

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 *AMICI CURIAE*
DISABILITY RIGHTS NORTH CAROLINA, THE NATIONAL DISABILITY
RIGHTS NETWORK, AND THE NATIONAL EMPLOYMENT LAWYERS
ASSOCIATION IN SUPPORT OF PLAINTIFF AND FOR REVERSAL**

**Lisa Grafstein
Katherine Slager
DISABILITY RIGHTS NORTH CAROLINA
3724 National Drive, Suite 100
Raleigh, North Carolina 27612
lisa.grafstein@disabilityrightsnc.org
katherine.slager@disabilityrightsnc.org
(919) 856-2195**

Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is not required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. _____ Caption: _____

Pursuant to FRAP 26.1 and Local Rule 26.1,

(name of party/amicus)

who is _____, 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: _____

Date: _____

Counsel for: _____

CERTIFICATE OF SERVICE

I certify that on _____ 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:

 (signature)

 (date)

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES.....ii

INTERESTS OF AMICI.....1

RULE 29(c)(5) DISCLOSURE.....3

CORPORATE DISCLOSURE STATEMENT.....3

INTRODUCTION.....3

 I. Defining Essential Functions to Allow Employees
 to Perform a Job in a Different Manner is
 Critical to Fulfilling the Purpose of Title I of
 the ADA.....4

 A. Essential Functions Are Determined by the
 Results to Be Achieved, and Not By the
 Manner of Performance.....5

 B. The Manner In Which An Employee Performs a
 Particular Duty Should Only Be Considered
 Essential Where the Manner and Substance Are
 One and the Same.....7

 C. The ADA Expressly Contemplates that an
 Accommodation May Include Reliance on an
 Assistant, So Long as The Employee Carries
 Out the Essential Functions.....10

 II. Whether Driving or Travel Was an Essential
 Function of Plaintiff’s Job is a Question of
 Fact.....12

 III. Whether a Function is “Essential” Must Be
 Determined on the Facts of a Particular Case and
 Not on the Basis of Policy Concerns.....16

CONCLUSION.....17

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF FILING AND SERVICE

TABLE OF AUTHORITIES

PAGE(S):

CASES:

Coleman v. Darden,
595 F.2d 533 (10th Cir. 1979).....11, 14

EEOC v. Fed. Express Corp.,
513 F.3d 360 (4th Cir. 2008).....10

Martinson v. Kinney Shoe Corp.,
104 F.3d 683 (4th Cir. 1997).....14, 15

Myers v. Hose,
50 F.3d 278 (4th Cir. 1995).....7

Nelson v. Thornburg,
567 F. Supp. 369 (E.D. Pa. 1983),
aff'd, 732 F.2d 146 (3rd Cir. 1984).....*passim*

Prewitt v. U.S. Postal Serv.,
662 F.2d 292 (5th Cir. 1981).....8, 15

Samson v. FedEx,
746 F.3d 1196 (11th Cir. 2014).....13

Skerski v. Time Warner Cable Co.,
257 F.3d 273 (3rd Cir. 2001).....6, 7

Supinski v. UPS,
413 Fed. Appx. 536 (3rd Cir. 2011).....13

Tolan v. Cotton, ___U.S.____
134 S. Ct. 1861,
188 L. Ed. 2d 895 (2014).....16

STATUTES:

29 U.S.C. § 794.....7

42 U.S.C. § 10801 *et seq.*.....1

42 U.S.C. § 12101(a)(3).....4

42 U.S.C. § 12101(b)(1).....4

42 U.S.C. § 12101(b)(2).....17

42 U.S.C. § 12111(8).....5, 7, 13

42 U.S.C. § 12111(9)(B).....10

42 U.S.C. § 12111(10)(B).....15

42 U.S.C. § 12112(a).....4

42 U.S.C. § 15041 *et seq.*.....1

RULE:

Fed. R. App. P. 26.1.....3

Fed. R. App. P. 29(c)(5).....3

REGULATIONS:

29 C.F.R. § 1630.2(n).....13, 17

29 C.F.R. § 1630.2(n)(1).....5

29 C.F.R. § 1630.2(n)(2).....12

29 C.F.R. § 1630.2(n)(3).....12

29 C.F.R. § 1630.2(o).....10, 11, 13, 14

29 C.F.R. § 1630.15(d).....15

OTHER:

