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 *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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May 11, 2015

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

Pursuant to FRAP 26.1 and Local Rule 26.1,

Equal Employment Advisory Council, Chamber of Commerce of the United States of America, and
(name of party/amicus)

National Federation of Independent Business Small Business Legal Center

who is amici curiae, 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/ Rae T. Vann Date: 5/11/2015

Counsel for: Amici Curiae

CERTIFICATE OF SERVICE

****

I certify that on 5/11/2015 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/ Rae T. Vann 05/11/2015
(signature) (date)

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RULE 29(c)(5) STATEMENT

No counsel for a party authored this brief in whole or in part.

No counsel or counsel for a party contributed money that was intended to fund the preparation or submission of this brief; and

No person other than *amici curiae*, their members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

Respectfully submitted,

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The Equal Employment Advisory Council, Chamber of Commerce of the United States of America, and National Federation of Independent Business Small Business Legal Center respectfully submit this brief *amici curiae* with the consent of the parties. The brief urges the Court to affirm the district court's ruling below and thus supports the position of Defendant-Appellee Pfizer, Incorporated.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes nearly 300 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every

region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 350,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

Amici's members are employers or representatives of employers subject to the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, as amended, as well as other labor and employment statutes and regulations. As potential defendants to claims of workplace disability discrimination and failure to

accommodate, *amici* have a direct and ongoing interest in the issues presented in this appeal. The district court ruled correctly that the ability to drive was an essential function of Plaintiff-Appellant's job, and that her proposed accommodation – the engagement of a permanent, full-time driver – was unreasonable. The questions presented in this case are of great importance to employers generally, but especially those with jobs for which the ability to drive a car, or operate similar equipment, is an essential function.

Because of their interest in the application of the nation's equal employment laws, *amici* have filed numerous briefs as *amicus curiae* in cases before the U.S. Supreme Court, this Court, and others involving the proper construction and interpretation of the ADA and other federal laws. Thus, they have an interest in, and a familiarity with, the issues and policy concerns involved in this case. *Amici* seek to assist the Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case.

Accordingly, this brief brings to the attention of the Court relevant matters that have not already been brought to its attention by the parties. Because of their experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Plaintiff-Appellant Whitney Stephenson was employed by Pfizer as a pharmaceutical sales representative. J.A. 1292. As such, her job required her to meet face-to-face on a daily basis with physicians throughout her 80-mile territory to discuss Pfizer products – which she brought with her to each visit. J.A. 1293. On average, Stephenson met with eight to ten physicians per day. *Id.* She was provided with a company car, but had no office outside of her home. *Id.*

Stephenson developed a vision impairment that prevented her from driving. *Id.* at 1292. In October 2011, she requested several workplace accommodations, including magnifying glasses for reading and special adaptive software for her computer. *Id.* at 1293. Stephenson also asked that Pfizer provide her with a full-time driver or car service, on a permanent basis, to accommodate her vision loss and enable her to continue her office calls. *Id.*

Pfizer provided the magnifying glasses and computer software, but refused to hire a driver for Stephenson, pointing out among other things that driving was an essential function of her position, and hiring a driver would expose Pfizer to a number of unacceptable business liability risks. *Id.* at 1293-94. However, the company expressed its willingness to consider other possible accommodations, including placing Stephenson in a vacant position for which she was qualified that did not require any driving. *Id.* at 1294.

Stephenson responded by restating her request for a driver. *Id.* She rejected the suggestion that she apply for any other job – including ones that would have enabled her to sell pharmaceutical products remotely. *Id.* According to Stephenson, telework jobs were undesirable because they would interfere with her career goals, require her to sit "behind a desk all day" and talk to people she "didn't know." J.A. 140. As an alternative, she proposed that Pfizer create a new position for her that would not require driving. J.A. 1294. Pfizer declined. *Id.* After exhausting FMLA and short-term disability leave, Stephenson was placed on long-term disability leave, where she remains. *Id.* at 1294-95.

