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

REPLY BRIEF OF APPELLANT

Robert M. Elliot
Daniel C. Lyon
ELLIOT MORGAN PARSONAGE, PLLC
Brickenstein-Leinbach House
426 Old Salem Road
Winston-Salem, North Carolina 27101
(336) 724-2828

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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The parties and their amici present two opposing perspectives of the interpretation and scope of the ADA, particularly with respect to the determination of the essential functions of a job and the consideration of reasonable accommodations**.**

Stephenson and amici (Equal Employment Opportunity Commission (EEOC)[1] and Disability Rights North Carolina, National Disability Rights Network, and the National Employment Lawyers Association (collectively DRNC)) contend that the congressional intent in the enactment of the ADA, as reflected in its statutory language and framework, establish that the intended result of the job, not the manner in which it is customarily performed, determines whether a function is essential. Plaintiff's Opening Brief (hereafter "Pl. Op. Br.)

[1] Pfizer's attempt to diminish the deference which the Court should pay to EEOC's interpretation of the ADA, based on *Young v. United Parcel Serv.*, __ U.S. __, 135 S. Ct. 1338, 1352 (2015), is without basis. *Young* involved a challenge to the Pregnancy Discrimination Act and referenced the fact that the EEOC position with respect to the litigation conflicted with its guidelines. The Supreme Court determined that the conflict in EEOC's stated positions on an issue of law diminished its authority on the issue in the case. EEOC's notice to Stephenson of her right to sue in this case did not conflict with its legal position as to the interpretation of the ADA. While EEOC, essentially, took no position in its notice as to whether there was a violation of the ADA based on its limited investigation, it certainly did not approve Pfizer's interpretation of the law. The fact that EEOC, after reviewing the record in this case, decided to submit an amicus brief on behalf of Stephenson speaks to the impact this decision will have on an entire class of disabled people in the workforce. Pfizer's attempt to diminish EEOC's position should be disregarded. *See* also, *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 572 (4th Cir. 2015).

23-25; DRNC Br. 5-6. To the extent there are issues of fact as to what the intended result of the job is, and whether the employee, despite her disability, can achieve it, then the jury should resolve the issue. *Keith v. City of Oakland*, 703 F.3d 918 (6th Cir. 2013); *Rorrer v. City of Stow*, 743 F.3d 1025 (6th Cir. 2014); *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562 (4th Cir. 2015). The consideration of reasonable accommodations is a distinct determination of whether the accommodation needed to enable the employee to perform the essential functions – to achieve the intended result – is reasonable; and whether it imposes an undue hardship on the employer. *Id.* To the extent there are disputed facts, then the jury should resolve that issue, as well. Accordingly, under this view, since Stephenson can achieve the intended result of her job – educating and persuading doctors to prescribe Pfizer's drugs – then the issue is whether the needed accommodation is reasonable or whether it imposes an undue hardship. *Jacobs*, 780 F.3d at 579.

Pfizer and its amici offer a much more limited view of the ADA's protections. Concerned for *second-guessing* employers, Pfizer demands that the courts defer to the employer's determination of essential functions, including those which clearly are not essential to achieve the intended result. By this interpretation, the determination of essential functions is, for the most part, a determination of how the job has customarily been performed – thereby eliminating any consideration of accommodations which may entail a different

means of performance. Under this view, the fact that Stephenson's ability to achieve the intended result of selling drugs for Pfizer was not sufficient since she could not *drive herself* to the doctors' offices. Indeed, by its emphasis on its concern for precedent – that the floodgates will open and numerous employees who are visually impaired will seek traveling sales jobs – Pfizer effectively reduces the two-step consideration of essential functions and reasonable accommodations to a single determination: whether the reasonable accommodation sought by the employee to enable her to achieve the intended result would require the employer to open up "an array of sales positions" to disabled individuals. *JA* 1302-1303 (district court decision quoting *Kielbasa v. Ill. EPA*, 2005 U.S. Dist. LEXIS 26758, *25-26, 17 Am. Disabilities Cas. (BNA) 505 (N.D. Ill. Nov. 3, 2005)).

The court's determination of these issues goes to the heart of the ADA, and its effectiveness in carrying out the congressional intent to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;" and to insure that "disabilities in no way diminish a person's right to fully participate in all aspects of society." 42 U.S.C. § 12101. Plaintiff contends that her view is supported by the congressional intent in the passage of the ADA, and its plain language.

I. Pfizer's interpretation of the ADA would severely restrict its intended power to protect qualified disabled employees in the workplace.

