No.

IN THE

Supreme Court of the United States

ADONIA K. SMITH, PETITIONER,

v

LOUDOUN COUNTY PUBLIC SCHOOLS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DENNIS P. DERRICK
Counsel of Record

7 Winthrop Street
Essex, MA 01929-1203
dennisderrick@comcast.net
(978)768-6610

CURRY & TAYLOR ♦ 202-393-4141

QUESTION(S) PRESENTED

1. Does the "motivating factor" test of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) as codified in Title VII apply to petitioner's "mixed motive" claim of unlawful discharge under the Americans with Disabilities Act?

2. Should this Court resolve the split of authority among the Circuits about whether a mixed motive plaintiff seeking relief under the ADA for wrongful discharge must prove but-for causation or may prove causation by showing only that discriminatory animus"played a motivating part" in her termination?

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The unpublished opinion of the United States Court of Appeals for the Fourth Circuit in *Adonia K. Smith v. Loudoun County Public Schools*, Docket No. 16-2435, decided and filed on March 1, 2018, and reported at ___F. App'x___; 2018 WL 1128697; 2018 U.S. App. LEXIS 5190 (4th Cir. 3/1/2018), affirming the District Court's order granting summary judgment to respondent as to petitioner's claims for retaliatory termination and wrongful discharge, is set forth in the Appendix hereto (App.1-9).

The unpublished Memorandum Opinion of the United States District Court for the Eastern District of Virginia, Alexandria Division, in *Adonia K. Smith v. Loudoun County Public Schools*, Civil Action No. 1:15-cv-956 (JCC/TCB), decided and filed February 18, 2016, and reported at 2016 WL 659786; 2016 U.S. Dist. LEXIS 19895 (E.D. Va. 2/18/2016), denying summary judgment to respondent as to petitioner's reasonable accommodation claim and granting summary judgment to respondent as to petitioner's claims for retaliatory termination and wrongful discharge, is set forth in the Appendix hereto (App. 10-49).

The unpublished order of the United States Court of Appeals for the Fourth Circuit in *Adonia K. Smith v. Loudoun County Public Schools*, Docket No. 16-2435, decided and filed on March 27, 2018, denying petitioner's timely filed petition for Panel Rehearing, is set forth in the Appendix hereto (App. 50).

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit affirming the District Court's order granting summary judgment to respondent as to petitioner's claims for retaliatory termination and wrongful discharge, was entered on March 1, 2018; and its order denying petitioner's timely filed petition for Panel Rehearing was filed on March 27,2018 (App.1-9;50).

This petition for writ of certiorari is filed within ninety (90) days of March 27, 2018. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. § 2000e-2(m)[Title VII of the Civil Rights Act]:

Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-5(g)(2)(B):

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

....

(2)

....

(B) On a claim in which an individual proves a violation under section 2000e–2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e–2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 12111(9): [Section 101 of the Americans with Disabilities Act of 1990 (the ADA)]:

(9) Reasonable accommodation. The term "reasonable accommodation" may include—
(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
(B) 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. § 12112(a) & (b)(1) & (5)(A) [Section 102 of the Americans with Disabilities Act of 1990 (the ADA)]:

(a) General rule. -No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment**.**
(b) Construction

As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

....

(5)

(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity....

42 U.S.C. § 12114(c)(4)[the ADA]:

(c) Authority of covered entity. A covered entity—

....

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee....

42 U.S.C. § 12117[the ADA]: Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e–4, 2000e–5, 2000e–6, 2000e–8, and 2000e–9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

42 U.S.C. § 12133[the ADA]: Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

STATEMENT

Petitioner Adonia K. Smith ("petitioner") is profoundly deaf from birth. She hears nothing, cannot speak and cannot read lips. Her primary language is American Sign Language ("ASL") which is not a form of English but rather a visual language with its own syntax and grammar. Petitioner subsequently learned to read and write English and it became her second

language as she earned a doctorate degree in education and worked as an educator of the deaf in an elementary school for more than five years.