Stephenson commenced an action in federal court, accusing Pfizer of failing to reasonably accommodate her disability, in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, as amended. *Id.* at 1295. Specifically, Stephenson asserted that "traveling" – not driving – to and from physicians' offices was an essential function of her position, and that she would have been able to perform that function had her request for a reasonable accommodation been granted. Appellant Br. at 26. She further alleged that Pfizer failed to "engage in a good-faith, reasonable, interactive process to determine reasonable accommodations to enable plaintiff to return to work." J.A. at 22.

In granting Pfizer's motion for summary judgment, the district court held that driving is an essential function of Stephenson's job, and that she was unable to

perform that function even with a reasonable accommodation. J.A. 1309. In addition, it held eliminating or reallocating this essential function was not a reasonable accommodation, noting that "the only reasonable accommodation that Pfizer could make" as a practical matter was reassignment to a vacant position – an option that Stephenson categorically rejected. J.A. 1306.

The district court thus concluded that Stephenson "has eschewed the available options in favor of her argument that Pfizer must hire a driver or provide transportation for her. Her desire to maximize her skills and income is admirable, but the ADA does not oblige Pfizer to accommodate Stephenson in either of these ways." J.A. 1309. This appeal ensued.

SUMMARY OF ARGUMENT

The Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, prohibits discrimination against a "qualified individual on the basis of disability …." 42 U.S.C. § 12112(a), and imposes an affirmative obligation on employers to provide reasonable accommodations to the known disabilities of such individual unless doing so would impose an undue hardship on the operation of its business. 42 U.S.C. § 12112(b)(5)(A). An individual with a disability who is unable to perform the essential functions of her position, even with reasonable accommodations, is not a "qualified individual" for purposes of the Act. 42 U.S.C. § 12111(8). "Essential functions" are those that play a fundamental, as opposed to

marginal, role in the effective performance of the job in question. *See Tyndall v. Nat'l Educ. Ctrs., Inc.*, 31 F.3d 209 (4th Cir. 1994).

The ADA expressly provides that courts must consider an employer's business judgment as to the essential functions of a particular job, 42 U.S.C. § 12111(8), a principle that is reinforced in the ADA's administrative regulations. 29 C.F.R. § 1630.2(n)(3)(i). While an employer must provide reasonable accommodations that are effective in enabling the individual to perform the essential functions of the job, in doing so, it never is required to eliminate an essential function. *See* 29 C.F.R. app. § 1630.2(o).

In this case, Pfizer made a business judgment—well before Stephenson's request for an accommodation—that an essential, indeed indispensable, function of the pharmaceutical sales representative position is the ability to drive. In fact, the ability to drive was so important to the position that Stephenson was supplied with a company car in lieu of a physical office. Because Stephenson, by her own admission, was unable to drive and failed to demonstrate that a reasonable accommodation existed that would have enabled her to perform that essential job function, she is not a "qualified" individual with a disability entitled to the protections of the Act.

For related reasons, Stephenson's requested accommodation was not a reasonable one under the Act. The ADA does not obligate employers to

implement whatever accommodations are necessary, no matter how extraordinary, in order to satisfy their compliance obligations. Rather, employers have an affirmative obligation to provide workplace accommodations that are both effective, as well as reasonable, in enabling the employee with a disability to perform the essential functions of the job. Where no such reasonable accommodation exists, the employer's obligation is discharged. Thus, even if Stephenson conceivably could have effectively performed the essential functions of her pharmaceutical sales representative job by being supplied with a full-time driver, that proposed accommodation was facially unreasonable. The ADA does not require that Pfizer go to such extraordinary lengths in the name of reasonable accommodations.

Furthermore, Stephenson's subsequent refusal to continue interactive discussions with Pfizer regarding other possible accommodations also bars her failure-to-accommodate claim, as the district court held. In attempting to identify and implement an effective reasonable accommodation to enable an employee to perform the essential functions of the job, the employer and the employee have a responsibility to engage in an interactive and good faith exchange about possible alternatives. *See Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 346-47 (4th Cir. 2013); *see also EEOC v. Kohl's Dep't Stores, Inc.*, 774 F.3d 127, 132 (1st Cir.