EEOC, *A Technical Assistance Manual on the Employment Provisions (Title I) of the ADA* (Jan. 1992).....8-9

EEOC, *Office of Legal Counsel, Informal Op., ADA/Drivers License/Essential Functions/Reasonable Accommodation* (June 21, 2006), available at http://www.eeoc.gov/eeoc/foia/letters/2006/ada_license_function_accommodation.html.....9

101 H. Rpt. 485 (Part III).....5, 6, 9, 13

136 Cong. Rec. 11, 451 (1990).....5

INTERESTS OF AMICI

Disability Rights North Carolina ("Disability Rights NC") is the federally-mandated Protection and Advocacy ("P&A") organization for people with disabilities in North Carolina. Disability Rights NC is authorized by federal law to protect and advocate for the rights of individuals with disabilities. See 42 U.S.C. § 10801 *et seq.*; 42 U.S.C. § 15041 *et seq.* (2014).

The National Disability Rights Network ("NDRN"), is the non-profit membership association of P&A agencies that are located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. There is also a federally mandated Native American P&A System. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A System comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination, including the opportunity to secure and maintain competitive, integrated employment.

The **National Employment Lawyers Association ("NELA")** is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

Amici write to highlight that allowing an employer to define essential functions to include the *manner* of performing the function obviates the right to a reasonable accommodation in many cases. Amici also write to address the District Court's improper determination of facts relating to whether driving was an essential function of Plaintiff's position.

RULE 29(c)(5) DISCLOSURE

No part of this brief was authored by counsel to either party. Neither party, counsel, nor any other person contributed money intended to fund preparing or submitting this brief. Fed. R. App. P. 29(c)(5).

CORPORATE DISCLOSURE STATEMENT

Amici have no parent corporations. No publicly held company owns 10% or more of stock in Amici. Fed. R. App. P. 26.1.

INTRODUCTION

A central tenet of Title I of the Americans with Disabilities Act (the ADA) is that, in order to participate in the workforce, an individual with a disability may need to perform his or her job in a manner that is different from the way the job is performed by others. For this reason, the ADA not only prohibits animus-based discrimination, but also requires reasonable accommodations to ensure that workers with disabilities are not excluded from jobs because of the need to do a job differently. In this case, the District Court erred in construing the nature of essential functions and the role of reasonable accommodations. By adopting the employer's characterization that driving was the only means for Plaintiff to travel to meet with physicians, the District Court unduly narrowed the ADA.

The District Court's decision, if adopted, would set a harmful precedent with regard to the central role that reasonable accommodations play in making work accessible to people with disabilities, and would undermine a central purpose of the ADA. First, defining essential functions to allow employees to perform a job in a different manner from that of non-disabled employees is essential to fulfilling the purpose and intent of Title I of the ADA. Second, whether driving or travel was an essential function of Plaintiff's position is a factual question. Lastly, the determination of whether a function is essential to a particular position must be made on a case by case basis, and not on the basis of any policy consequences of the determination.

I. Defining Essential Functions to Allow Employees to Perform a Job in a Different Manner is Critical to Fulfilling the Purpose of Title I of the ADA.

In enacting the ADA, Congress noted the historic discrimination against individuals with disabilities in, *inter alia*, employment, and specified that the purpose of the ADA was to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §§ 12101(a)(3), (b)(1). Title I of the ADA thus prohibits discrimination in employment against a qualified individual with a disability. *Id.* § 12112(a). A "qualified individual" is one "who, with or without reasonable

accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). In order to qualify as an "essential function," a duty must be "fundamental" to the job. 29 C.F.R. § 1630.2(n)(1).

A. Essential Functions Are Determined by the Results to Be Achieved, and Not By the Manner of Performance

In determining essential functions, it is critical to separate out the manner of performance and the results to be achieved. That is, the ADA recognizes that an individual with a disability may be able to accomplish the same functional objective in a manner that differs from someone without a disability. The House Judiciary Committee, in its report recommending passage of the ADA, explained that:

The incorporation of the requirement of reasonable accommodation into the definition of 'qualified individual with a disability' is meant to indicate that essential functions are those which must be performed, even if the manner on which particular job tasks comprising those functions are performed, or the equipment used in performing them, may be different for an employee with a disability than for a non-disabled employee.