In August of 2007, respondent Loudoun County Public Schools ("respondent") hired petitioner as a special education teacher at Frances Hazel Reid Elementary School, promising that she would be working with other teachers who were fluent in ASL and who would help her communicate with others at the school. For the first two years of her employment, petitioner worked in the same classroom with a colleague (Pat Sullivan) who was fluent in ASL and an instructional assistant (Michelle Long) who was nearly fluent in ASL, both helping petitioner communicate with other teachers and school administrators.

Armed with ASL interpreters, petitioner received outstanding performance reviews.

Beginning in the fall of 2007, respondent assigned petitioner to work with several deaf children, a task which included serving as case manager for two profoundly deaf children with minimal language skills and cognitive disabilities which made it difficult for them to learn. By the spring of 2009, however, petitioner had made significant progress with these children and she received favorable performance evaluations from respondent for her work, e.g., "[s]he motivate[s] the students and encourage[s] them to do their best;" she is a "compassionate[,] dedicated educator;" and she is "very responsive to the child's individual learning style and unique needs."

Fellow teachers observed that petitioner's students blossomed under her instruction, that she devoted many hours of one-on-one time with each

student developing their ASL communication skills and that she made "phenomenal progress" with those students with minimal language skills and cognitive disabilities. The students' parents agreed, seeing "amazing" progress with their children as the result of petitioner's commitment to ASL, her weekly individualized education plan (IEP) reports and her quarterly report cards.

Petitioner repeatedly requests a daily ASL interpreter to help her communicate with co-workers.

In the spring of 2009, respondent urged petitioner as a special education teacher to improve her "collaboration" with school administrators and with general classroom teachers at the school, i.e., teachers who had no hearing disability and did not know ASL. In order to address this request, petitioner determined that she needed access to an ASL interpreter on a daily basis and in March of 2009 she requested this accommodation from respondent. As she wrote, daily access to an ASL interpreter would mean that "[c]ommunication...for everyone with me in school will be markedly improved."

With respondent providing no immediate access to an ASL interpreter for petitioner, she again requested this accommodation on April 13, 2009, in an e-mail to the school's principal; and she repeated this request on May 3, 2009, May 4, 2009, August 27, 2009, and in October of 2009, in e-mails to her union representatives who had permission to act on her behalf with respondent on this issue. On October 7, 2009, petitioner met with respondent's administrator (Mary Kearney) and again requested an ASL interpreter, full or part-time, on a daily basis, to help

her communicate with co-workers and school administrators. On October 26, 2009, petitioner wrote the school's new principal (Brenda Jochems) and again requested this accommodation "in order to avoid misunderstandings" between her and her co-workers as well as with school administrators.

Respondent denies petitioner's requested accommodation and removes other accommodations.

By this time, however, respondent had transferred the three co-employees at the school who were fluent or nearly fluent in ASL (Michelle Long, Patrick Sullivan and Sarrea DeSuza), leaving petitioner without any co-workers who could interpret for her. Making matters worse, on November 3, 2009, respondent formally denied all of petitioner's prior requests for a daily ASL interpreter, full or part-time. As respondent wrote, it "will give no further consideration to hiring an interpreter to shadow you every day of the school year, full or part-time." Tacitly acknowledging petitioner's need for some kind of assistance in daily interpretation, respondent promised to install within the next 60 days a Video Remote Interpreting System (VRI) for her impromptu interpreting requests. But this system was never installed during petitioner's employment.

Compounding its denial of petitioner's request for a full or part-time daily ASL interpreter and its transfer of the only co-workers who could interpret for her, respondent in the fall of 2009 removed petitioner's video relay phone----a free device allowing deaf ASL-speakers to communicate with hearing individuals by phone----from her classroom without explanation, storing it in a locked room and refusing to give

petitioner a key. Petitioner added the return of her video relay phone to her previous accommodation requests.