2014). An employee who fails to do so cannot then seek damages against her employer for a resulting failure to accommodate. *Id*.

Even in rejecting as plainly unreasonable Stephenson's request that it effectively reassign the essential function of driving to another person, Pfizer remained willing to consider other alternatives, including those that would not require Stephenson to perform any driving duties. Once Stephenson backed out of the process, however, Pfizer no longer had any legal obligation to consider possible reasonable accommodations.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT DRIVING IS AN ESSENTIAL FUNCTION OF THE PLAINTIFF'S PHARMACEUTICAL SALES JOB

A. "Essential Functions" Are Those Tasks That Are Fundamental To The Performance Of A Particular Job

The Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, makes it unlawful for a covered employer to "discriminate against a qualified individual on the basis of disability …." 42 U.S.C. § 12112(a). It requires covered employers to make "reasonable accommodations to … an otherwise qualified individual with a disability … unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the [employer's] business ...." 42 U.S.C. § 12112(b)(5)(A).

"The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). As this Court has held, "Whether [a disability discrimination plaintiff] meets the definition of the statute, and therefore can bring a claim under the statute, is a question of law for a court, not a question of fact for a jury." *Hooven-Lewis v. Caldera*, 249 F.3d 259, 268 (4th Cir. 2001); *see also Hoskins v. Napolitano*, No. CIV.A. RDB-12-0639, 2012 WL 5921041, at *9 (D. Md. Nov. 26, 2012) ("The question of whether Plaintiff 'qualifies' for the position and therefore falls within the statute's purview is a preliminary question of law, not a question of fact for a jury"), *aff'd*, 519 Fed. Appx. 191 (4th Cir. 2013) (citation omitted).

Though the statute does not define "essential functions," the legislative history of the ADA confirms that this term is intended to describe the fundamental, as opposed to marginal, tasks associated with a particular job:

> The phrase "essential functions" means job tasks that are fundamental and not marginal … [I]nclusion of this phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job.

H.R. Rep. 101-485, pt. 3, at 33, 1990 U.S.C.C.A.N. 445, 455 (footnote and internal quotation omitted). The EEOC's regulatory definition reflects that legislative intent, providing that essential functions are "the fundamental job duties of the

employment position," and exclude "the marginal functions of the position." 29 C.F.R. § 1630.2(n)(1). This Court likewise describes "essential functions" as "functions that bear more than a marginal relationship to the job at issue." *Tyndall v. Nat'l Educ. Ctrs., Inc.*, 31 F.3d 209, 213 (4th Cir. 1994) (citation omitted).

B. The ADA Expressly Provides That Courts Must Consider An Employer's Business Judgment As To The Essential Functions Of A Particular Job

The ADA provides that "consideration *shall* be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions…." 42 U.S.C. § 12111(8) (emphasis added); *see also* H.R. Rep. 101-485, pt. 3, at 33, 1990 U.S.C.C.A.N. 445, 456 (statute "states explicitly that consideration shall be given to the employer's judgment as to what functions of a job are essential. Although essential functions need not be listed in a written form, a written list by an employer is a useful starting point for determining essential functions of a job"). Thus, the Courts of Appeal have uniformly held that "the applicable statutory and regulatory framework accords a significant degree of deference to an employer's own business judgment regarding which functions are essential to a given position[.]" *Jones v. Walgreen Co.*, 679 F.3d 9, 14 (1st Cir. 2012); *see also EEOC v. Clay Printing Co.*, 955 F.2d 936, 946 (4th Cir. 1992) (It is not the purpose of the

EEOC nor the function of this court to second guess the wisdom of business decisions"); *accord Fields v. Verizon Servs. Corp.*, 493 Fed. Appx. 371, 378-79 (4th Cir. 2012); *Mulloy v. Acushnet Co.*, 460 F.3d 141, 147 (1st Cir. 2006); *Mason v. Avaya Communs., Inc.*, 357 F.3d 1114, 1119 (10th Cir. 2004). The courts' task is not "to second guess the employer or to require the employer to lower company standards." *Tate v. Farmland Indus., Inc.*, 268 F.3d 989, 993 (10th Cir. 2001) (citation omitted).