101 H. Rpt. 485 (Part III)(May 15, 1990)(emphases added). As one sponsor noted, "[t]he essential function requirement focuses on the desired result rather than the means of accomplishing it."

136 Cong. Rec. 11,451 (1990)(comments of Representative Hamilton Fish, Jr.). "The underlying premise of [Title I] is that persons with disabilities should not be excluded from job opportunities

unless they are actually unable to do the job." 101 H. Rpt. 485 (Part III)(May 15, 1990)(emphasis added). In an example provided by the Committee, "in a job requiring the use of a computer, the essential function is the ability to access, input, and retrieve information from the computer. It is not 'essential' that the person be able to use the keyboard or visually read the information from a computer screen." *Id.*

The Third Circuit adhered to this approach in *Skerski v. Time Warner Cable Co.*, 257 F.3d 273 (3rd Cir. 2001). There, the plaintiff was a cable installer and technician. *Skerski*, 257 F.3d at 275. His job included climbing poles, as well as work that did not require climbing. *Id.* at 276. Skerski developed an anxiety disorder that precluded him from continuing to climb. *Id.* at 275. He was initially accommodated by adjusting his work so that he was not required to climb. *Id.* at 276. After a new supervisor began, Skerski was told that that accommodation would end. *Id.* He asked for the use of a bucket truck to enable him to do the elevated work without climbing, but this request was denied. *Id.* at 277.

In analyzing the question of whether climbing was an essential function of Skerski's job, the Third Circuit observed that climbing was not listed as an essential function in Skerski's job description and that that omission supported the idea that "one could view climbing as a useful skill or method

to perform the essential functions of the job but that it is not itself an essential function of the installer technician position." *Id.* at 280. Reversing the grant of summary judgment, the court noted that the use of a bucket truck could be another means - a reasonable accommodation - for performing elevated work. *Id.* at 286.

By focusing on the result to be achieved, rather than the manner of performance, the ADA takes into account the legitimate needs of the employer and the needs of a worker whose disability requires accommodation.

B. The Manner In Which An Employee Performs a Particular Duty Should Only Be Considered Essential Where the Manner and Substance Are One and the Same

The ADA provides that, where an individual can perform the duties of the position, but requires a reasonable accommodation to do so, that individual is nevertheless qualified. 42 U.S.C. § 12111(8).

In *Nelson v. Thornburg*, decided under the Rehabilitation Act,¹ the court distinguished between the manner in which blind social workers performed their jobs, with accommodations, and the essential functions of the position:

The capacity to read without aid is certainly helpful in carrying out the duties of the job, as are the abilities to hear or to move about without help. The

¹ 29 U.S.C. § 794. Claims under the Rehabilitation Act and Title I of the ADA are judged by the same standards. *Myers v. Hose*, 50 F.3d 278, 281 (4th Cir. 1995).

essential qualifications for this career, however, are dedication to the work, sufficient judgment and life-experience to enable one accurately to assess the legitimate needs of clients, and the ability to work effectively under the pressure of competing demands from clients and supervisors.

Nelson, 567 F. Supp. 369, 373 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3rd Cir. 1984). In *Nelson*, the essential functions (e.g., serving clients) were separable from the ability to read without the use of an aid.

In another case decided under the Rehabilitation Act, the Fifth Circuit framed the essential functions question as whether the employee's disability created a "surmountable barrier." *Prewitt v. U.S. Postal Serv.*, 662 F.2d 292, 305 (5th Cir. 1981). If the employee can perform the job with an accommodation, then the disability poses a surmountable, rather than an insurmountable barrier, and the employer must provide an accommodation so long as it would not impose an undue hardship. *Id.* at 307-09. The Fifth Circuit's formulation in *Prewitt* is consistent with the language of the ADA, as well as Congressional intent and the Equal Employment Opportunity Commission ("EEOC") Guidance that the essential functions inquiry must "focus on the *purpose* of the function and the *result* to be accomplished[] rather than the manner in which the function presently is performed." EEOC, *A Technical Assistance Manual on the Employment Provisions (Title I) of the ADA*, at II-

16 (Jan. 1992)(emphases in original); see also 101 H. Rpt. 485 (Part III).

