RECORD NO. 14-2079

In The
United States Court of Appeals
For The Fourth Circuit

WHITNEY C. STEPHENSON,

Plaintiff – Appellant,

v.

PFIZER, INCORPORATED,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AT GREENSBORO

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 14-2079 Caption: Whitney C. Stephenson v. Pfizer, Incorporated

Pursuant to FRAP 26.1 and Local Rule 26.1,

Whitney C. Stephenson
(name of party/amicus)

who is Plaintiff-Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/Robert M. Elliot Date: 10/23/14

Counsel for: Plaintiff-Appellant

CERTIFICATE OF SERVICE

****

I certify that on October 23, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/Robert M. Elliot (signature) 10/23/14 (date)

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Plaintiff-appellant[1] instituted this action, seeking relief for the deprivation of her federal civil rights under the Americans with Disabilities Act, *as amended*, 42 U.S.C. §§ 12111 *et seq*., (ADA). *JA* 12.[2] The United States District Court for the Middle District of North Carolina assumed jurisdiction of her claims pursuant to 42 U.S.C. § 12117 and 28 U.S.C. § 1331.

The district court entered summary judgment in favor of Pfizer on all Stephenson's claims on September 8, 2014. *JA 1310*. Stephenson filed notice of appeal pursuant to Rule 3 of the Federal Rules of Appellate Procedure on October 7, 2014. *JA* 1311.

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 because the judgment dismissing Stephenson's claims is a final judgment disposing of all claims with respect to all parties, immediately appealable to this Court.

[1] For the sake of simplicity, plaintiff-appellant will be referred to as "Stephenson" or "plaintiff" and defendant-appellee will be referred to as "Pfizer" or "defendant" throughout this brief.

[2] Citations to the Joint Appendix will be designated as "JA ___"; citations to the Joint Appendix containing sealed documents will be designated as "JAS ___."

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the district court err when it found, as a matter of law, that driving, as opposed to travel, was an essential function of the job of a pharmaceutical sales representative when the fundamental purpose of the job is to sell Pfizer's products, which entails understanding, explaining, distinguishing, and selling drugs to medical providers at their offices, and when the record reflects, at minimum, genuine issues of material fact as to the fundamental functions of the job?
2. Did the district court err in finding, as a matter of law, that permitting Stephenson to utilize alternative transportation, which would enable her to sell drugs – the primary purpose of her job – was not a reasonable accommodation because of Pfizer's purported concerns for liability and precedent?

STATEMENT OF THE CASE

Procedural History

Plaintiff, Whitney Stephenson, instituted this action on February 20, 2013, pursuant to the ADA, 42 U.S.C. §§ 12111, *et seq.*, *as amended*, to request reinstatement and other injunctive relief, and to recover damages for the violation of her rights to reasonable accommodations which would enable her to continue in her long-term position as a pharmaceutical sales representative for Pfizer. *JA 12.*

In her pleadings Stephenson alleged that she was discriminated against because of her disability by her employer, Pfizer. 42 U.S.C. §§ 12111 *et seq*. *JA 12.* Pfizer filed its answer denying the material allegations of the complaint, and alleging affirmative defenses. *JA 25*.

Following discovery, Pfizer filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. *JA 37*. United States District Court Judge Thomas D. Schroeder filed his Memorandum Opinion and Order, and Judgment dismissing Stephenson's claims on September 8, 2014. *JA 1291, 1310.*

Stephenson filed notice of appeal, requesting review by this Court on October 7, 2014. *JA 1311*.

The Facts

Background

Whitney Stephenson was initially employed by Pfizer's predecessor in 1984. Since her initial employment, Stephenson served as a pharmaceutical sales representative in the territory surrounding Winston-Salem. In that position, for 27 years, Stephenson "sold"[3] Pfizer's products to doctors and other healthcare professionals in the area. *JA 468, ¶¶ 8-9.*

[3] The word "sold" is used throughout this brief in the broad sense. Pfizer sales representatives did not engage in direct sales of Pfizer's drugs, but sold physicians on the products so the physicians would prescribe them to their patients.

Stephenson's Position

Stephenson's position as a pharmaceutical sales representative required her to travel to doctors' offices and medical facilities within the territory of Winston-Salem, and to meet with doctors and educate them concerning Pfizer's products. Stephenson's performance of her duties was exceptional and resulted in significant sales of Pfizer's products. Consequently, Stephenson was inducted into the Pfizer Hall of Fame, was recognized as a Pfizer Master, and won other awards and commendations for her sales. *JA 468, ¶ 9*.

Stephenson's Disability

In October, 2008, Stephenson was diagnosed with a serious and permanent eye disorder, known as Non-Arteritic Anterior Ischemic Optic Neuropathy (NAION). *JA 470 ¶¶ 15-16; JA 569*. As a result of her disorder, Stephenson lost over 60% vision in her left eye. Stephenson was able to adapt to the loss of vision in one eye, and continue to perform her job duties with Pfizer without accommodation. *JA 470, ¶ 16*.

In early October, 2011, Stephenson contracted the same disorder in her right eye. Stephenson was hospitalized by her ophthalmologist in an attempt to prevent further visual deterioration. The physician's therapy was ultimately unsuccessful, and Stephenson lost over 60% vision in her right eye. *JA 469, ¶ 14; JA 569*.

Stephenson's physician advised her that due to her substantial limitations of vision, she could no longer operate a motor vehicle. *Id*.

Stephenson informed her manager of her condition, and requested reasonable accommodations to enable her to continue in her position, including transportation to meet with her clients. *JA 474, ¶ 26; JA 542; JA 565*. Driving was not included in Stephenson's job description, and was not an essential function of her job. *JA 546; 550*. With reasonable accommodations, Stephenson is able to perform all of the essential functions of her position with Pfizer. *JA 473, ¶ 25; JA 559*.

Shortly after Stephenson requested accommodations, Pfizer advised her to apply for short-term disability (STD), and to remain out of work on leave of absence while the company considered her request. *JA 578-579; JA 581*. Stephenson was placed on STD, starting November 8, 2011. *Id*.