Thus petitioner was left with no ability to communicate with her colleagues or supervisors except in formal meetings where she had to request an ASL interpreter several days in advance. Yet even this accommodation was inadequate as respondent failed to provide an interpreter about 40 per cent of the time and, when it did, the interpreters provided were not qualified to interpret accurately the content shared during the meetings; they were often co-workers with very minimal sign language skills who were "unintelligible," frustrating petitioner's efforts to understand and communicate with her colleagues. Petitioner made multiple complaints about these problems to respondent but nothing changed. Without access to a daily interpreter, petitioner was relegated to primitive, ineffective methods of communicating with her colleagues such as white boards, post-it notes and texting on her Blueberry, a slow and arduous process.

Respondent terminates petitioner for reasons founded in large part on its own refusal to provide the requested accommodations to petitioner.

Besides denying petitioner's requests for accommodations for her hearing disability and removing those already in place, respondent's administrators in the fall of 2009 began a campaign of scrutinizing excessively petitioner's once-praised work performance, questioning her lesson plans, reprimanding her behavior, and ignoring her attempts to interact with them, even treating her with disdain and hostility.

On November 20, 2009, respondent placed petitioner on its "December List," a list of those employees in danger of being terminated, without evaluating her classroom performance as required by its own policies. Shortly thereafter in January of 2010, school principal Jochems told petitioner for the second time that if she thought she could not do her job without an interpreter, she should resign. Petitioner refused to quit citing her established track record of helping deaf children.

On February 22, 2010, Jochems gave petitioner a mid-year performance of "unsatisfactory," claiming----after respondent had repeatedly denied petitioner an interpreter to help her communicate with her colleagues----that she "has failed to develop a positive rapport with colleagues" and that her students were making little progress in their reading proficiency. On March 1, 2010, at Jochems' urging, respondent told petitioner that it would not renew her contract for the following year; and on April 30, 2010, it again informed petitioner her contract would not be renewed. Petitioner was thereafter terminated on June 22, 2010.

According to respondent, the primary reason for petitioner's termination was her "strained professional relationships with the special education team that has caused undue stress and hurt feelings." It also claimed that she did not "exhibit a cooperative approach in the performance of professional duties and interactions with colleagues" and that she has "failed to develop a positive rapport with colleagues." All of these asserted reasons for her discharge stemmed from her inability to communicate effectively with her co-workers in the absence of an ASL interpreter.

Moreover, each of the three letters of reprimand petitioner received from the school's administrators

during the year was founded on her inability to communicate effectively with those administrators because of the absence of an ASL interpreter and the misunderstandings which ensued from their interactions. As petitioner later testified, her relationships with her co-workers and administrators were strained "because I had no adequate communication access in order to develop those relationships."

Petitioner's litigation.

After respondent formally denied her prior requests for a daily ASL interpreter on November 3, 2009, petitioner submitted a charge of discrimination to the EEOC in January of 2010 which due to administrative error it did not receive until April 1, 2010 (App. 21). On April 2, 2010, petitioner filed a second EEOC charge that respondent terminated her because of her disability (*Id.*). While these charges were under investigation, petitioner in March of 2014 added a claim alleging that respondent had retaliated against her for making her accommodation requests (App. 22). On June 3, 2015, EEOC issued a no-action letter (App. 22-23).

Petitioner then brought suit against respondent in the federal district court for the Eastern District of Virginia, Alexandria Division, alleging that it violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq*. ("ADA"), when it failed to reasonably accommodate her disability, wrongfully discharged her on account of that disability, and retaliated against her for making reasonable accommodation requests (App. 23;47).

On January 8, 2016, respondent moved for summary judgment on all petitioner's claims and on February 18, 2016, the district court, Cacheris, J., issued a memorandum opinion and order granting in part and denying in part summary judgment for respondent (App. 10-49). It first determined that a triable fact issue existed for trial about whether respondent denied petitioner reasonable accommodation in refusing to provide her full or part-time access to an ASL interpreter on a daily basis and in denying her an in-classroom video relay phone (App. 29-35).

As the court reasoned, an essential function of petitioner's job was "some form of impromptu verbal communication" with her fellow teachers in completing her IEP duties, developing lesson plans and communicating with administrators; and her "performance seems to have been better when she had access to other teachers who could act as informal ASL interpreters" (App. 31-32). Thus a jury could find that petitioner's request for a daily ASL interpreter and an in-classroom video relay phone was reasonable and that respondent's refusal to provide same was actionable under the ADA (App. 32;33-35).