The EEOC, tasked with implementing Title I of the ADA and providing interpretive guidance, has articulated the separation between purpose and manner in the driving context as follows:

[I]t is important to determine whether driving is the objective to be accomplished or an incidental means for accomplishing the true objective. For example, driving could be an essential function for a person whose job requires that he deliver water pipes. This is especially true where others load and unload the pipes and this individual's function is simply to drive the truck to make the delivery.

But, driving may not be an essential function for an engineer who must inspect pipes around the district. Engineers generally may drive themselves, but the essential function is to inspect the pipes. Driving is incidental to this job function - the means to get to the site where pipes need to be inspected. The critical function is using one's experience, skills, and expertise to inspect pipes, evaluate the need for repairs or replacements, to bring in other skilled workers if necessary, and to order appropriate repairs or replacements.

EEOC Office of Legal Counsel, Informal Op., ADA/Drivers

License/Essential Functions/Reasonable Accommodation (June 21, 2006), *available at*

http://www.eeoc.gov/eeoc/foia/letters/2006/ada_license_function_accommodation.html

Consistent with the ADA and its implementing regulations and EEOC Guidance, it is improper to limit the manner of performing an essential function in a way that excludes a person

with a disability, unless the manner and function are inseparable.

C. The ADA Expressly Contemplates that an Accommodation May Include Reliance on an Assistant, So Long as The Employee Carries Out the Essential Functions

The ADA defines "reasonable accommodation" as including:

job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, *the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.*

42 U.S.C. §12111(9)(B)(emphasis added). Thus, the statute specifically and expressly contemplates the availability of qualified readers, interpreters, and other similar accommodations. The EEOC Guidance also states that "other accommodations could include . . . making employer provided transportation accessible" and "[p]roviding personal assistants, such as a page turner for an employee with no hands." 29 C.F.R. pt. 1630 app. § 1630.2(o). Consistent with these provisions, the Fourth Circuit affirmed an award of punitive damages where an employer failed to provide an interpreter for a deaf employee. *EEOC v. Fed. Express Corp.*, 513 F.3d 360, 377 (4th Cir. 2008).

In *Nelson, supra*, the court held that the employer was required to accommodate blind social workers who required readers, as well as other technological accommodations, in order

to fulfill the essential functions of their jobs. *Nelson*, 567 F. Supp. at 382.² There, the assistants facilitated the work being performed by the social workers, but the social workers performed the core duties. By contrast, an employer would not be required to provide an assistant to a blind security guard whose job was to check identification cards because "the assistant would be performing the job for the individual with a disability rather than assisting the individual to perform the actual job." 29 C.F.R. pt. 1630 app. § 1630.2(o).

Similarly, in *Coleman v. Darden*, 595 F.2d 533 (10th Cir. 1979), decided under the Rehabilitation Act, the Tenth Circuit observed that it would be reasonable to provide a reading assistant to an employee working as a law clerk or staff attorney where the essential functions required "specialized training and skills not possessed by the ordinary reader," while it would not be reasonable to do so with regard to a research analyst, whose essential duties were "in the nature of evidence preparation and data interpretation." *Coleman*, 595 F.2d at 540.

² While acknowledging the cost involved in providing readers, the *Nelson* Court noted that "Congress recognized that failure to accommodate handicapped individuals also imposes real costs upon American society and the American economy" and concluded that "[w]hen one considers the social costs which would flow from the exclusion of persons such as plaintiffs from the pursuit of their profession, the cost of accommodation -- a cost which seems likely to diminish, as technology advances and proliferates -- seems, by comparison, quite small." *Nelson*, 567 F. Supp. at 382.

The distinction, again, was whether an assistant, provided as an accommodation for the employee's disability, would be doing the job *for* the employee with the disability.

In sum, where the manner of performance is separable from the core duties of the position, a worker with a disability must be permitted to perform the duty in a manner that accounts for the worker's disability. In evaluating essential functions, the focus must remain on the results rather than the method. If an accommodation would allow an employee to perform the essential functions - even where the accommodation may include the assistance of a third person, so long as the third party is not actually performing the function - the employee is a "qualified individual" under the ADA.

