in 1972-1973 and 1973-1974) and 5.7% may be sufficiently small to weaken the Government's other proof, while the disparity between 3.7% and 15.4% may be sufficiently large to reinforce it.
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> If the 15.4% figure is taken as the basis for comparison . . . [f]or the two years combined, the difference between the observed number of 15 Negro teachers hired (of a total of 405) would vary from the expected number of 62 by more than six standard deviations. . . . If, however, the 5.7% area-wide figure is used . . . for the two years combined, the expected value of 23 would be less than two standard deviations from the observed total of 15.

evidence in employment discrimination litigation is . . . probability theory"[214]—a comparison of what we *observe* from an employer and what we statistically *expect* from it based on population or labor market data.

2. Probability Theory and Non-Disabled Replacement Evidence

Given that probability theory focuses upon what we *expect* in light of relevant labor market data, it is important to understand the percentage of the U.S.'s population and labor force that is comprised of disabled persons.

Disabled persons constitute a fairly modest percentage of the general population of the United States. For example, a recent 2010 report from Cornell University's Employment and Disability Institute (hereinafter "Cornell University 2010 Report") noted that only 11.9% of our overall population had a "disability."[215] This report defined "disability" as any condition or impairment that creates "serious difficulty" in any activity of "hearing," "seeing," "concentrating, remembering, or making decisions," "walking or climbing stairs," "dressing or bathing" (part of "self-care"), or "doing errands alone such as visiting a doctor's office or shopping" (part of "independent living").[216]

Id. at 310–11, 311 n.17 (also noting that "a fluctuation of more than two or three standard deviations would undercut the hypothesis that decisions were bring made randomly with respect to race").

[214] ZIMMER ET AL., *supra* note 8, at 132.

[215] EMPLOYMENT AND DISABILITY INSTITUTE AT THE CORNELL UNIVERSITY ILR SCHOOL, CORNELL UNIVERSITY, 2010 DISABILITY STATUS REPORT, UNITED STATES 5 (2012) [hereinafter "Cornell University 2010 Report"]. *See id*. at 9 ("In 2010, the overall percentage (prevalence rate) or people with a disability of all ages in the US was 11.9 percent. In other words, in 2010, 36,399,700 of the 305,353,600 individuals of all ages in the US reported one or more disabilities."); *id*. at 10. The Cornell University 2010 Report based its figures on "American Community Survey (ACS) data—a US Census Bureau survey that has replaced the Decennial Census long form." *Id*. at 2.

[216] *Id*. at 3, 58. Specifically, the Cornell University 2010 Report described its data collection methods as follows:

> A person is coded as having a disability if he or she or a proxy respondent answers affirmative for one or more of these six categories:
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> [1] Hearing Disability (asked of all ages): Is this person deaf or does he/she have serious difficulty hearing?
>
> [2] Visual Disability (asked of all ages): Is this person blind or does he/she have serious difficulty seeing even when wearing glasses?

As one would expect, disabled persons comprise an even smaller percentage of the U.S.'s actual *labor force*, which encompasses those individuals who are of working age (e.g., sixteen years old or older) and *either* (i) gainfully employed *or* (ii) unemployed but seeking and available for work.[217] For example, a recent 2011 report from the U.S. Department of Labor's Bureau of Labor Statistics (hereinafter "BLS 2011 Report") showed that only 3.7% of the U.S.'s labor force had a "disability."[218] This report defined "disability" in a virtually identical manner as the Cornell University 2010 Report—namely, any condition or impairment that causes "serious difficulty" in "daily activities" such as "hearing," "seeing," "concentrating, remembering, or making decisions," "walking or climbing stairs," "dressing or bathing," or "doing errands alone such as visiting a

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> [3] Cognitive Disability (asked of persons ages 5 or older): Because of a physical, mental, or emotional condition, does this person have serious difficulty concentrating, remembering, or making decisions?
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> [4] Ambulatory Disability (asked of persons ages 5 or older): Does this person have a serious difficulty walking or climbing stairs?
>
> [5] Self-Care Disability (asked of persons ages 5 or older): Does this person have difficulty dressing or bathing?
>
> [6] Independent Living Disability (asked of persons ages 15 or older): Because of a physical, mental, or emotional condition, does this person have difficulty doing errands alone such as visiting a doctor's office or shopping?

Id.; *see id*. at 3 (setting forth the same six categories of "disability").