As to the claim of retaliatory discharge, the district judge, employing the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) because he saw no direct or indirect evidence of retaliatory termination, assumed *arguendo* that petitioner had set forth a *prima facie* case of discrimination (App. 35-36;48). However, she failed to show that the several legitimate, nondiscriminatory reasons proffered by respondent for her discharge were a pretext for discrimination (App. 36-41). That is, her evidence "did not discredit the honesty of her

employer's belief in her poor performance, but merely shows that some parents and colleagues join [her] in disagreeing with [respondent's] assessment..." (App. 38;40).

Thus as to the retaliation claim, Judge Cacheris concluded that petitioner "has not created a genuine dispute that the denial of a reasonable accommodation was *the* but-for cause of the poor performance leading to her termination" (App. 41) (emphasis supplied). As he saw it, "[s]everal of [petitioner's] citations of poor performance relate to actions that are completely independent of her lack of access to impromptu verbal communication or a video relay phone in her class, including removing state testing binders from the school, failing to submit those binders in a timely fashion, and noncompliance with sick leave request procedures" (*Id.*).

Addressing the wrongful discharge claim, the lower court again employed the *McDonnell Douglas* framework together with the same but-for causation analysis and determined that petitioner had not shown as an element of her proof that at the time of her discharge, she was performing her job at a level that met respondent's legitimate expectations (App. 43-45). As it found, respondent adduced various negative reviews of petitioner's job performance in 2010, unmet by any evidence petitioner proffered, and this was fatal to her claim (App. 44). But even if petitioner satisfied her *prima facie* case, for the reasons already identified in its retaliation analysis, "her claim would fail because she cannot refute [respondent's] legitimate nondiscriminatory reasons for [her] termination" (App. 44-45).

The surviving claim against respondent for its failure to provide petitioner reasonable accommodation

was twice tried before a jury in the district court, the first ending in a mistrial and the second resulting in a jury verdict for petitioner in the amount of $310.00 (App. 8). The jury unanimously agreed that respondent not only discriminated against petitioner on the basis of her disability by denying her a daily ASL interpreter but also failed to make a "good faith effort...[to] provide [petitioner] with an equally effective opportunity at the work place."

Upon the entry of a final judgment on this claim, petitioner noticed her appeal from the grant of summary judgment on her retaliatory termination and wrongful discharge claims (App. 1-9). On March 1, 2018, the court of appeals in a *per curiam* decision unanimously affirmed these rulings "for the reasons stated in the district court's thorough opinion" (App. 9).

On March 27, 2018, the court of appeals denied petitioner's timely filed petition for Panel Rehearing (App. 50).

REASONS FOR GRANTING THE PETITION

1. Having Adduced Direct Evidence That Respondent Violated The ADA When It Discharged Her Because Of Her Hearing Disability, Petitioner Was Entitled To Have Her Claim Decided Under The "Motivating Factor" Test Of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) As Codified in Title VII.

Introduction.

Upon summary judgment, petitioner adduced strong direct and circumstantial evidence----later confirmed by a jury verdict----that respondent failed to

provide petitioner with the reasonable accommodation of an ASL interpreter for her duties as a teacher and that as a direct result she was unable to collaborate or communicate effectively with her co-workers and school administrators in the workplace. The summary judgment materials further showed that respondent terminated her employment for the primary reason that she had failed to communicate effectively with her co-workers and school administrators, *the very inadequacy the requested accommodation was intended to address*. Thus respondent's failure to offer petitioner reasonable accommodation for her hearing disability created the very conditions which caused her discharge. The record accordingly showed that respondent discharged petitioner because of her hearing disability.