The EEOC confirms that principle in its substantive regulations interpreting the ADA, explaining that "[e]vidence of whether a particular function is essential includes, but is not limited to[t]he employer's judgment as to which functions are essential." 29 C.F.R. § 1630.2(n)(3)(i). Thus, in determining whether a particularfunction is essential, the EEOC regulations call for deference to the employer's own business judgment, and also look to other evidence such as, for instance,the employer's written job descriptions, the amount oftime actually spent performing that task, and the consequences of not requiring an employee toperform the function. 29 C.F.R. § 1630.2(n)(3).

Moreover, consistent with the above caselaw, "the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards." Appendix to Part 1630—Interpretive

Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. (Section 1630.2(n) Essential Functions).

Citing 42 U.S.C. § 12112(b), Stephenson contends that the ADA "requires that the court *scrutinize* employer's [sic] judgment on what are essential functions." Appellant Br. at 23 (emphasis added). Nothing in the ADA's text, legislative history, or implementing regulations supports that notion, however, and Section 12112(b) merely sets forth the general statutory prohibition against discrimination (and failure to provide reasonable accommodations) on the basis of disability.

Thus, far from "scrutinizing" an employer's judgment regarding the essential functions of a particular job, the ADA requires that courts defer to it. *See Holly v. Clairson Indus., LLC*, 492 F.3d 1247, 1258 (11th Cir. 2007) (employer's judgment regarding essential functions entitled to "substantial weight in the calculus") (citation and internal quotation omitted).[1] In contrast, "[n]either the statute nor regulations nor EEOC guidance instructs courts to credit the *employee's* opinion about what functions are essential." *EEOC v. Ford Motor Co.*, 782 F.3d

[1] Although Stephenson argues that *Holly* supports her claims, the facts of *Holly* are readily distinguishable. There, the employer's claim that strict punctuality was an essential function of the plaintiff's job was undermined by evidence that the employer did not, in fact, treat the plaintiff's job as time sensitive at all. In this case, Stephenson has pointed to no evidence of Pfizer hiring or retaining other employees in her position who were unable to drive.

753, 764 (6th Cir. 2015) (*en banc*) (emphasis added). As the Sixth Circuit explained:

> That's because we do not allow employees to define the essential functions of their positions based solely on their personal viewpoint and experience. And for good reason: If we did, every failure-to-accommodate claim involving essential functions would go to trial because all employees who *request* their employer to exempt an essential function *think* they can work without that essential function.

Id. (citations and internal quotations omitted).

C. In Pfizer's Judgment, Driving Is An Essential Function Of The Plaintiff's Position

In addition to Stephenson's own concessions regarding what her sales representative job entailed, the district court found that Pfizer presented substantial evidence that it treated the ability to drive to and from physicians' offices – for the purpose of demonstrating and promoting Pfizer products – as an essential function of the position. Perhaps the most compelling evidence is the fact that Pfizer provided Stephenson with a company car in lieu of an office. She, along with all others in that position, also were required to maintain good driving records, and each year were required to undergo a motor vehicle record background check verifying their continued ability to drive. Indeed, pharmaceutical sales representatives whose driver's licenses were suspended or revoked, or who for other reasons were no longer able to drive, were removed from that role. JA 843-44, 846.

As noted, Congress in enacting the ADA gave explicit direction to the courts that in deciding whether a particular job function is essential, "consideration *shall* be given to the employer's judgment …." 42 U.S.C.§ 12111(8). Accordingly, this Court must take into account Pfizer's judgment that driving is an essential function of its pharmaceutical sales representative job. "This approach is consonant with Congress's indication that '[b]y including the phrase "qualified individual with a disability," the Committee intends to reaffirm that this legislation does not undermine an employer's ability to choose and maintain qualified workers.'" *Hawkins v. Schwan's Home Serv., Inc*., 778 F.3d 877, 885 (10th Cir. 2015).