Pfizer and its amici misinterpret the ADA and the EEOC regulations in an attempt to assign blanket authority to the employer to determine the essential functions of a job. From their repeated references to the ADA's common-sense recognition that "consideration shall be given to the employer's judgment as to what functions of a job are essential," they essentially argue that the determination is subject to the near total discretion of the employer. (Equal Employment Advisory Council (EEAC) Br. at 7, 10, 11 quoting 42 U.S.C § 12111(8)). Pfizer also misinterprets the legislative history regarding marginal versus essential functions of a job to inappropriately extend the discretion of the employer. Defendant's Brief ("Def. Br.") 11. This view presents a significant threat to the ADA's legislative purpose to protect disabled employees.[2] *Holly v. Clairson Ind., LLC*, 492 F.3d 1247, 1258 (11th Cir. 2007) ("Indeed, if [an employer's discretion] were considered to be conclusive, then an employer that did not wish to be *inconvenienced* by making reasonable accommodations could, simply by asserting

[2] Obviously, an employer should have discretion to determine the primary purposes and objectives of an employees' position. It is also the employer's responsibility to determine those job duties which are integrally linked to the achievement of the desired result. For example, Stephenson does not challenge Pfizer's right to determine that face-to-face meetings with doctors, as opposed to electronic communications, were essential since such meetings had long been determined to be most effective in achieving the desired result.

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…"); *Keith v. City of Oakland*, 703 F.3d 918 (6th Cir. 2013); *Rorrer v. City of Stow*, 743 F.3d 1025 (6th Cir. 2014).

The congressional intent and legislative history of the ADA in determining essential functions clearly supports Stephenson's position. In enacting the ADA, Congressmen Hamilton Fish Jr. stated "[t]he essential function requirement focuses on the desired result rather than the means of accomplishing it." 136 Cong. Rec. 11, 451 (1990). The discretion of the employer is just a part of the essential function analysis, and should not be the central focus. *See Skerski v. Time Warner Cable Co.*, 257 F.3d 273 (3d Cir. 2001).

Stephenson was not hired by Pfizer to drive a car. She was issued a car as a mode of travel to get to doctors' offices to sell Pfizer's drugs.[3] The desired result of Stephenson's positon is selling Pfizer's products by educating and persuading doctors to prescribe them to patients. Nothing about that result is dependent on the mode of transportation Stephenson used to get to their offices. Nothing about the desired result changes if a third party drives Stephenson to the offices.

[3] Pfizer and their amici repeatedly point to the fact that Stephenson was issued a company car in lieu of an office. (Pfizer Br. 3, 19, 22; EEAC Br. at 7, 14). The fact that employees were issued company cars does not render driving an essential function. It simply reflects that driving was the customary means by which sales representatives traveled to doctors' offices.

In short, a focused analysis of the intended result of Stephenson's job establishes that she could perform its essential functions *without driving* herself to meet with her clients.

II. Pfizer has the burden of proving the essential functions of the job of its sales representatives.

Pfizer also contends that Stephenson bears the burden of proof on whether a challenged function is essential. Def. Br. 15. Pfizer relies, in part, on *Hawkins v. Schwan's Home Servs. Inc.*, 778 F.3d 877 (10th Cir. 2015).[4] The Supreme Court has set out the framework for assigning burdens of proof in analogous situations, holding that the burden rests with the party who has special knowledge of the facts necessary to establish the issue. *See Pa. State Police v. Suders*, 542 U.S. 129, 146 n. 7 (2004):

> The employer is in the best position to know what remedial procedures it offers to employees and how those procedures operate. *See* 9 J. Wigmore, Evidence § 2486, p 290 (J. Chadbourn rev. ed. 1981) ('[T]he burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge enabling him to prove its falsity if it is false.' (emphasis deleted)).

Because the employer clearly has superior knowledge as to the relevant factors, the First, Sixth, Eighth and Ninth Circuits have directly addressed this issue and agree that the employer has the burden of proving a function is essential. *See Ward v.*

[4] Pfizer cites decisions from the Fourth Circuit regarding the burden of proving whether a plaintiff is qualified and can perform the essential functions of their job. Def. Br. 15. Pfizer cites only *Hawkins* on the burden of proving whether a challenged function is essential. *Id*.

Massachusetts Health Research Inst., Inc., 209 F.3d 29, 35 (1st Cir. 2000) (collecting cases):

> [T]he defendant, who has better access to the relevant evidence, should bear the burden of proving that a given job function is an essential function. *See Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1113 (8th Cir. 1995); *Monette v. EDS Corp.*, 90 F.3d 1173, 1182 n.8, 1184 (6th Cir. 1996) (discussing 42 U.S.C. § 12112(b)(6)); cf. *Stone v. City of Mount Vernon*, 118 F.3d 92, 99-100 (2d Cir. 1997) (reversing because there was insufficient evidence to support claimed essential function), cert. denied, 522 U.S. 1112, (1998); White [v. York Int'l Corp], 45 F.3d [357 (10th Cir.1995)] at 362 (examining employer's evidence in support of position's essential functions).