Because of this very strong direct and circumstantial evidence connecting respondent's failure to accommodate with the reasons why petitioner was discharged, there was direct proof that discriminatory animus towards petitioner's disability "played a motivating part" in her termination and she was therefore entitled to proceed under the "mixed motive" analysis as set out in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 261-279 (O'Connor, J., concurring) (1989). Under this "mixed motive" framework and at the summary judgment stage, a genuine issue of material fact for trial was *already* created on this record whether respondent's reliance on an illegitimate criterion was a motivating factor in its decision. *Id.* at 258;265-266.

And because "mixed motive" causation controls, i.e., petitioner could prevail at trial even if her discharge resulted from both permissible and impermissible considerations, it makes no difference at the summary judgment stage whether respondent

could show that it would have made the same decision even if it had not taken her disability into account. This burden of persuasion borne by respondent under *Price Waterhouse* is one for the factfinder at trial, *not* at the summary judgment stage. *Id.* at 265-266. As the court in *Fabela v. Socorro Independent School Dist.*, 329 F.3d 409, 418 (5th Cir. 2003) explained,

> in the mixed motive context, the fact that the [employer] has supplied and supported a legitimate reason for discharging [the plaintiff] merely means that the employer, too, has met its requirement to show that judgment as a matter of law cannot be rendered against it, *and the issue is ripe for trial*.

Id. citing *Fierros v. Texas Dept. of Health*, 274 F.3d 187, 195 (5th Cir. 2001) (emphasis supplied).

Indeed, after *Price Waterhouse v. Hopkins*, 490 U.S. at 242-247, and *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100-101 (2003), where a plaintiff prosecutes a mixed-motive case under the ADA where both legitimate and non-legitimate reasons may have motivated the employer's adverse action, she can survive the employer's motion for summary judgment by showing through either direct or circumstantial evidence that the employer took an adverse employment action against her and that her disability "was *a* motivating factor." 42 U.S.C. § 2000e-2(m) (emphasis supplied). See *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008).

This burden is less onerous than the *McDonnell Douglas* burden-shifting framework because petitioner need not eliminate all possible legitimate reasons for the employer's actions; she can prevail "simply by

showing that the defendant's consideration of a protected characteristic such as her disability 'was *a* motivating factor for [its] employment [decision], *even though other factors also motivated the [decision]*.'" *White*, 533 F.3d at 401 quoting 42 U.S.C. § 2000e-2(m) (emphasis in original). Thus the *McDonnell Douglas* framework is *not* required at the summary judgment stage with mixed motive claims and

> [t]he only question that a court need ask in determining whether a plaintiff is entitled to submit h[er] claim to a jury in such cases is whether the plaintiff has presented "sufficient evidence for a reasonable jury to conclude by a preponderance of the evidence, that '[her disability] was a motivating factor for'" the defendant's adverse employment decision.

Id. quoting *Desert Palace*, 539 U.S. at 101 (quoting 42 U.S.C. § 2000e-2(m)). See *Ondricko v. MGM Grand Detroit, LLC*, 689 F.3d 642, 449 (6th Cir. 2012).

Instead of employing this approach, however, the district court (and the court of appeals) overlooked this direct evidence of discrimination and wrongly (1) imposed a "but-for" causation standard on petitioner's ADA claim for wrongful discharge, forcing her to show at summary judgment that her termination would not have occurred without considering her disability, a much more difficult burden when an employer like respondent asserts that it would have discharged petitioner for poor performance alone; and (2) applied *McDonnell Douglas'* burden-shifting pretext framework to her claims, forcing petitioner to show through circumstantial evidence and inference that

respondent's other reasons for her discharge were a pretext for invidious discrimination.

Petitioner submits that because of the persuasive force of her direct and circumstantial proof that discriminatory animus towards her disability "played a motivating part" in her termination, her claim of unlawful discharge under the ADA deserved the "mixed motive" analysis set out in *Price Waterhouse* without any resort to a but-for causation analysis or the *McDonnel Douglas* burden-shifting framework; that it should have survived summary judgment as a genuine issue of material fact to be decided by a jury at trial; and that under this "mixed motive" analysis, respondent should have been put to the burden at trial of demonstrating more likely than not that its decision to terminate petitioner would have been the same without any consideration of her disability.