II. Whether Driving or Travel Was an Essential Function of Plaintiff's Job is a Question of Fact.

In this case, the parties are not disputing that, to do her job, Ms. Stephenson had to visit physicians' offices. In other words, the dispute here is not whether that requirement is essential; the dispute is what that requirement is called. Plaintiff calls it travel; Defendant calls it driving. The factual question, then, is whether the manner in which Ms. Stephenson went to physicians' offices matters.³

³ The ADA regulations provide a non-exclusive list of factors that may be considered in determining whether a duty is an essential function. 29 C.F.R. §1630.2(n)(2)-(3). This brief does

What is or is not an essential function "is a factual determination that must be made on a case by case basis," 29 C.F.R. pt. 1630 app. § 1630.2(n), and is not generally appropriate for resolution on a motion for summary judgment. *Samson v. FedEx*, 746 F.3d 1196, 1202-03 (11th Cir. 2014); see also *Supinski v. UPS*, 413 Fed. Appx. 536 (3rd Cir. 2011)(unpublished)(summary judgment in an employer's favor can only be upheld if "reasonable jurors could not but find" that a task was an essential function of the position).

Whether driving or travel was an essential function of Ms. Stephenson's position is critical because that factual determination necessarily informs whether an accommodation would be required. If driving is determined to be essential, Pfizer would not be required to reallocate that job duty. 29 C.F.R. pt. 1630 app. § 1630.2(o). If travel was essential, Ms. Stephenson could perform that function and all of her other job duties with an accommodation. 42 U.S.C. § 12111(8).

As noted above, the inquiry in determining whether a function is essential focuses on the purpose or results to be achieved, and not on the manner of performance. 101 H. Rpt. 485 (Part III)(May 15, 1990). The job descriptions submitted by Plaintiff, which were in use prior to her request for

not address the weighing of those factors, but focuses instead on the question of the role of the manner of performance in defining essential functions.

accommodation, focused on the capacity of the employee to promote Pfizer products, cultivate relationships with physicians, and continue to self-improve. (J.A. 539-40, 546-47, 550-51.) These job descriptions make no mention of driving or the manner in which she was to make her visits. (J.A. 539-40, 546-47, 550-51.)

Thus, it appears that driving was not the stated ends to be achieved, but a means. A driver would not have been traveling in place of Ms. Stephenson; he or she would have been facilitating Ms. Stephenson's ability to travel, in much the same way that readers facilitated the work of social workers in *Nelson, supra*, and law clerks in *Coleman, supra*. *Nelson*, 567 F. Supp. at 382; *Coleman*, 595 F.2d at 540. The ADA explicitly provides for reliance on such assistants to enable workers with disabilities to maintain their employment. 29 C.F.R. pt. 1630 app. § 1630.2(o).

The District Court cited *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683 (4th Cir. 1997), for the proposition that an employer is not required to hire another person to perform an essential function. *Stephenson, slip op.* at 14. There, the plaintiff, who had epilepsy, was unable to provide appropriate security if he were working alone and had a seizure. If the employer had hired a security guard to protect the store, that individual would have been taking over the essential function of

security from the plaintiff, a result that would be at odds with the ADA regulations. *Martinson*, 104 F.3d at 687. Here, the use of a driver or other means of travel accommodation would not be substituting for Ms. Stephenson in terms of her travel to physicians' offices; the accommodation would instead be facilitating her performance of the essential functions of her job, which is precisely what the ADA envisions.

The question of whether driving, as opposed to the ability to travel, was an essential function of Ms. Stephenson's job is a factual question. Put another way, the question is whether Ms. Stephenson faces a surmountable or insurmountable barrier to doing her job as a sales representative.⁴ See *Prewitt, supra*, 662 F.2d at 205. She produced evidence that (1) the purpose of the job was wholly divisible from the ability to drive, (2) her job description emphasized salesmanship and people skills, and (3) she is in fact able to travel and otherwise perform her job so long as she is provided an accommodation. Summary judgment was improper because, in the light most favorable to Plaintiff,