D. Plaintiff's And Her *Amici*'s Novel Approach To Determining Whether "Driving" Is An Essential Function In This Case Should Be Rejected

In urging this Court to reverse the district court, Stephenson contends that the ability to drive is not what enables her to carry out her job responsibilities. Rather, applying the EEOC's multi-factor regulatory test, Stephenson insists that "the reason the position of pharmaceutical sales representative exists is to sell Pfizer's drugs, not the mode of transportation." Appellant Br. at 14.

Stephenson's argument appears to assume that because the general function of "travel" is essential, no particular form of travel could also be essential. That assumption is false. A job may, and usually will, have more than one essential function, and these functions may be general or specific. A truck driver must be

able to transport goods, but he or she must also be able to drive a truck. A customer service representative must be able to communicate, but in a job providing customer service by phone, he or she must also be able to speak. And a pharmaceutical sales representative must be able to travel, but, in an area with minimal public transportation, he or she must also be able to drive. Pfizer's consistent conduct demonstrates a business judgment to this very effect—driving was an essential form of travel for Stephenson's position.

In effect, Stephenson and her *amici* are advocating a new model under which courts are required to unpack an entire job, and construe any functions necessary to perform that job at the highest level of generality possible. Such an approach would have far-reaching and serious implications for all ADA-covered employers, large and small. To appreciate the potentially significant practical implications of such an approach, one need only consider the many jobs for which driving may be an essential function. While cable installation technicians must primarily install cable to the homes of new customers, they must be able to drive to service calls. *See Skerski v. Time Warner Cable Co.*, 257 F.3d 273 (3d Cir. 2001). While materials handler supervisors must primarily oversee the work of truck drivers, they must also be required to drive as an essential function of their supervisory jobs, *see Hawkins v. Schwan's Home Service, Inc*., 778 F.3d 877 (10th Cir. 2015), as may supervisors in other contexts. *See Minnihan v. Mediacom Communs.Corp.*,

779 F.3d 803 (8th Cir. 2015). And while the primary responsibility of a police officer is to keep and enforce the law, the ability to drive a patrol car is also an essential function of the typical "beat" officer's position. *See Kapche v. City of San Antonio*, 176 F.3d 840 (5th Cir. 1999).

Like Stephenson, *amicus* EEOC argues that a material issue of fact exists as to whether Pfizer could have provided an accommodation that would have enabled Stephenson to "travel" to her meetings with physicians. The EEOC emphasizes that "undisputed essential functions of Stephenson's job include visiting doctors' offices and striving to convince the doctors to prescribe to appropriate patients the Pfizer drugs in Stephenson's portfolio." EEOC Br. at 12 (citation omitted). However, the EEOC says, "there is, at a minimum, a factual dispute whether applicable job descriptions included driving as an essential function." *Id.* at 16.

The EEOC's attempt to create a jury question in this case confuses the role of the court and the jury, particularly given the significant deference to be given the employer in defining essential job functions. As described above, it is undisputed that every employee in Stephenson's position had a car and drove routinely as part of the job. In addition, it is undisputed that driving was so central to Stephenson's position that Pfizer offered employees a car in lieu of an office. And it is undisputed that Pfizer regularly listed driving as an essential function of jobs such as Stevenson's. Even if it were not, written job descriptions "need not be

Byzantine or prolix in order to be deemed sufficient" for purposes of an ADA essential functions analysis. *Hawkins*, 778 F.3d at 891 (citation omitted); *see also Rohan v. Networks Presentations LLC*, 375 F.3d 266 (4th Cir. 2004). Moreover, the need to drive is self-evident given the nature of the pharmaceutical sales representative role, which required Stephenson to visit and present products to as many as ten physicians' offices within a vast, eighty-mile radius each day. Nothing in the factual record undermines Pfizer's considered judgment—demonstrated by conduct independent of its denial of Stephenson's requested accommodation—that driving is an essential job function.