Pfizer's Denial of Accommodations

From November, 2011, to April, 2012, Stephenson maintained frequent communication with Pfizer, attempting to engage in an interactive process regarding her return to work, as required by the ADA. Specifically, Stephenson wrote to her manager requesting the reasonable accommodation of transportation, and provided specific information concerning drivers who could be contracted to transport Stephenson from site to site, at a reasonably low rate relative to the

substantial amounts Stephenson earned for Pfizer. *JA 524-527, ¶¶ 6-11; JA 532-535, ¶¶ 6-13*. Stephenson specifically requested the provision of a driver to transport her. *JA 474-476, ¶¶ 26-33; JA 564-568; JA 583-584; JA 589*. Pfizer rejected her requested accommodation. *JA 476, ¶ 34; JA 593-594; JA 617*.

As a result of Pfizer's refusal to provide reasonable accommodations to enable Stephenson to return to her position, Stephenson was placed on long term disability (LTD). *JA 484, ¶ 62*.

The District Court Judgment

On September 8, 2014, the District Court entered summary judgment against Stephenson dismissing her claims. *JA 1310*. The District Court found initially, based on evidence which it described as "undisputed," that due to her disability, Stephenson could not perform the essential functions of her job as a pharmaceutical sales representative because that she could not drive to doctors' offices to sell Pfizer's drugs. *JA 1300-01*. The court rejected Stephenson's contention that travel, not driving, was the essential function of her job. The court also found that there were no reasonable accommodations that Pfizer would be required to make which would enable Stephenson to maintain her employment with Pfizer. *JA 1309*. Based on its findings, the court entered summary judgment in favor of Pfizer. *JA 1310*. Stephenson has appealed. *JA 1311*.

SUMMARY OF ARGUMENT

The district court's entry of summary judgment requires reversal because the court found facts in violation of Rule 56, *Fed. R. Civ. P.*, and in doing so, denied Stephenson a trial by jury on her claims. The court's interpretation of the requirements of the ADA ignored the legislative purpose of the ADA; and the court violated the Congressional mandate as to its construction. According to the plain meaning of the ADA, and its core purposes of promoting the employment of disabled persons, the district court's entry of summary judgment was in error, and should be reversed.

Specifically, in finding that plaintiff was unable to perform the essential functions of her position as a pharmaceutical sales representative, the court found, as a matter of law, that driving, not travel, was an essential function, and since plaintiff was unable to drive, she was unable to perform the job. Stephenson's primary duty as a pharmaceutical sales representative was to sell drugs; travel was incidental to those duties. While Stephenson was required to travel to doctors' offices, her ability to sell drugs was not dependent on how she travelled, or who was behind the wheel. The evidence supported the facts that Pfizer's judgment was that pharmaceutical sales representatives were employed and required to sell drugs, that the representatives were expected to have and develop the skills necessary to sell drugs, and that they were rewarded on that basis. Pfizer's *after-the-fact*

characterization of driving as an essential function of the job of pharmaceutical sales representative was based, not on any factual judgment of the essential functions of the job, but on its purported concerns for liability and precedent. Pfizer's characterization of driving as an essential function, and the district court's ruling in support, denied employment opportunities to Stephenson and an entire class of disabled individuals who can perform the primary duties of the job.

The district court's ruling that driving, as opposed to travel, was an essential function of the job of pharmaceutical sales representative, enabled Pfizer to ignore its obligations to provide reasonable accommodations which would allow Stephenson to continue her long-term employment as a pharmaceutical sales representative. Stephenson had demonstrated, following the onset of her disability, that she could continue to sell drugs for Pfizer with the reasonable accommodation that she be permitted some alternative form of travel which was not contingent on driving herself to doctors' offices. There were, in fact, a number of possibilities of such accommodations, any of which would have been effective in permitting plaintiff to continue her job of selling drugs for Pfizer, without any significant negative impact on Pfizer. However, Pfizer's flat refusal to engage in a good-faith process to determine such accommodations deprived Stephenson of the employment opportunity of continuing to perform the duties of her position as a pharmaceutical sales representative, and violated her rights under the ADA. At

minimum, there were issues of material fact to be determined by the jury as to whether Pfizer violated Stephenson's rights to reasonable accommodations.

The district court's summary judgment in favor of Pfizer must be reversed. Upon reversal, this case should be remanded to the district court for trial by jury.

ARGUMENT

The district court improperly granted summary judgment for Pfizer. Summary judgment is appropriate only when there is "no genuine issue as to any material fact and … the moving party is entitled to a judgment as a matter of law." *Fed. Rules of Civ. P. 56(c).* In reviewing the record before it, the court "must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion." *Tuck v. Henkel Corp.*, 973 F.2d 371, 374 (4th Cir. 1992); *Freeman v. Dal-Tile Corp*, 750 F.3d 413, 419-420 (4th Cir. 2014). This Court's review of the district court's judgment, and the two issues brought forward on this appeal, is *de novo*. *Freeman v. Dal-Tile Corp*, 750 F.3d 413, 419-420 (4th Cir. 2014).

The Americans with Disabilities Act recognizes that "disabilities in no way diminish a person's right to fully participate in all aspects of society," 42 U.S.C. § 12101(a). Congress sought to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b). In order to fulfill these objectives, Congress adopted Title I,

imposing on covered employers the affirmative obligation to provide "reasonable accommodations" to enable disabled persons to perform the "essential functions" of their jobs "unless the employer can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. § 12112(5)(A).

Stephenson is precisely the type of employee the ADA was designed to protect. The record is replete with Stephenson's evidence that she could perform the essential functions of her job as a pharmaceutical sales representative, only some of which Pfizer has disputed. Moreover, Stephenson presented substantial evidence that reasonable accommodations, contemplated by the ADA, were available which would have enabled Stephenson to continue her work. In response, Pfizer has defended—both in its communications with Stephenson and in this action—with vague references to "liability" and "precedent," as its excuses for not making reasonable accommodations. In light of this evidence, the district court erred in granting summary judgment to Pfizer.