⁴ Although the issue of reasonable accommodations is intertwined with the question of essential functions, this brief does not address the question of the reasonableness of any particular accommodation. Generally, whether a requested accommodation is reasonable depends on whether it would pose an undue hardship, determined with reference to a number of factors, including the overall resources of the employer. 42 U.S.C. § 12111(10)(B); see also 29 C.F.R. pt. 1630 app. § 1630.15(d) ("[T]o demonstrate that the cost of an accommodation poses an undue hardship, an employer would have to show that the cost is undue as compared to the employer's budget.").

while travel is necessary, driving is not. See *Tolan v. Cotton*, ___U.S.___, ___, 134 S. Ct. 1861, 1866-68, 188 L. Ed. 2d 895, 901-03 (2014) (emphasizing that District Courts are not to adjudicate facts that are the province of a jury).

III. Whether a Function is "Essential" Must Be Determined on the Facts of a Particular Case and Not on the Basis of Policy Concerns.

In adopting Pfizer's contention that driving was an essential function of Ms. Stephenson's job, the District Court anticipated the "consequences of a different conclusion" with regard to "a vast array" of other sales representative positions in other contexts. *Stephenson, slip op.* at 12-13 (internal quotations and citation omitted).

According to Plaintiff's evidence, this same consideration was a factor in Pfizer's decision not to afford her an accommodation. (J.A. 481 ¶ 51; J.A. 518-19 ¶ 16.) Specifically, Ms. Stephenson's supervisor testified that in early discussions about Ms. Stephenson's accommodation request Pfizer officials were "dismissive" and focused on not "setting a precedent." (J.A. 518-519 ¶ 16.) Ms. Stephenson was told that "not everyone is Whitney Stephenson," meaning that Pfizer's concern about "setting a precedent" related to the potential that it would not want to have to later accommodate a sales representative who was not as high a performer as Ms. Stephenson. (J.A. 481 ¶ 51.) However, whether Ms. Stephenson was entitled to a reasonable

accommodation must be made on the facts of her case alone and not with regard to a concern for "setting a precedent." Nothing in the ADA permits employers to evade their obligation to provide reasonable accommodations for an employee to perform essential functions of a position based on fears about having to accommodate other employees in similar circumstances that might arise in the future.

The determination of essential functions, what may constitute a reasonable accommodation, and whether an accommodation would be an undue hardship, are made on a case by case basis. 29 C.F.R. pt. 1630 app. § 1630.2(n). To do otherwise would result in the kind of broad exclusion that the ADA was meant to rectify, and would contravene the Congressional intent to "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. §12101(b)(2).

CONCLUSION

To serve the fundamental purposes of the ADA, the factual determination of essential functions must be an assessment of the core activities required of an employee. The District Court's opinion undermines a central purpose of the ADA not only because it defines essential functions incorrectly, but also because it takes the factual determination from the jury. The Fourth Circuit should therefore reverse the grant of summary

judgment on the issue of the essential functions of Plaintiff's job.

Respectfully submitted,

DISABILITY RIGHTS NORTH CAROLINA

/s/ Lisa Grafstein

Lisa Grafstein

lisa.grafstein@disabilityrightsnorthcarolina.org

North Carolina Bar No. 22076

Katherine Slager

katherine.slager@disabilityrightsnorthcarolina.org

North Carolina Bar No. 46404

3724 National Drive, Suite 100

Raleigh, North Carolina 27612

Telephone: (919) 856-2195

Facsimile: (919) 856-2244

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

 this brief contains 3,911 words, excluding the parts
 of the brief exempted by Fed. R. App. P.
 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

 this brief has been prepared in a mono-spaced typeface
 using Microsoft Word in 12 point Courier New.

/s/ Lisa Grafstein
Lisa Grafstein

Dated: March 9, 2015

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 9, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Robert Elliot
Daniel Lyon
Elliot Morgan Parsonage, P.A.
426 Old Salem Road
Winston-Salem, NC 27101

Attorneys for Appellant

Stephanie Lewis
Jackson Lewis LLP
One Liberty Square
55 Beattie Place, Suite 800
Greenville, SC 29601

Attorneys for Appellee

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

/s/ Karen R. Taylor
Karen R. Taylor
GIBSON MOORE APPELLATE SERVICES, LLC
421 East Franklin Street
Suite 230
Richmond, VA 23219