[217] BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS—2011 6 (in "Technical Note" section) (2012) [hereinafter "BLS 2011 Report"] ("*Civilian labor force* comprises all persons classified as employed or unemployed."). This report also defines the terms "employed persons" and "unemployed persons." *Id*. ("*Employed persons* are all those who, during the survey reference week . . . , (a) did any work at all as paid employees; (b) worked in their own business, profession, or on their own farm; (c) worked 15 hours or more as unpaid workers in a family-operated enterprise; or (d) were temporarily absent from their jobs because of illness, vacation, labor dispute, or other reason. *Unemployed persons* are all persons who had no employment during the reference week, were available for work, . . . and had made specific efforts to find employment sometime during the 4 weeks preceding the survey.").

[218] *Id*. at 4 (in Table A). This 3.7% figure was obtained by dividing 5,722,000 (as the raw number of disabled persons at least sixteen years old in the 2011 "civilian labor force") by 153,616,000 (as the sum of the raw numbers of disabled *and* non-disabled persons of these ages in the 2011 civilian labor force). *Id*. The BLS 2011 Report based its figures on data "collected as part of the Current Population Survey (CPS), a monthly sample survey of about 60,000 households that provides statistics on employment and unemployment in the United States." *Id.* at 1.

doctor's office or shopping."[219] Similarly, a recent 2012 report from the U.S. Census Bureau (hereinafter "U.S. Census 2012 Report") illustrated that only 3.8% of our labor force had a "disability."[220] This report used a more general definition of "disability"—specifically, "a physical, mental, or emotional condition that causes serious difficulty with [the person's] daily activities."[221] Collectively, these Reports demonstrate that disabled persons constitute less than 12% of the U.S.'s general population and less than 4% of its actual labor force (employed or unemployed).

But, are these percentages (particularly the less-than-4% labor force figure) even relevant or important to the issue of whether non-disabled replacement evidence is (or should be) legally sufficient to create a genuine dispute or issue of material fact regarding the employer's purported discriminatory intent at the Rule 56 summary judgment stage?

Yes, because of probability theory. As discussed above, probability theory compares (a) what we *observe* from an employer and (b) what we *expect* from it based on labor market data; and, this comparison can then contribute to conclusions regarding an employer's discriminatory intent (or lack thereof).[222] If an employer hires a work force that, in terms of composition (e.g., based on race, sex, age, or disability), is an improbable, "substantial departure from what is to be expected" given the relevant labor market, then this statistical evidence calls into question the employer's intent.[223] In contrast, if an employer hires a work force that, in terms of such composition, is exactly what we expect given that labor market, then this statistical evidence does not (and should not) call into question that intent.

Importantly, the second feature of the Minimal Relevant Approach—namely, its designation of non-disabled replacement evidence as legally insufficient to create a genuine dispute or issue of material fact regarding

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[219] *Id*. at 5 (in "Technical Note" section) (enumerating six survey questions that are identical to those asked for purposes of the Cornell University 2010 Report); *see supra* note 216 and accompanying text (discussing the Cornell University 2010 Report and its definition of "disability").

[220] U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 380 (in Table 591). This 3.8% figure was obtained by dividing 5,795,000 (as the raw number of disabled persons between sixteen and sixty-four years old in the 2010 "civilian labor force") by 153,889,000 (as the sum of the raw numbers of disabled *and* non-disabled persons of these ages in the 2010 civilian labor force). *Id*.

[221] *Id*.

[222] *See supra* notes 198-200 and accompanying text (discussing probability theory).

[223] ZIMMER ET AL., *supra* note 8, at 133.

the employer's purported discriminatory intent at the Rule 56 summary judgment stage—dovetails with probability theory and what we statistically "expect" from employers.

To illustrate the point, consider two scenarios involving hiring decisions by an employer. The first scenario involves the *collective* hiring decisions of the freight carrier in *Teamsters*. The second scenario involves a *singular* decision of an employer that opts to hire, promote, or retain a *non-disabled* individual (rather than a disabled person) as to a particular position.

In each scenario, do the respective decisions (what we observe from each employer) compare favorably with the labor force data (what we statistically expect from each employer)? In the first scenario, the answer is no. We do *not* observe *collective* hiring decisions by the *Teamsters* freight carrier that we expect in light of the relevant labor market data. As discussed above, the observed percentage of African-American line drivers in that carrier's Atlanta facility was 0%, even though African-Americans constituted 22.35% of the metropolitan Atlanta area and 51.31% of the city itself.[224] Similarly, the observed percentage of these line drivers in the carrier's Los Angeles facility was 0%, even though African-Americans constituted 10.84% of the metropolitan Los Angeles area and 17.88% of the city itself.[225]

Thus, in this first scenario, the statistical evidence reveals that the *Teamsters* freight carrier has hired a work force that (in terms of its racial composition) is extremely unlikely—an improbable, substantial departure from the statistically expected based on the labor market data. Given this observed "imbalance" and "gross disparity" from the statistically expected,[226] probability theory properly calls into question the carrier's intent.