In addition, petitioner submits that the "motivating factor" test of *Price Waterhouse* which addressed discrimination claims under Title VII should apply to petitioner's "mixed motive" claim under the ADA because the ADA makes it illegal to discriminate "on the basis of disability," a similar status-based protection to Title VII's prohibition against discrimination "because of race, color, religion, sex, sex, or national origin," 42 U.S.C. § 2000e–2(a)(1); and because the ADA expressly provides that the remedies available under Title VII are available in ADA actions. 42 U.S.C. § 12117(a). Accordingly, the ADA should incorporate the "motivating factor" test of *Price Waterhouse* and Title VII for a mixed motive case like petitioner's and the Court's decisions in *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013) and *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) do not undermine this conclusion.

Discussion.

The ADA prohibits an employer from discriminating against an individual "on the basis of disability" who, with reasonable accommodation, can perform the essential functions of a job, unless the employer can demonstrate that the accommodation would impose undue hardship on the operation of the employer's business. See 42 U.S.C. §§ 12112(a); (b)(5)(A). This rule applies to the employer's failure to make reasonable accommodations and to the discharge of disabled employees. *Id.* There is no dispute on this record that respondent knew of petitioner's hearing disability both when she was hired and at the time of its decision to terminate her employment. Absent undue hardship, then---and the courts below found none here(App. 32-33)---respondent had "an affirmative obligation" to make reasonable accommodation for this known disability. *School Board of Nassau County, Florida v. Airline*, 480 U.S. 273, 288-289 n.19 (1987).

Petitioner claimed not only that respondent unlawfully failed to accommodate her disability but also that such failure led to her unlawful discharge. Unlike a simple failure to accommodate claim, an unlawful discharge claim requires a showing that the employer terminated the employee because of her disability. Often these two claims are, from a practical standpoint, the same because the consequence of a failure to accommodate is frequently an unlawful termination. *Humphrey v. Memorial Hospitals Assoc.*, 239 F.3d 1128, 1139 (9th Cir. 2001).

For the purposes of the ADA, with few exceptions like alcoholism and drug abuse, see 42 U.S.C. § 12114(c)(4), conduct resulting from the disability is considered to be part of the disability

rather than a separate basis for termination. *Id.* at 1139-1140. "The link between the disability and termination is particularly strong where it is the employer's failure to reasonably accommodate a known disability that leads to discharge for performance inadequacies resulting from that disability." *Id.* at 1140 quoting *Borkowski v. Valley Cent. School Dist.*, 63 F.3d 131, 143 (2d Cir. 1995) (failure to provide disabled teacher with an aide produced classroom management issues which led to unlawful discharge) and *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 875 (9th 1989) (failure to provide flex time for employee with migraine condition led to unlawful discharge for absenteeism). See also *Gilday v. Mecosta County*, 124 F.3d 760, 765 n.7 (6th Cir. 1997) (that un-accommodated diabetes was the reason for rudeness that precipitated discharge "might itself support [a] claim of discrimination under the Act.").

Such is the case here. Respondent discriminated against petitioner on the basis of her disability by denying her adequate interpreting services so that she could effectively interact with her colleagues and then fired her because she failed to effectively interact with her colleagues. As the summary judgment record showed---and as a jury ultimately found---respondent failed to provide reasonable accommodation to petitioner's hearing limitations by failing to provide a daily ASL interpreter, either full or part-time, forcing the un-accommodated, profoundly deaf petitioner to carry around a small dry-erase white board to try to communicate with others by writing notes on it. Even when interpreters were provided, they were unqualified 80% of the time.

In these circumstances, respondent could not legitimately expect petitioner to perform an integral

part of her job which required her to communicate effectively with her co-workers and school administrators or to develop a positive rapport with them. "Few activities are more central to the human condition than interacting with others," *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 573 (4th Cir. 2015), and accommodating petitioner with a full or part-time ASL interpreter was the very type of reasonable accommodation contemplated under the ADA and, in fact, was provided petitioner for almost the first two years of her employment when her performance flourished. See *Borkowski*, 63 F.3d at 142 ("[r]easonable accommodation may include...the provision of interpreters, and other similar actions.").