See also, *Bates v. UPS*, 511 F.3d 974, 991 (9th Cir. 2007) ("[W]e agree with the Eighth Circuit's approach that 'an employer who disputes the plaintiff's claim that he can perform the essential functions must put forth evidence establishing those functions.' *EEOC v. Wal-Mart*, 477 F.3d 561, 568 (8th Cir. 2007)"); *Keith v. City of Oakland*, 703 F.3d 918 (6th Cir. 2013); *Rorrer v. City of Stow*, 743 F.3d 1025 (6th Cir. 2014).

III. The decisions cited by the district court and Pfizer are distinguishable and should not be followed.

The decisions cited by Pfizer and its amici on the issue of driving as an essential function of sales jobs are distinguishable from the present case on the evidence. The decisions, for the most part, involve plaintiffs who were attempting to modify the nature of the job, create a new position, or who were unable to perform the job adequately.

A. Decisions involving employees attempting to change the nature of their job or create a new job do not support Pfizer's position.

Pfizer mistakenly relies on district court decisions and selected circuit court opinions involving employees that have attempted to change the nature of the job or its responsibilities. *Dicino v. Aetna U.S. Healthcare*, No. 01-3206, 2003 U.S. Dist. LEXIS 26487 (employee attempted to change job responsibilities due to issues with eating, sleeping, and travelling); *Hurd v. Am. Income life Ins*., 2014 U.S. Dist. Lexis 163742 (plaintiff filed a state claim[5] resulting from an injury while she was on a work-related trip, then later attempted to change to the nature of her job as a result of the injury); *Minnihan v. Mediacom Communs. Corp*., 779 F.3d 803 (plaintiff attempted to change his job description to eliminate driving and his travel requirements assigned to another employee following multiple seizures and the temporary revocation of his driver's license).

Unlike *Dicino* and *Hurd*, Stephenson has not attempted to alter or change the essential job functions or responsibilities of her job. Stephenson's disability does not prevent her from traveling to meet with her clients and performing the primary duties of her job. She has not requested that Pfizer make any modification of her core job functions.

[5] This case does not even involve a claim under the ADA or any federal statute. It was only in federal court as a result of the diversity of the parties.

Pfizer and the district court also relied on the district court decision in *Kielbasa v. Illinois E.P.A*, 2005 U.S. Dist. LEXIS 26758. In *Kielbasa*, the plaintiff, who was unable to drive, arranged travel to and from work sites with other employees. *Id*., at 7. After initially allowing the arrangement, his employer determined that he would no longer be able to ride with other employees because the arrangement infringed upon a collective bargaining agreement covering the employees who were providing the transportation. *Id*., at 8. *See* 29 C.F.R. 1630.2(n)(3)(v) (specific factor in determining whether a task is an essential function under the EEOC).

Unlike *Kielbasa* or *Minnihan*, Stephenson has not requested an accommodation of any of her co-workers or colleagues for travel to and from doctors' offices to sell Pfizer's products. No present employee of Pfizer in a sales representative capacity would have to be re-allocated from his own job responsibilities as a result of Stephenson's travel accommodations. No scheduling or advanced planning by her supervisors is required as a result of her reasonable accommodation for a driver. And there is no collective bargaining agreement implicated in Stephenson's request that she be permitted a driver to accomplish the function of travel required for her position.

B. Decisions involving the performance of sales representatives where travel was a component of the job do not support Pfizer's position.

Pfizer also relies on cases where it was the employees' performance or conduct that was the determining factor in termination or removal; not whether they could perform the essential functions of the job. *Mathews v Irving Commc'ms, Inc*., 143 F.3d 1160, 1165 (8th Cir. 1998) (plaintiff disqualified from the employer's vehicle insurance policy and subsequently terminated because of driving violations (including impaired driving charges) and his failure to accurately report them to his employer); *Walsh v. AT&T Corp.*, 2007 U.S. Dist. LEXIS 50051, (2007) (plaintiff terminated following multiple unsuccessful stints on job performance improvement plans; court determined that plaintiff *was* able to meet the essential function of travel for his position in spite of a stomach issue, and no reasonable accommodation was needed); *Olivia v. Pride Container Corp.*, 81 F. Supp. 2d 907 (plaintiff's termination not in violation of the ADA where she continually failed to meet sales goals and could not perform her job functions of speaking or travel as result of a car accident); *Durning v. Duffens Optical*, 1996 U.S. Dist. LEXIS 1685 (E.D. LA 1996) (plaintiff fired for poor work performance and failing to meet established goals for sales after her sales territory had been reduced and another sales representative hired to cover some of plaintiff's territory).