I. STEPHENSON CAN PERFORM THE ESSENTIAL FUNCTIONS OF HER POSITION AS A PHARMACEUTICAL SALES REPRESENTATIVE

A. The ADA's statutory language and the EEOC's regulatory reasons for labeling a job function as "essential" provide a plain meaning of the phrase "essential functions" and support Stephenson's evidence that understanding, explaining, distinguishing, and selling drugs in meetings with medical providers were the essential functions of her job.

Since Congress established clear standards in the ADA, it comes as no surprise that the ADA requires the use of plain meaning to determine when functions of a job are *essential*. Congress selected the word "essential," whose ordinary meaning is "absolutely necessary" or "indispensable." *Dictionary.com.* Likewise, EEOC in its general definition of "essential functions" provides that "essential functions" means an employee's "fundamental job duties," 29 C.F.R. § 1630.2(n)(1), and does not include "the marginal functions of the job." *Id.* The EEOC regulations elaborate:

> The inquiry into whether a particular function is essential initially focuses on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential. ...
>
> If the individual who holds the position is actually required to perform the function the employer asserts is an essential function, the inquiry will then center around whether removing the function would fundamentally alter that position.

Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Part 1630 (hereafter "29 C.F.R. § ___, App.).

In other words, EEOC, the administrative agency responsible for implementing the ADA, through its regulations, recognizing the threshold importance of the interpretation of "essential functions," informs the courts that "essential" means "absolutely necessary," or "fundamental," to the extent that removing the function would "fundamentally alter" the job. The inquiry into whether functions are "essential" is so important that courts have emphasized that it cannot be left to the *after-the-fact* characterization of the employer, but that it is a "a factual determination that must be made on a case by case basis" by the jury, considering "all relevant evidence." *29 C.F.R. § 1630.2(n), App*. *See Keith v. County of Oakland*, 703 F.3d 918 (6th Cir. 2013) (whether a job function is essential is a question of fact that is typically not suitable for resolution on a motion for summary judgment); *Rorrer v. City of Stow*, 743 F.3d 1025 (6th Cir. 2014) (same); *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208 (2d Cir. 2001); *Skerski v. Time Warner Cable Co.*, 257 F.3d 273 (3d Cir. 2001).

The record is replete with Stephenson's evidence on what functions were essential, or fundamental, to her job as a pharmaceutical sales representative to sell Pfizer's drugs:

- to understand the drugs Pfizer and its competitors sold;
- To research and understand how Pfizer's products fit into providers' specialties and treatment strategies;

- to explain the drugs to medical providers in in-person meetings at their places of work;
- to highlight the distinctions between Pfizer's and competitors' drugs, focusing on the particular practices of the medical providers;
- to convince medical providers to prescribe the drugs she was describing because they were superior for the providers' patients.

As Stephenson explained in her deposition:

> Following my initial employment … I was trained in headquarters and on the job with experienced representatives to be a sales representative. The training consisted primarily of learning about the drugs which my employer sold, and the disease states for which they were indicated, in order to articulate to medical providers the distinctive qualities of the drugs, and their comparative strengths as opposed to other drugs on the market. Much of my initial training focused on the science of the medications, the anatomy of the relevant human body system, and how to present complex material in short periods of time when I met with busy medical professionals.
>
> [M]y primary role as a pharmaceutical sales representative was to share product and disease state knowledge, prescribing information, and correct patient targets, about the drugs I was responsible for promoting at any given time. The goal was to encourage medical professionals to prescribe Pfizer products for their appropriate patients.
>
> …I worked hard in my research to keep myself informed about the drugs I was presenting, and in preparing my presentations to medical providers.

JA 467-68, ¶¶ 6-8.

In addition to the general definitions of "essential functions," the EEOC also provides three reasons, not necessarily exhaustive, why a function may be considered "essential," which support giving a plain meaning to "essential functions." The regulations provide:

> (i) The function may be essential because the reason the position exists is to perform that function;
>
> (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
>
> (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

29 C.F.R. 1630.2(n)(2).

Application of the first and third factors strongly supports Stephenson's position, and the second factor is not directly relevant. With respect to the first factor, as Stephenson's evidence makes clear, the reason the position of pharmaceutical sales representative exists is to sell Pfizer's drugs, not the mode of transportation. With respect to the third factor, the core function of Stephenson's position was to sell drugs, and Stephenson had indisputably developed highly specialized expertise in selling Pfizer's drugs. With respect to the second factor, Stephenson has acknowledged that in order to perform her job, she had to travel, and she has not alleged that other sales representatives should be required to transport her. Accordingly, there is no issue as to whether the function of driving

could be distributed to other employees. Stephenson's request for an accommodation acknowledged this fact, and requested that she be permitted to travel by use of a third party driver. The determination of how such driver would be provided was, consistent with the ADA, left to the interactive process.

B. Stephenson presented favorable evidence as to most of the EEOC's regulatory categories of evidence in support of her position on essential functions, some of which Pfizer disputed, raising genuine issues of material fact.

As explained above, the ADA and the EEOC in its implementing regulations give plain meaning to "essential functions," calling them "fundamental." The record is clear on what was essential to Stephenson's job as a pharmaceutical sales representative: understanding, explaining, distinguishing, and selling drugs in meetings with medical providers. Likewise, the EEOC's reasons why a function may be considered "essential" generally support Stephenson's position that understanding, explaining, distinguishing, and selling drugs in meetings with medical providers were the essential functions of her job.

The EEOC regulations also provide a non-exclusive list of evidentiary factors which may bear on the issue of whether a function is essential.[4]

[4] Evidence of whether a particular function is essential includes, but is not limited to:
(i) The employer's judgment as to which functions are essential;
(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
(iii) The amount of time spent on the job performing the function;

Stephenson offered evidence supporting her position on essential functions - understanding, explaining, distinguishing, and selling drugs in meetings with medical providers – in most of these categories of evidence, which, according to one court, "suggests caution against a premature determination on essential functions as at least some of them lean in [plaintiff's] favor." *Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 280 (3d Cir. 2001) (where the court reversed summary judgment for the employer, recognizing that there were issues of fact as to whether climbing was an "essential function" of the job of installing and disconnecting cable television service for the employer's customers, applying the reasons and evidentiary factors listed in the regulations). The district court should have denied summary judgment because Pfizer's sole response was to dispute the conclusions of Stephenson's evidence, at most, raising genuine issues of material fact.