By denying her this crucial accommodation thereafter, an accommodation she needed to interact with and communicate with others in the workplace, and then terminating her for "strained professional relationships," a failure to "exhibit a cooperative approach in...interactions with [her] colleagues" and a "failure to develop a positive rapport with colleagues," respondent fired petitioner for performance inadequacies which proximately resultedfrom its own failure to accommodate her known disabilities. This is *direct* proof of discrimination toward a deaf individual on the basis of her disability and *direct* evidence of a causal relationship between her disability and her discharge. In effect, petitioner was fired for being deaf. It is akin to an employer denying a ramp to a wheel-chaired employee and then firing him for slowing down traffic in the workplace because he has to work his way up a flight of stairs.

Direct evidence of discrimination can be "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that

bear directly on the contested employment action." *Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510, 520 (4th Cir. 2006) quoting *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) (*en banc*) (citation and internal quotations omitted). *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995). It also refers to evidence which shows a strong, specific causal link between the adverse employment decision and impermissible discriminatory motives. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1044 (8th Cir. 2011) (*en banc*). Under this approach and consistent with *Desert Palace, Inc. v. Costa*, 539 U.S. at 99-100, direct and circumstantial evidence are not opposing terms; and direct evidence of a discriminatory motive can include "strong" circumstantial evidence that is not subject to a *McDonnell Douglas* analysis. 643 F.3d at 1044 quoting *Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64, ,66 (8th Cir. 1997).

By showing that respondent fired her for performance inadequacies resulting from its own failure to accommodate her known disabilities, petitioner adduced direct evidence showing this strong, specific causal link between her disability and her discharge. *Humphrey v. Memorial Hospitals Assoc.*, 239 F.3d at 1140, quoting *Borkowski v. Valley Cent. School Dist.*, 63 F.3d at 143. Upon this "convincing mosaic of discrimination," *Winsley v. Cook Cnty.*, 563 F.3d 598, 604 (8th Cir. 2009), a reasonable jury could find that respondent, after refusing to provide petitioner continuing accommodation for her known disability and then terminating her for performance inadequacies directly resulting from that disability, had discharged petitioner because of her disability.

All this is consistent with *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000), where the Court explained that regardless of the type of

evidence proffered or the plaintiff's theory of liability, "[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." *Id.* In order to demonstrate that intent, a plaintiff must produce "sufficient evidence" upon which one could find that "the protected trait...actually motivated the employer's decision...[i.e., it] must have actually played a role in the employer's decisionmaking process and had a determinative influence on the outcome." *Id.* at 141 (internal quotations omitted). Accord, *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring).

Because petitioner's direct proof of causation demonstrated an extremely close nexus between her disability and her discharge, it met *Reeves'* requirements and, as a plaintiff entitled to mixed-motive treatment under *Price Waterhouse*, she was entitled to bypass *McDonnell Douglas'* burden-shifting framework which is "of little value" when direct evidence of discrimination like this is available. *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 318 n.4 (4th Cir. 2005). *Fabela v. Socorro Independent School Dist.*, 329 F.3d at 417.

Nor was either of the lower courts warranted in employing a "but-for" causation analysis in order to assess whether petitioner's claim of wrongful discharge under the ADA should survive summary judgment. Whether characterized as"*the* but-for"causation test (as the district court employed) or "a but-for" causation analysis, neither one is appropriate for judging whether this mixed motive plaintiff seeking relief under the "motivating factor" test of *Price Waterhouse* had triable claims under the ADA which a jury should hear. Instead, Title VII's causation analysis should apply, i.e.,

petitioner could satisfy her burden of proof on causation by showing only that respondent's discriminatory animus "played a motivating part" in her termination or that her disability "was *a* motivating factor," 42 U.S.C. § 2000e-2(m), in her discharge.