In the second scenario, however, the answer is yes. We *do* observe a *singular* decision by the employer that we expect in light of the relevant labor market data. Here, the employer hires, promotes, or retains a *non-disabled* individual as to a particular position. Non-disabled persons constitute over 88% of the U.S.'s general population and over 96% of its actual labor force; in contrast, disabled persons comprise less than 12% of our general population and less than 4% of our labor force.[227]

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[224] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 337 n.17. (1977).

[225] *Id*.

[226] *Id*. at 339 n.20.

[227] *See supra* notes 215–221 (discussing applicable statistical data).

So, in this second scenario, the statistical evidence reveals that the employer has made a decision that (in terms of the selected person's disability status) is an extremely *likely* and highly *probable* result based on the labor market data, rather than a *Teamsters*-like outcome that is an unlikely, improbable, or substantial departure from the statistically expected. Simply stated, the probability that this employer would hire, promote, or retain a *disabled* person for this position is less than one in twenty-five; the odds that it would pick a non-disabled person are more than twenty-four in twenty-five. Statistically speaking, this employer's *singular* decision to hire a non-disabled replacement is *exactly* what we expect. Given the absence of any observed "imbalance" or "gross disparity" from the statistically expected, non-disabled replacement evidence does not (and should not) sufficiently call into question this employer's intent at the summary judgment stage.[228]

Of course, one could argue that the Cornell University 2010 Report, the BLS 2011 Report, and the U.S. Census 2012 Report use more narrow "disability" definitions, which, in turn, yield (a) an inaccurately low percentage of disabled persons in the U.S.'s labor force and (b) an inaccurately low probability ("less than one-in-twenty-five") of a disabled replacement for a particular position. In contrast, as the argument would go, the ADA uses a broader "disability" definition, which, in turn, yields (a) a higher percentage of disabled persons in this labor force and (b) a higher probability of a disabled replacement for a particular position.

While well-taken, this argument is flawed for two reasons. First, it overlooks the significant overlap that exists between the ADA's purportedly broader "disability" definition and the purportedly more narrow "disability"

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[228] In the ADEA context, some federal courts have implicitly alluded to probability theory and statistical evidence concepts when concluding that "outside-the-protected-group" replacement evidence is legally insufficient to create a genuine dispute or issue of material fact regarding the employer's purported discriminatory intent at the Rule 56 summary judgment stage. *See, e.g.*, Futrell v. J.I. Case, 38 F.3d 342, 348 (7th Cir. 1994) ("Futrell showed that his replacement, Carl Brown, was six years younger. . . . Typically, younger workers will replace older ones; this is an unremarkable phenomenon that does not, in and of itself, prove discrimination."); La Montagne v. Am. Convenience Prods., Inc., 750 F.2d 1405, 1412–13 (7th Cir. 1984) ("The third item of evidence, Bark's hiring of Ibsen as La Montagne's replacement, is likewise too insubstantial to support an inference of age discrimination. . . . Because younger people often succeed to the jobs of older people for perfectly legitimate reasons, the mere fact that an older employee is replaced by a younger one does not permit an inference that the replacement was motivated by age discrimination.").

definitions used in the Cornell University 2010 Report, the BLS 2011 Report, and the U.S. Census 2012 Report.

Specifically, the ADA defines "disability" to include "a physical or mental impairment that substantially limits one or more major life activities" of an individual.[229] The ADA further defines "major life activities" as including "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working," as well as "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[230]

In contrast, and as discussed above, the Cornell University 2010 Report and BLS 2011 Report define "disability" as any condition or impairment that causes "serious difficulty" in "daily activities" such as "hearing," "seeing," "concentrating, remembering, or making decisions," "walking or climbing stairs," "dressing or bathing" (part of "self-care"), or "doing errands alone such as visiting a doctor's office or shopping" (part of "independent living").[231] The U.S. Census 2012 Report simply defines "disability" as any "a physical, mental, or emotional condition that causes serious difficulty with [the person's] daily activities."[232]

So, how much broader is the ADA's definition of "disability"? How much more narrow are the definitions used in these Reports? Not much. In fact, substantial similarities exist. For example, the ADA's definition includes any person whose condition "substantially limits" any "major life activit[y]"; and, similarly, these Reports' respective definitions include any person whose condition creates "serious difficulty" with any "daily activit[y]."[233] Consequently, the ADA's "substantially limits" language seems on par with (rather than significantly broader or more inclusive than) these Reports' "serious difficulty" language.