(iv) The consequences of not requiring the incumbent to perform the function;
(v) The terms of a collective bargaining agreement;
(vi) The work experience of past incumbents in the job; and/or
(vii) The current work experience of incumbents in similar jobs. 29 C.F.R. 1630.2(n)(3).

1. The evidence raised genuine issues of material fact on the employer's judgment, and the written job description prepared before Stephenson's disability supports Stephenson's position on essential functions.

The first two of the seven categories of evidence that the regulations name as potentially probative of what functions are essential are the "employer's judgment" and "job descriptions prepared *before* advertising or interviewing applicants for the job." 29 C.F.R. 1630.2(n)(3)(i) and (ii). By placing these two categories first and together, the regulations suggest not only are they important, but also that one would expect to see the employer's perspective or judgment of the "essential functions" of the job *in* its job descriptions.

On these first two categories of evidence, Stephenson offered a variety of evidence in support of her position that the essential functions of the job were understanding, explaining, distinguishing, and selling drugs in meetings with medical providers. As indicated, the most probative evidence of the employer's judgment was the job description that Pfizer posted for her position, in which Pfizer described the *role* of the sales representative:

- the representative "must demonstrate a strong understanding of necessary disease states and possess a solid ability to communicate necessary technical, scientific, and product in disease management information to customers;"

Pfizer described the necessary specific *qualifications* for the position:

- "business acumen, proficiency using sales data/call reporting software/applications, 4 year degree or equivalent pharmaceutical sales experience...;"

and Pfizer emphasized the *core competencies* of the position:

- specific sales skills, positive character traits and a commitment to "a compelling and inspired vision or sense of core purpose" [to sell Pfizer products].

JA 550-51. The job description makes no mention of the need for the representative to drive herself to meetings with medical providers. *Id.*

Pfizer offers only self-serving statements that in its judgment, in addition to these functions, driving herself to the meetings with medical providers was also essential. In response, Stephenson – in addition to the job description posted for her job – offered Pfizer's conduct as evidence of what Pfizer considered essential functions. In the few weeks she continued to work after her condition rendered her unable to drive, Pfizer's manager and other sales representatives drove her to meetings with medical providers. *JA 470-471, ¶¶ 17-18; JA 516-518 ¶¶ 11-15; JA 559*. Her colleague's description established that while others performed the marginal function of driving, Stephenson continued to perform the essential functions of her position and performed them with exceptional skill:

> I spent the day with Whitney observing her selling messages, style and interactions with her providers. In true Whitney fashion today was an awesome day. I continue to be amazed by Whitney's technical proficiency not with just one product but with our entire portfolio. Whitney competently demonstrates how and why pre-call planning (knowing how each provider is optimized; their relevant payers and prescribing is critical to craft a [sic] impactful and hard-hitting presentation that ultimately moves the sales needle forward. It is obvious that the providers have a tremendous amount of respect for the knowledge and level of product expertise Whitney brings to the table by the time and attention paid to her every word during the sales presentations specifically at our lunch with Dr. Snider's group. Observing Whitney in actions served as continued confirmation for me that the value we bring to each provider and interaction can exponentially increase as we work to increase our technical knowledge in a solution based selling framework that compliments [sic] how they deliver patient care. This experience was of great value as I took away numerous selling statements and pearls that I will incorporate into my own messaging and personal style with the customers in my territory.
> Thank you for the opportunity to watch a true Master at Work!

JA 559. Given this evidence, there is simply no ground for arguing that "removing the [driving] function would fundamentally alter that position." *29 C.F.R. § 1630.2(n), App.*

Stephenson also presented evidence that the skills Pfizer valued and rewarded over her years was her ability to sell drugs. Specifically, Pfizer heaped recognition on Stephenson for generating millions of dollars of sales each year, ranking her consistently as one of the top sales representatives in the region. Stephenson's sales resulted in her being inducted into the Pfizer Hall of Fame, and being recognized as a Pfizer Master. *JA 468, ¶ 9.* At no point did Pfizer mention

her ability to drive herself to the offices of medical providers as reasons for her recognition. *Skerski v. Time Warner Cable Co.*, 257 F.3d 273 (3d Cir. 2001) (plaintiff, whose position as a cable installer generally required climbing telephone poles, had received high ratings for his performance while not climbing, indicating that climbing was not an essential function).

There is, at minimum, a genuine issue of material fact with respect to Pfizer's judgment as to the essential functions of the job. Stephenson's evidence points to the job description for her position, to her immense skills in continuing to sell after her disability, and to Pfizer's acts in rewarding her for sales (not for her ability to drive herself). Pfizer raises a genuine issue of material fact only by its self-serving statements that driving herself was an essential function.[5]

Pfizer did not raise a genuine issue of material fact, however, relating to the job description. The regulations direct the court to look at job descriptions prepared *before* the onset of disability. *29 C.F.R. 1630.2(n)(3)(ii)*. As set forth above, the job description of Stephenson's position *before* her disability clearly articulated the fundamental functions relating to the sales of its products, but said nothing about any mode of travel or who was to do the driving. *JA 546-547; JA 550-552*.

[5] The district court also mentioned the fact that Pfizer had provided company vehicles. *JA 1299*. This fact is probative as to how the job was customarily performed, not as to Pfizer's judgment of the essential functions.

2. With respect to the other examples provided by EEOC, the evidence either supports Stephenson's position on the essential functions of her job or raises issues of fact.

Of the five other examples listed by EEOC, four are arguably relevant to this case. On these examples, the evidence either supports Stephenson's position or raises issues of fact.

The amount of time spent on the job performing the function. 29 C.F.R. § 1630.2(n)(3)(iii). The record contains genuine issues of material fact on this issue. The district court found that this factor "weigh[s] heavily in favor of Pfizer," and emphasized that Stephenson spent "up to 90% of her time travelling." *JA 1293*. In fact, Stephenson's testimony was that in a 10 hour day, she spent eight hours in the field, while she spent two hours performing administrative and preparatory work at her home. *JA 78 (at 8-18).* Of this 80% of her time, much of it was spent on the core function of visiting with doctors, while the balance was spent in travel. In any event, the application of this factor is not relevant to the issue of whether driving herself is an essential function. It simply supports the undisputed fact that travel was essential.