In each of the above cases, the employee failed to adhere to the employer's policy or failed to meet the standards established to ensure that the primary purpose of the job was accomplished. To the contrary, at all times before and after the onset of Stephenson's disability, she surpassed any reasonable performance standards set by Pfizer. *JA* 468 ¶¶ 8-10; *JA* 559.

IV. Pfizer's failure to act in good faith in an interactive process presents a jury issue.

Stephenson repeatedly attempted to engage Pfizer in discussion as to her requested accommodation for a driver and Pfizer refused. Stephenson's communications demonstrate simply that she was requesting that she be permitted a driver to enable her to travel. How the accommodation might have evolved is not clear because Pfizer refused to discuss it.[6] There certainly were alternatives available which would have satisfied Stephenson's request. *See Lovejoy-Wilson v. Noco Motor Fuel, Inc.*, 263 F. 3d 208 (2d Cir. 2001) (at least 6 alternatives in *Lovejoy* were possible as a result of plaintiff's request for a driver). In any event, Stephenson's testimony in the record clearly supports her willingness to consider alternative options – including options which called for her to contribute to the cost of the accommodation, and there is no indication in the evidence that she would have rejected such an option. *JA* 475-476, ¶¶ 32-33.

[6] Stephenson and her husband had received quotes from different driving services and had progressed to a formal bid with one potential driver. *JA* 532-535, ¶¶ 8-13.

In any event, Pfizer's refusal to consider the accommodation and truly participate in the interactive process is replete in the record. Stephenson first asked about the driving option in a communication with her supervisor who referred her to Pfizer HR representative John Harp. After some delay, Harp denied Stephenson's request for a driver on several alternative grounds, citing liability issues. *JA* 476, ¶¶ 34-35. Pressed by Stephenson for explanation, Harp, his replacement Chrissie Smith, and Pfizer's management simply repeated themselves.[7] *JA* 476-478, ¶¶ 34-47. When Stephenson provided three different proposals for reasonable accommodations (at the request of her manager), including alternative positions not requiring driving, all were denied. The only alternative position suggested by Pfizer involved an entry level sales position, the availability of which was never established, *JA* 364-366; for which Stephenson was clearly overqualified; and which would have reduced her income to approximately one third of what Stephenson made as a sales representative. *JA* 481-482, ¶¶ 51-54.

[7] When pressed in depositions to explain their simplistic response, Pfizer managers continued to repeat themselves through conclusory statements that they cannot provide the driver accommodation because of liability concerns. *JA* 233, 238-41 (Harp dep.); 310-16 (Salamone dep.). In response, Stephenson presented dispositive evidence that Pfizer was clearly able to and did address liability concerns in other contexts through insurance and other measures. *See* Pl. Op. Br., pp. 35-39.

In its recent decision in *Jacobs*, 780 F. 3d at 581-82, this Court emphasized the "good faith duty" imposed on employers by the ADA "to engage [with their employees] in an interactive process to identify a reasonable accommodation." The Court noted that two circuits have held that failure to discuss a reasonable accommodation with a disabled employee is evidence of bad faith. *Id.* (*citing Rorrer*, 743 F.3d 1025, 1040 (6th Cir. 2014)). The Court found that there was evidence from which "a reasonable jury could … conclude that the AOC acted in bad faith by failing to engage in the interactive process with Jacobs," and reversed the decision of the district court and remanded the case for trial. 780 F.3d at 582.

Similarly, in this case, Pfizer's flat refusal to discuss the driver accommodation with Stephenson, while continuing to impose the non-essential requirement that Stephenson drive herself, citing, without basis, issues of liability and precedent, was in bad faith.

CONCLUSION

Based on the foregoing reasons, and those set forth in Stephenson's principal brief, Stephenson respectfully requests that this Court reverse the district court's decision on summary judgment, and remand this action for trial.

This the 1st day of June, 2015.

/s/ Robert M. Elliot
Robert M. Elliot (7709)
Daniel C. Lyon (43828)
Attorneys for Plaintiff
ELLIOT MORGAN PARSONAGE, PLLC
Brickenstein-Leinbach House
426 Old Salem Road
Winston-Salem, NC 27101
(336) 724-2828
rmelliot@emplawfirm.com

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Dated: June 1, 2015

/s/ Robert M. Elliot
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 1st day of June, 2015, I caused this Reply Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all Counsel for Amici and the following registered CM/ECF users:

Stephanie E. Lewis
Jonathan A. Roth
JACKSON LEWIS PC
15 South Main Street, Suite 700
Greenville, South Carolina 29601
(864) 672-8048

Counsel for Appellee

I further certify that on this 1st day of June, 2015, I caused the required copies of the Reply Brief of Appellant to be hand filed with the Clerk of the Court.

/s/ Robert M. Elliot
Counsel for Appellant