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[229] 42 U.S.C. § 12102(2)(A) (2006); *see supra* note 1 (discussing the ADA's definition of the term "disability").

[230] 42 U.S.C.A. § 12102(2)(A)–(B) (2013).

[231] *See supra* notes 216, 219 and accompanying text (discussing the definition of "disability" in the Cornell University 2010 Report and the BLS 2011 Report, respectively).

[232] U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 380 (in Table 591).

[233] 42 U.S.C.A. § 12102(2)(A).

In addition, the ADA's definition provides a laundry list of "major life activities" that are overwhelmingly present—whether explicitly or implicitly—in the Cornell University 2010 Report and the BLS 2011 Report.[234] As to explicitly included activities, both the ADA and these two Reports include in their respective "disability" definitions the activities of "hearing," "seeing," "concentrating," and "walking."[235] As to implicitly included activities: (a) the ADA includes specific activities like "learning," "reading," "thinking," and "communicating," which implicitly fall under the umbrella of the general activities of "concentrating," "remembering," and "making decisions" included by these Reports; and (b) the ADA includes specific activities like "caring for oneself," "performing manual tasks," "eating," "sleeping," "standing," "lifting," "bending," "speaking," "breathing," and "working," which implicitly fall under the umbrella of the general activities of "self-care" (such as "dressing or bathing") and "independent living" (such as "doing errands alone such as visiting a doctor's office or shopping") included by these Reports.[236]

Now, to be sure, the ADA's definition does include "the operation of a major bodily function" (such as "functions of the immune system" and "normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions") in its list of "major life activities." These bodily functions are not explicitly referenced in these Reports' definitions of "disability," and a portion of these functions may not implicitly fall under the umbrellas of the general activities enumerated in these Reports. But, otherwise, the ADA's list of relevant "major life activities" seems comparable to (rather than significantly broader or more inclusive than) the "daily activities" language from these Reports.

Second, even assuming that the ADA uses a broader definition of "disability," the above-referenced argument wrongfully assumes that this definition will yield a *statistically meaningful, probability theory-altering* increase in the percentage of disabled workers in the United States. Even

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[234] *See* EMPLOYMENT AND DISABILITY INSTITUTE AT THE CORNELL UNIVERSITY ILR SCHOOL, CORNELL UNIVERSITY, 2010 DISABILITY STATUS REPORT, UNITED STATES 3 (2012); *see also* BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS—2011 2–3 (2012).

[235] 42 U.S.C.A. § 12102(2)(A)–(B); *see supra* notes 216, 219 and accompanying text (discussing these Reports' definitions of "disability").

[236] *See supra* notes 216, 219 and accompanying text (discussing these Reports' definitions of "disability").

under the ADA's purportedly broader definition, how much higher would (or could) this percentage be? Twice as high (8%)? Three times as high (12%)? Four times as high (16%)? Of course, given the substantial similarities and overlap between the "disability" definitions used by the ADA and these Reports, these larger increases on the list seem quite unlikely.

But, let us assume the most improbable increase on this list—a four-fold increase in the percentage of disabled persons in the U.S.'s labor force (from less than 4% to about 16%). With that percentage increase, does the *singular* decision of the employer in the above-referenced second scenario to hire, promote, or retain a *non-disabled* individual as to a particular position (what we observe) still compare favorably with the labor force data (what we statistically expect)?

The answer is yes. We still observe a *singular* decision by that employer that we expect in light of the adjusted labor market data. The statistical evidence still reveals that the employer has made a decision that (in terms of the selected person's disability status) is an extremely *likely* and highly *probable* result based on the labor market data, rather than some *Teamsters*-like "imbalance" or "gross disparity" from the statistically expected. After all, the adjusted probability that this employer would hire, promote, or retain a disabled person for this position is less than one in six (about 16%); the odds that it would pick a non-disabled person are more than five in six (about 84%). So, statistically speaking, this employer's *singular* decision to hire a non-disabled replacement is still *exactly* what we expect. Consequently, even if the ADA's purportedly broader definition of "disability" would yield such an improbable, four-fold jump in the percentage of disabled workers in the United States, non-disabled replacement evidence still would not (and should not) sufficiently call into question this employer's intent at the summary judgment stage.