The consequences of not requiring the incumbent to perform the function. 29 C.F.R. § 1630.2(n)(3)(iv). This category of evidence supports Stephenson's

position on the essential functions of her job.[6] There is no evidence of negative consequences of not requiring Stephenson to drive herself.[7] In fact, it is ludicrous to believe that sales of Pfizer's drugs would diminish if someone other than Stephenson drove her to the meetings with medical providers. The record is silent on any consequences of not requiring Stephenson to drive, as long as she could travel to sell drugs.

The work experience of past incumbents in the job, and the current work experience of the incumbents in similar jobs. 29 C.F.R. § 1630.2(n)(3)(vi-vii). On this category of evidence, the record contains genuine issues of material fact. On the one hand, pharmaceutical sales representatives *customarily* drove themselves to meet with medical providers. On the other hand, Pfizer had provided a manager and another sales representative to drive Stephenson, when her disability manifested itself. *JA 470-471, ¶¶ 17-18; JA 516-518, ¶¶ 11-15; JA 559.* The fact that there is little evidence of other instances of such accommodations[8] may simply reflect the fact that no disabled person had ever requested "modifications … to the

[6] Without analysis, the court also found that this factor "weigh[s] heavily in favor of Pfizer," a finding which is not supported by the evidence. *JA 1300*.

[7] Of course, the costs of any reasonable accommodation should not be considered in this analysis, since it is considered in the determination of reasonable accommodations and undue hardship. *See note 9 infra*.

[8] As a matter of fact, after the conclusion of discovery, counsel received a document indicating that a disabled employee had been approved for an exemption from driving. JAS 1395. It is unclear in the document as to whether the approval was for a temporary or permanent accommodation.

manner or circumstances under which the position held or desired is *customarily* performed, that enable an individual with a disability who is qualified to perform the essential functions of that position." *29 C.F.R. § 1630.2(o)(1)(ii) (emphasis provided).*

C. The ADA itself and case law interpreting it impose limits on drawing conclusions based on employers' self-serving statements on what is essential when, as here, the evidence supports a finding that the employer may be labeling a function as essential only to avoid making reasonable accommodations.

If an employer could turn any function into an essential function and avoid the obligation to make reasonable accommodations, employers could eviscerate the protection of the ADA. If an employer could avoid reasonable accommodations simply by expressing its "judgment" that a function precluded by the disability was essential, employers could discriminate in ways that the ADA seeks to prohibit.

Indeed, in order to accomplish Congress' purposes in enacting the ADA, the statute requires that the court scrutinize employer's judgment on what are essential functions. In 42 U.S.C. § 12112(b), Congress mandated the rules of construction of the ADA. Emphasizing that discrimination against disabled employees is prohibited under the law, Congress specifically set forth those acts that constitute discrimination:

> As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes –
>
> …
>
> (5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
>
> (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant…

Accordingly, Congress declared that an employer's refusal to hire an employee simply because the employment would require a reasonable accommodation would defeat the purposes of the law.

By the same token, Pfizer's *after-the-fact* characterization of what was essential supports the conclusion that Pfizer is doing precisely what 42 U.S.C. § 12112(b)(5)(B) precludes: denying employment opportunities to avoid making reasonable accommodations. Stephenson's evidence demonstrates that the functions of understanding, explaining, distinguishing, and selling drugs in meetings with medical providers were the essential functions of her job, and that, as demonstrated by Stephenson, a person unable to drive can perform these essential functions. By characterizing driving as an essential function to avoid

making reasonable accommodations, Pfizer has excluded an entire class of disabled employees who could perform the fundamental duties of the job solely because they cannot drive.

Not only the language of the ADA, but case law construing it supports giving careful scrutiny to self-serving statements on the employer's judgment about the essential functions of a job. As the Eleventh Circuit Court of Appeals observed in *Holly v. Clairson Ind., LLC*, 492 F.3d 1247, 1258 (11th Cir. 2007):

> "[A]lthough the employer's view is entitled to substantial weight in the calculus," this factor alone may not be "conclusive." [Citation omitted]. Indeed, if it were considered to be conclusive, then an employer that did not wish to be *inconvenienced* by making reasonable accommodations could, simply by asserting that the function is "essential," avoid the clear congressional mandate that employers "make reasonable accommodations to the known physical… limitations of an otherwise qualified individual with a disability …unless such covered entity can demonstrate … an undue hardship to the operation of the business….."

(*quoting from D'Angelo v Conagra Foods, Inc.*, 422 F.3d 1220 (11th Cir. 2005)). *See also*, *Rorrer v. City of Stow*, 743 F.3d 1025 (6th Cir. 2014); *Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 280-81 (3d Cir. 2001) (emphasizing that, based on the legislative history of the ADA, *136 Cong. Rec. 11,451 (1990)*, "[t]he essential function requirement focuses on the *desired result* rather than the means of accomplishing it," and finding in that case that there were issues of fact as to whether climbing was an "essential function" of the job of installing and

disconnecting cable television service for the employer's customers, although it had customarily been required).

Other circuits have cautioned against relying on employers' self-serving statements about essential functions. The Seventh Circuit made this point in *Keith v. County of Oakland*, 703 F.3d 918 (6th Cir. 2013). In *Keith*, a deaf lifeguard sued the town under the ADA for its rejecting his application for the job. A critical issue in the case, as in this case, involved the essential functions of the job. In reversing summary judgment, the court reasoned that the employer's judgment notwithstanding, "hearing" was not an essential function of the job – "communication" was. And since the lifeguard had adapted with other means of communication, he had raised issues of fact that precluded summary judgment.