On this record, whether driving was an essential job function is a question of law for the court. That is doubly true given the ADA's command that courts defer to an employer's business judgment regarding the essential functions of a job. Employers faced with an ADA suit cannot, post-hoc, "recast what essential functions of a job are for ADA purposes[.]" *Whillock v. Delta Air Lines, Inc.*, 926 F. Supp. 1555, 1563 (N.D. Ga. 1995) (citations omitted). In most cases, however, once an employer has established a policy of treating a particular job function as essential, the plaintiff will not be in a position to try to a jury the wisdom of that decision, that is, whether the employer *should have* such a policy. Under the ADA, "employers do have the right to define the essential functions of a job." *Id.* Allowing an employee's personal opinion to create a jury question would

eviscerate that prerogative. If plaintiffs and the EEOC are allowed to second-guess whether an employer should have structured a particular job in the manner it did, a jury question could arise in virtually every ADA dispute. At bottom, the ADA does not empower juries to set the core functions of individual jobs, and permitting them to overrule employers on a case-by-case basis would create intolerable uncertainty for employers who must establish job qualifications without guidance from a jury.

II. THE DISTRICT COURT CORRECTLY HELD THAT PFIZER WAS NOT OBLIGATED TO CONSIDER PROVIDING A DRIVER AS A REASONABLE ACCOMMODATION

A. The Plaintiff Could Not Perform The Essential Functions Of Driving At All, And Therefore Was Not A "Qualified" Individual With A Disability Entitled To Reasonable Accommodations

The ADA defines "discrimination" to include "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 [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the [employer's] business ...." 42 U.S.C. § 12112(b)(5)(A) (emphasis added). In tandem with § 12112(b)(5), and as noted, the Act defines "qualified individual with a disability" as "an individual [with a disability] who, with or without reasonable accommodation, can perform the

essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (emphasis added).

As the EEOC in its ADA enforcement guidance points out:

> The reasonable accommodation that is required by this part should provide the individual with a disability with an equal employment opportunity. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability.

29 C.F.R. pt. 1630 app. (Section 1630.9 – Not Making Reasonable Accommodation).

While an employer must provide reasonable accommodations that are effective in enabling the individual to perform the essential functions of the job, it never is required under the ADA to eliminate an essential function, *see* 29 C.F.R. app. § 1630.2(o), or to otherwise advance individuals with disabilities in a way that disadvantages their non-disabled peers. In addition, "the burden of identifying an accommodation that would allow a qualified individual to perform the job rests with the plaintiff, as does the ultimate burden of persuasion with respect to demonstrating that such an accommodation is reasonable." *Lamb v. Qualex, Inc.*, 33 Fed. Appx. 49, 59 (4th Cir. 2002) (citation omitted).

By her own admission, Stephenson was unable to drive. *See* Appellant Br. at 24. As convincingly shown by Pfizer, and as the district court found, driving is an essential function of Stephenson's job as a pharmaceutical sales representative.

Accordingly, Stephenson bore the burden of demonstrating that a reasonable accommodation existed that would enable her to perform that essential job function. As she says herself, however, "In truth, there was only one accommodation which would enable [her] 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." Appellant Br. at 29. Having failed to identify *any* accommodation that would have enabled *her* – not someone else – to perform the essential functions of her job, Stephenson is not a "qualified" individual with a disability entitled to the protections of the Act.

Thus, assuming Stephenson's contention that Pfizer failed to explore possible reasonable accommodations with her is somehow correct, "that failure is actionable only if it prevents identification of an appropriate accommodation *for a qualified individual*." *Ford*, 782 F.3d at 766. As the *en banc* Sixth Circuit in *Ford* pointed out, "Courts thus need not consider this form of non-independent liability if the employee fails to present evidence sufficient to reach the jury on the question of whether she was able to perform the essential functions of her job with an accommodation." *Id.* (citation omitted).

B. Even Assuming A Duty To Consider Reasonable Accommodations Arose, Plaintiff's Proposed, Hire-A-Driver Accommodation Was Unreasonable On Its Face

In order to maintain a claim under the ADA based on the failure to provide an accommodation, an employee must identify a requested accommodation that is "'reasonable' on its face, i.e., ordinarily or in the run of cases." *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002). The district court below framed the reasonable accommodation question in that manner, providing that once a plaintiff establishes a proposed accommodation that "seems reasonable on its face," J.A. 1297, the burden of production of evidence shifts to the employer to prove undue hardship.