In sum, the second feature of the Minimal Relevant Approach—namely, its designation of non-disabled replacement evidence as legally insufficient to create a genuine dispute or issue of material fact regarding the employer's purported discriminatory intent at the summary judgment stage—dovetails with probability theory and statistical evidence regarding the fairly modest percentage of disabled workers in the United States.[237]

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[237] Of course, probability theory and statistical evidence can still sufficiently call into question an employer's intent in a *Teamsters*-like context—one in which an employer's *collective* hiring, promotion, and retention decisions yield a work force that (in terms of composition based on race,

IV. CONCLUSION

The Minimal Relevance Approach brings judicial uniformity and clarity to the legal necessity and legal sufficiency issues regarding non-disabled replacement evidence in ADA cases. Together, the two features of this proposed approach are consistent with applicable Supreme Court precedent and philosophy, promote the ADA's anti-discrimination policy, and dovetail with probability theory and statistical evidence regarding disabled persons in the U.S.'s labor force.

Furthermore, the Minimal Relevance Approach represents a balanced, middle-ground in ADA cases, as it provides both advantage and disadvantage to ADA plaintiffs and employers alike. As to ADA plaintiffs

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sex, age, disability, or other protected trait or characteristic) is extremely unlikely due to its "imbalance" and "gross disparity" from the statistically expected. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 337 n.17. (1977).

As a final point regarding this legal sufficiency issue, it is interesting to consider the practical ramifications if a mandatory prima facie element approach jurisdiction were to view non-disabled replacement evidence as legally *sufficient* to create a genuine dispute or issue of material fact regarding the employer's purported discriminatory intent at the Rule 56 summary judgment stage. Simply put, an ADA plaintiff would be able to survive an employer's Rule 56 summary judgment motion merely by using his or her prima facie case elements (which, under this approach, necessarily includes non-disabled replacement evidence). Courts have concluded in comparable ADEA and Title VII contexts that such a result runs contrary to the three-step, *McDonnell Douglas* burden-shifting framework. *See*, *e.g.*, Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1084 (6th Cir. 1994) ("If the bare bones elements of a[n ADEA] plaintiff's prima facie case were sufficient to make this [pretext] showing, . . . the entire 'burden shifting' analysis of *McDonnell Douglas* and its successors would be illusory. No case could ever be culled out after the prima facie stage and every case would have to be determined by a jury. We do not believe that this was the intent of Congress or the outcome envisioned by the Supreme Court in its long line of cases implementing employment discrimination legislation. Accordingly, we hold that, in order to make this type of rebuttal showing, the plaintiff may not rely simply upon his prima facie evidence but must, instead, introduce additional evidence of age discrimination."); Schaeffer v. Tractor Supply Co., No. 08-15000, 2010 WL 2474085, at *7 (E.D. Mich. June 9, 2010) ("The only relevant evidence that Schaeffer cites to establish pretext is the fact that the person who replaced her as area manager was a male. . . . Restating a prima facie case is not enough. The fact that she was replaced by an individual outside the protected class is an essential element of Schaeffer's prima facie case and is not sufficient, standing alone, to support a finding of pretext. . . . [T]o find otherwise would preclude any possibility of summary judgment once a plaintiff established a prima facie case."); Stahlnecker v. Sears, Civ. A. No. 08-0681, 2009 WL 661927, at *7 (E.D. Pa. Mar. 11, 2009) ("The only evidence that Stahlnecker can offer in support of her claim is that she was replaced by a male employee. In other words, Stahlnecker has offered nothing more than her prima facie case. Thus, summary judgment is proper as to Stahlnecker's Title VII claim . . . .").

(especially those in a mandatory prima facie element approach jurisdiction), they gain advantage at the prima facie case step of the *McDonnell Douglas* framework, because their claims now remain viable despite the absence of non-disabled replacement evidence. But, these plaintiffs in turn incur disadvantage at the pretext for discrimination step of that framework, because they would now be required to supplement non-disabled replacement evidence with other proof of the employer's discriminatory intent at the summary judgment stage.

As to employers (especially those in a mandatory prima facie element approach jurisdiction), they incur disadvantage at this prima facie case step, because they do not automatically prevail just because an ADA plaintiff lacks non-disabled replacement evidence. But, these employers in turn gain advantage at the pretext for discrimination step, because ADA plaintiffs would now be unable to use mere non-disabled replacement evidence to overcome employers' summary judgment motions.