The distinction made by the Seventh Circuit in *Keith* is directly analogous to the distinction in this case between traveling to meet medical providers in their offices, which is essential, and driving oneself to those offices, which Pfizer contends is essential. In the Seventh Circuit's analysis of the lifeguard position in *Keith*, it was the communication, not the mode of communication (hearing), which was essential. Analyzing the fundamental nature of selling drugs, it is likewise true that it is the travel – like the communication in *Keith* – rather than the mode of

travel (driving oneself) that is essential to the job.[9] *See also*, *Holly v. Clairson Ind., LLC*, 492 F.3d 1247 (11th Cir. 2007)(similar analysis of "strict punctuality" policy); *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208 (2d Cir. 2001); *Davidson v. America Online, Inc.*, 337 F.3d 1179, 1191 (10th Cir. 2003) ("an employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description."); *Skerski v. Time Warner Cable Co.*, 257 F.3d 273 (3d Cir. 2001).

As stated above, the regulations contemplate that the determination of essential functions is a factual determination, and courts have consistently interpreted "essential functions" to require to a case-by-case factual determination by the finder of fact. 29 C.F.R. § 1630.2(n), App. *Keith v. County of Oakland*, 703 F.3d 918 (6th Cir. 2013). In this case, the ADA supports a determination by this Court that while travel was essential to the job of pharmaceutical sales representative for Pfizer, driving was not. At the least, the record reflects genuine

[9] The district court attempted to distinguish *Keith*, stating that the job of a lifeguard could be performed without the ability to hear, "but that "Stephenson cannot show how she can perform her sales representative job without the ability to drive and without shifting of burden onto Pfizer that the ADA does not permit." *JA 1302*, *fn. 2*. The court missed the point of the above analogy raised by the town's insistence in *Keith* to characterize the essential function as the ability to hear, rather than communicate. More importantly, the district court, in conclusory terms, demonstrated the danger in linking essential functions and reasonable accommodations--in effect, finding that the characterization of an "essential function" is dependent upon the "burden" of the reasonable accommodation which the ADA may require. This statement confuses the issues, and violates the rules of construction set forth by Congress in *42 U.S.C. § 12112(b)(2)(5).*

issues of fact that must be decided by the jury as to whether Stephenson was able to perform the essential functions of her job. The district court's determination to the contrary should be reversed.

II. STEPHENSON REQUESTED REASONABLE ACCOMMODATIONS THAT PFIZER FAILED TO CONSIDER IN AN EFFECTIVE INTERACTIVE PROCESS

The ADA labels the failure to provide reasonable accommodations as a form of unlawful disability discrimination. 42 U.S.C. § 12112. Indeed, a qualified individual with a disability is entitled to a reasonable accommodation to enable him to perform his job unless his employer "can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. § 12112(b)(5)(A). These reasonable accommodations may include:

> - [m]odifications or adjustments to the … manner or circumstances under which the position … is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or
>
> - [m]odifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

29 C.F.R. § 1630.2(o).

As one would expect, the determination of the reasonableness of a requested accommodation or any undue hardship that it would present is an issue of fact on which the employer has the burden of proof, to be determined by the jury. *Williams v. Channel Master Satelite Systems.*, 101 F.3d 346, 350 (4th Cir. 1996); *Rorrer v.*

City of Stow, 743 F.3d 1025 (6th Cir. 2014); *Keith v. County of Oakland*, 703 F.3d 918 (6th Cir. 2013); *Skerski v. Time Warner Cable Co.*, 257 F.3d 273 (3d Cir. 2001).

Stephenson's rights under the ADA should have turned, not on her essential functions, but on the factual consideration of reasonable accommodations which would enable her to continue in her position. However, based on its finding that driving was an essential function, the court gave short shrift to the issue, instead addressing other types of accommodations which are not at issue in this case.[10]

A. There are issues of fact as to Stephenson's requested accommodation which require resolution by a jury.

In truth, there was only one accommodation which would enable Stephenson to return to her job – a driver – and there were no other accommodations offered by Pfizer which would permit her to assume a comparable job. Stephenson's requested accommodation of a driver was contemplated by EEOC. *JA 473-474, ¶¶ 30;* 42 U.S.C. § 12111(9)(B) (the provision of "qualified readers and interpreters" may be a reasonable accommodation); 29 C.F.R. § 1630.2(o); *Record,*

[10] The district court stated that Stephenson sought to require Pfizer to create a new position for her. On the request of her manager, Salamone, that they "think out of the box," Stephenson envisioned two additional positions in which she could use her experience in the interest of Pfizer and its employees. *JA 480-481, ¶¶ 50-52; JA 635*. Apparently, Salamone was chastised for his request, and, Stephenson's suggestions were rejected with the legal admonition that Pfizer was not obligated to create a new position. *JA 660-662; JA 652-65*. Stephenson, who was simply responding to her manager, has never argued that point.

Pl. Exh. 46, EEOC Guidance: Questions & Answers about Blindness and Vision Impairments in the Workplace and the Americans with Disabilities Act (ADA). Stephenson and her husband conducted the necessary research, and ultimately found a professional driver who could accommodate Stephenson at a reasonable price to enable her to continue to sell Pfizer's products. *JA 474-476, ¶¶ 27-33; JA 525-527, ¶¶ 7-11; JA 532-534, ¶¶ 6-10*. Stephenson presented her request to Pfizer. *JA 474, ¶ 26*.

While Stephenson did the groundwork of finding a professional driver – one who would meet any reasonable standards of Pfizer – the details of the arrangement awaited Pfizer's input. Accordingly, it was unclear what category of person might serve as driver, what vehicle the driver might drive, how much insurance was necessary, what form of indemnification was necessary, and how the driver was to be paid (*i.e.*, whether Stephenson would be expected to contribute). *Id.*[11] *See Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208 (2d Cir. 2001) (at least 6 alternatives were possible based on plaintiff's request for a driver).

The ADA recognizes that the employer may need "to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify … potential reasonable

[11] The district court assumed that Stephenson did not propose to contribute to the accommodation. *See JA* 1309. In fact, since Pfizer refused to discuss the driver accommodation, the issue never came up. *See JA 475-476*, ¶ 33.

accommodations that could overcome those limitations." 29 C.F.R 1630.2(o)(3). More specifically, the EEOC directs "a problem-solving approach," to:

> (1) Analyze the particular job involved and determine its purpose and essential functions;
>
> (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with reasonable accommodation;
>
> (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have and enabling the individual to perform the essential functions of the positions; and
>
> (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for the employee and the employer.