Here, even assuming *arguendo* that Stephenson was entitled to a reasonable accommodation that would enable her to perform the essential functions of her job, the request for a full-time driver would be unreasonable on its face. The ADA stops well short of imposing such as extraordinary obligation on employers.

Since the plain text of the statute makes clear that an employer has no duty to an individual who is able to perform the job with an "unreasonable" accommodation, it follows that hiring a driver to perform Stephenson's essential driving duties is never required, even if theoretically possible.

C. Plaintiff's Disengagement From Interactive Discussions With Pfizer Bars Her Failure To Accommodate Claim

In the Interpretive Guidance accompanying its ADA regulations, the EEOC encourages employers to engage in a four-step problem-solving process for identifying possible effective reasonable accommodations, and specifies that the "interactive process" requires the participation of both the employer and the employee. As this Court has observed, "the duty to engage in an interactive process to identify a reasonable accommodation is generally triggered when an employee communicates to his employer his disability and his desire for an accommodation for that disability." *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 346-47 (4th Cir. 2013). However:

> [T]he interactive process is not an end in itself; rather it is a means for determining what reasonable accommodations are available to allow a disabled individual to perform the essential job functions of the position sought. Therefore, even if an employer's duty to engage in the interactive process is triggered, the employer's liability for failing to engage in that process may collapse for a number of reasons.

Id. at 347 (citations and internal quotations omitted).

By its very nature, this interactive process requires ongoing, back-and-forth dialogue and communication between the employee and the employer about possible reasonable accommodations that would be effective in enabling the employee to perform the essential job functions. Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R.

app. 1630. Thus, when contemplating possible reasonable accommodations, both the employer and the employee are expected to fully participate in the interactive process as appropriate. Indeed, as the EEOC emphasizes, "The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the individual with a disability." *Id.* (Section 1630.9 – Not Making Reasonable Accommodation).

In addition, good faith efforts are essential to the process, and "empty gestures on the part of the employer will not satisfy the good faith standard." *EEOC v. Kohl's Dep't Stores, Inc.*, 774 F.3d 127, 132 (1st Cir. 2014). Likewise, an employee who fails to cooperate in the interactive process shirks her responsibilities to participate in good faith, and the employer will not be held liable for failure to accommodate as a result. *Id.* In other words, an employee who (as here) unilaterally refuses to engage in, or short-circuits, the interactive dialogue is precluded from recovering for failure to accommodate.

In this case, after Stephenson's vision deteriorated to the point at which she no longer could drive, she requested a number of reasonable accommodations, some of which Pfizer implemented and others – notably, Stephenson's request for a permanent, full-time driver or car service – it refused. Even in rejecting as plainly unreasonable Stephenson's request that it effectively reassign the essential function of driving to another person, Pfizer remained willing to consider other

alternatives, including those that would not require Stephenson to perform any driving duties. After it became apparent to her that Pfizer would not give in to her demands for a personal driver, however, Stephenson disengaged from the process – rejecting the company's efforts to identify other positions for which she was qualified that did not require any driving.

Once Stephenson backed out of the process, Pfizer no longer had any legal obligation to consider possible reasonable accommodations. Even if Pfizer's response to Stephenson's initial accommodation request was less than enthusiastic, there is nothing to suggest that its subsequent attempts to discuss possible accommodations were anything but meaningful and sincere. Accordingly, it complied with the expectation that once initiated, it would engage in the interactive process in good faith.

CONCLUSION

For all of the foregoing reasons, the Equal Employment Advisory Council, Chamber of Commerce of the United States of America, and NFIB Small Business Legal Center respectfully urge the Court to affirm the district's court's decision below.

Respectfully, submitted,

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May 11, 2015

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14-2079 **Caption:** Stephenson v. Pfizer, Inc.

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