29 C.F.R. § 1630.9, App.

Instead of engaging in the interactive process contemplated by the ADA, Pfizer summarily dismissed the request, responding instead that driving oneself "is an essential function of [the] job of sales representative;" that the request "would require the Company to hire someone full-time to perform an essential function of your job for you;" and that the "request is inherently unreasonable as use of a personal driver and vehicle would expose the Company to significant increased risk and liability related to vehicular accidents, workers compensation and misappropriation of and/or lost pharmaceutical samples." *JA 593*. In the same

communication Pfizer emphasized that "costs were not determinative in [the] analysis." *Id.* Stephenson continued to make the request. *JA 584-585; JA 612-613; JA 616; JA 655-656.* Her requests, however, met repeated rejections from various managers. *JA 425; JA 594-595; JA 432-433.*

Given Pfizer's flat refusal to engage in discussions concerning Stephenson's request, the precise parameters of the requested driver accommodation were never set. Nevertheless, the district court repeatedly assumed that Stephenson's request would require Pfizer to hire another employee to transport Stephenson on her sales calls. *See, e.g., JA 1293; JA1305-1306; JA 1309* (Stephenson "has eschewed the available options[12] in favor of her argument that Pfizer must hire a driver or provide transportation for her," *JA 1309.* Stephenson was clear that she was open to considering any driver option which would permit her to return to her job. *JA*

[12] The single "available option" was the potential position of tele-detailing which, it was proposed to her, would permit her to take orders for certain products on her home computer. As revealed in discovery, it was not at all certain at the time of consideration that the position was open or available. The job had been traditionally performed by a group in a facility in Pennsylvania, and there were security concerns with the proposal that Stephenson be permitted to do the job at home. *JA 624; JA 631.* In any event, the job, which paid 1/3 to 1/2 of Stephenson's normal compensation, was not comparable with Stephenson's position as a pharmaceutical sales representative, or commensurate with her skills and experience. *JA 479-480, ¶¶ 45-50; JA 626-629.* For good reason, Stephenson, a 27-year veteran, decided, in the context of her rights under the ADA, she did not wish to accept being relegated to an entry-level position. *42 U.S.C. § 12101(a)(5); Skerski v. Time Warner Cable Co.*, 257 F.3d 273 (3d Cir. 2001) (employee not required to accept assignment to a considerably lower-paying job as a reasonable accommodation).

475-476, ¶ *33*. But from November, 2011, to April, 2012, Stephenson was unsuccessful in convincing Pfizer managers to consider—or even discuss—some form of alternative transportation to permit her to return to her job. *See JA 474-84*, ¶¶ *27-62; JA 432-433*.

The refusal to consider Stephenson's requested accommodation and to engage in the interactive process when the facts necessitate it violates the ADA. *See Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208 (2d Cir. 2001) (employer "flatly refused" to consider proposed accommodations which included, potentially, having another manager drive her; plaintiff hiring a service to drive her; the employer hiring a service to drive her; plaintiff hiring an individual to drive her; employer hiring an individual to drive her; and using public transportation); *Keith v. County of Oakland*, 703 F.3d 918 (6th Cir. 2013) (duty to engage in interactive process is mandatory and "requires communication and good-faith exploration of possible accommodations" with the purpose "to identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."); *Rorrer v. City of Stow*, 743 F.3d 1025 (6th Cir. 2014) (responsibility for failure of process "will lie with the party that caused the breakdown."). The court's admonishment to the defendant in *Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 285 (3d Cir. 2001) is applicable to this case:

> Time Warner's defense in this case has been, in essence, that it would have been 'inconvenient' for it to make adjustments needed to retain [employee] in the position that he previously had. However, the ADA was enacted to compel employers to look deeper and more creatively into the various possibilities suggested by an employee with a disability.

Without a clear understanding of what Stephenson's accommodation entailed, the district court found that it was unreasonable as a matter of law. *JA 1305-1306*. This broad finding unnecessarily excluded all blind persons, or other disabled persons who are, because of their disability, unable to drive, from holding the position, whether they were willing to provide their own drivers or not.

Stephenson has raised, at a minimum, genuine issues of material fact as to whether Pfizer failed to reasonably accommodate Stephenson to enable her to return to work. *Feldman v. LEA Corp.*, 779 F. Supp. 2d 472 (E.D.N.C. 2011) ("the reasonableness of [plaintiff's requested accommodation is a question of fact"). In the light most favorable to Stephenson, the requested driver accommodation was reasonable, particularly given the incredibility of Pfizer's reasons for refusing to consider it. The district court's finding of unreasonableness for Pfizer, who had the burden of proof on the issue, was in error.[13]

[13] The district court erred also in analyzing other accommodations not in issue in this case. The district court stated that Stephenson sought to require Pfizer to create a new position for her. Stephenson did no such thing. On the request of her manager, Salamone, that they "think out of the box," Stephenson envisioned two additional positions in which she could use her experience in the interest of Pfizer and its employees. *JA 480-481, ¶¶ 50-52; JA 635*. Apparently, Salamone was

B. The ADA does not allow a conclusion that an accommodation is unreasonable when the employer's only evidence is unsubstantiated, vague references to "liability," "precedent," and "costs."

The burden on the employer to prove the unreasonableness of a requested accommodation or that a requested accommodation presents an undue hardship requires the employer to come forward with facts. This court has held that the determination of "reasonableness is an objective analysis, not a subjective one dominated by either party's concerns." *Williams v. Channel Master Satellite Systems*, 101 F.3d 346, 350 (4th Cir. 1996). "[T]he standard of 'reasonableness' is empty if 'reasonable' means only 'the employer's opinion.'" *Id*. "In assessing objective reasonableness, the governing statute provides guidance." *Id*. (*citing* 42 U.S.C. § 12111(9)). In addition, this Court emphasized that deference to the employer was inappropriate on summary judgment because the evidence at that stage is viewed in the light most favorable to the plaintiff. 101 F.3d at 350.

Instead of presenting facts to substantiate its claim of unreasonableness or undue hardship, Pfizer simply named issues, without coming forward with any evidence on those issues. The dominant issue referred to repeatedly was labelled "liability," without any supporting facts to enable the fact-finder to draw a

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chastised for his request, and, Stephenson's suggestions were rejected with the legal admonition that Pfizer was not obligated to create a new position. *JA 660-662; JA 652-653*. Stephenson, who was simply responding to her manager, has never argued that point.

conclusion on whether "liability" presented any serious issues to Pfizer. From the onset of Stephenson's disability, Pfizer summarily claimed that granting Stephenson's requested accommodation would increase its exposure to "liability" due to the use of another driver – with respect to automobile accidents, worker's compensation, and misappropriation of samples. *JA 593-594; JA 615-619.*

Undoubtedly, as part of the interactive process, there were liability issues that required resolution. Just as clearly, Pfizer's managers and lawyers knew how to resolve the issues and protect the company based on their many business arrangements where such issues had been addressed. Pfizer contracted with Publicis, for example, a company that sells Pfizer's products through *non*-Pfizer sales representatives. Pfizer employs limousine drivers who transport its executives. Pfizer contracts with common carriers who transport their drugs. All of these involve insurance and indemnification agreements. *JAS 1364-1387; JAS* 1389-1393; *JA 670-680.*

Stephenson and her husband understood the need for insurance and indemnification and discussed the issues with the drivers they interviewed. Lambert, who was accustomed to providing insurance for his professional driver services, had agreed to provide insurance and indemnification for Pfizer in his services to Stephenson. *JA 525-527, ¶¶ 8-11; JA 532-535, ¶¶ 5-13.* Nevertheless, when Stephenson inquired why "liability" in regard to her requested

accommodation was any more of an issue than in other business relationships, Pfizer's managers were dismissive and cut off discussion. *JA 474-479*, ¶¶ *26-41; JA 631*.

In view of the evidence in the record, Pfizer knew how to address liability issues. By not coming forward with any facts to support its claim that "liability" imposed an undue hardship, Pfizer's conduct raises the reasonable inference that liability was a pretext for its refusal to consider the driver accommodation. At any rate, Pfizer's using the word "liability" clearly does not suffice to carry its burden of proof. *Keith v. County of Oakland*, 703 F.3d 918 (6th Cir. 2013); *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208 (2nd Cir. 2001)

More accurately, perhaps, Pfizer's managers and lawyers seem to be concerned with precedent – that by granting a reasonable accommodation to Stephenson, it might have to grant similar accommodations to other disabled employees in the future *JA 481*, ¶ *51; JA 518-519*, ¶¶ *16-17; JA 1064 (at 16) - 1065 (at 16); JA 1080 (at 19-24); JA 1008 (at 13-20); JA 1141 (at 18)- 1142(at 10).* Pfizer's manager, Thomas Salamone, was the most revealing in attempting to respond to Stephenson's repeated requests for an explanation of Pfizer's position: "Not everyone is a Whitney Stephenson; Pfizer is afraid of setting precedent in case a future non-performing employee were to ask for something similar." *JA*

481, ¶ *51*. Pfizer's refusal to provide an accommodation on the ground of "precedent" is in direct violation of the ADA. *42 U.S.C. § 12112(b)(5)(B)*.

Pfizer initially denied that the perceived costs of a driver accommodation was "determinative." *JA 593*. However, Pfizer's pretext of liability, and its concern with "precedent," may reflect its concern for costs, and it has alleged the defenses of the "reasonableness" of the driver accommodation, and of undue hardship. *JA 31-32*.

The evidence shows that Stephenson, a highly successful sales representative was responsible for millions of dollars in sales of Pfizer products in her territory year after year. *JA 468-469*, ¶¶ *8-11*. In comparison to these sales, one estimate put the cost of a driver at approximately $36,000 per year. *JA 479*, ¶ *42*; JA 525-526, ¶ *9; JA 533-534*, ¶ *9*. In view of other costs incurred by Pfizer on a regular basis, a jury could find that this investment is reasonable and proportional, *JAS 1317*, ¶ *13*, especially when the parties have not even discussed whether or how they might share this cost. As the courts have determined, any accommodation must be shown to be "objectively reasonable," "in the sense both of efficacious and of proportional to costs." *Keith v. County of Oakland*, 703 F.3d 918, 927 (6th Cir. 2013). Such issues are clearly in the domain of the jury.

In any event, the ADA has imposed significant limitations on the consideration of costs through the strict proof standards of undue hardship. *42*

U.S.C. § 12111(10). This point has been well articulated in *Nelson v. Thornburg*, 567 F. Supp. 369, 378 (E.D. Pa 1983), a § 504 action where the court made the following observation in a case involving blind employees of a government agency seeking reimbursement for the cost of readers:

> There is no claim in the present case that accommodation of these plaintiffs would entail substantial modifications of the requirements of the position, or impose a new administrative burden on [the employer]. The claim is simply that the accommodation called for would cost too much. Thus, the arguments over "otherwise qualified," "reasonable accommodation," "undue burden" … all collapse into one issue: would the cost of providing half-time readers be greater than the Act commands?

The court ultimately answered its own question: "When one considers the social costs which would flow from the exclusion of persons such as plaintiffs from the pursuit of their profession, the modest costs of accommodation … seems, by comparison, quite small." 567 F. Supp. at 382.

In short, Stephenson has presented substantial evidence that Pfizer failed to offer or provide a reasonable accommodation for her disability. Accordingly, plaintiff is entitled to a trial by jury on this issue. The district court's judgment should be reversed.

CONCLUSION

For the reasons stated above, the district court's entry of summary judgment should be reversed, and this case should be remanded to the district court for trial by jury on the factual issues presented.

This the 2nd day of March, 2015.

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Dated: March 2, 2015

/s/ Robert M. Elliot
Counsel for Appellant

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I hereby certify that on this 2nd day of March, 2015, I caused this Brief of Appellant and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 2nd day of March, 2015, I caused the required copies of the Brief of Appellant and Joint Appendix to be hand filed with the Clerk of the Court and a copy of the Sealed Volume of the Joint Appendix to be served, via UPS Ground Transportation, upon counsel for the Appellee, at the above address.

/s/ Robert M. Elliot
Counsel for Appellant