Several reasons justify employing Title VII's "motivating factor" standard of causation in cases claiming wrongful discharge under the ADA. First, the "but-for" standard in practice obligates a plaintiff to resort to a conjectural inquiry into an employer's state of mind or internal motivations which an employer can succinctly reject with myriad other reasons for termination; and it is contrary to "our common sense" that "Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges." *Price Waterhouse*, 490 U.S. at 241. See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. at 191 (Breyer, J., dissenting). On the other hand, the "motivating factor" standard which requires only that the plaintiff show that her disability was one of the factors the employer took into account when deciding to terminate her, is more compatible with the remedial goals and objectives of Title VII. *Id.* at 240-242.

Second, in 1989 *Price Waterhouse* determined that the statutory language "because of" in Title VII meant that if a plaintiff proved that gender played a "motivating part" in an employment decision, along with other legitimate factors, she had established that the decision was "because of" sex in violation of Title VII, now known as the "mixed motive" analysis or the "motivating factor" standard. *Id.* at 246-247;250. Thus when Congress enacted the ADA one year later in 1990 and chose to include the "because of" language of Title VII and to cross-reference Title VII's "powers,

remedies, and procedures" set forth in 42 U.S.C. § 2000e-5(g)(2)(B) ("impermissible motivating factor"), among others, see 42 U.S.C. §§ 12117(a);12133, it intended that these two statutory schemes would be interpreted the same way. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 698-699 (1979) ("[E]valuation of congressional action must take into account its contemporary legal context."). That the ADA was subsequently amended to substitute "on the basis of" for "because of" does not disturb the conclusion that Congress in 1990 intended that the remedies of Title VII, then currently in effect and as amended as it was in1991, would be applicable to persons with disabilities. See *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312,326-331 (6th Cir. 2012) (*en banc*) (Stranch, J., concurring in part and dissenting in part).

Third, when Congress amended Title VII in 1991, it kept and clarified *Price Waterhouse's* "motivating factor" analysis and specifically provided that a plaintiff establishes an unlawful employment practice when she demonstrates that "race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). The ADA incorporated this remedial language of Title VII by force of 42 U.S.C. § 12117(a), giving ADA plaintiffs the right to recover under a "motivating factor" standard.

Finally, neither of this Court's decisions in *Gross* or *Nassar* undermines this conclusion. *Gross* determined that "but-for" causation governs claims under the Age Discrimination in Employment ("ADEA"), 29 U.S.C. §§ 621-634. 557 U.S. at 174. The ADEA, however, addresses discrimination under a different analytic rubric. It was enacted in 1967,

decades before the *Price Waterhouse* holding and without any explicit cross-references to the major substantive provisions of Title VII. The ADA, on the other hand, was conceived in 1990 by a Congress that was well aware of *Price Waterhouse* and within a legal context where the language "because of" meant that a "motivating factor" applied. Moreover, contrary to ADEA's provisions, Congress assured the application of Title VII's substantive provisions to the ADA by including cross references to Title VII in the initial ADA language. If context is everything when interpreting statutes, see *Cannon v. Univ. of Chicago*, *supra*, there is no logical or legal force for *Gross* to require a "but for" causation standard for ADA plaintiffs seeking relief for wrongful discharge.

In requiring "but-for" causation for retaliation claims under Title VII, the *Nassar* Court through Justice Kennedy made the point that there is a distinction between status-based claims based on personal traits as opposed to other types of protected employee conduct; and that when Congress amended the Civil Rights Act in 1991, it chose to have *Price Waterhouse's* motivating-factor test apply only to status-based claims rather than to claims based on retaliation. 570 U.S. at 352-353. But disability discrimination *is* a status-based claim under the ADA, a statutory regime which clearly cross references Title VII's remedies identified in 42 U.S.C. § 2000e-5, for application under the ADA. See 42 U.S.C. § 12117(a). As the *Nassar* Court wrote, this is exactly the way to accomplish making Title VII's motivating factor provision of § 2000e-2(m) apply to other discrimination claims if Congress had intended to do so. *Id.* at 354. Congress did precisely that with the ADA and *Nassar's* holding and rationale support rather than erode the

conclusion that ADA plaintiffs have the right to recover under Title VII's "motivating factor" standard for wrongful discharge.

2. The Court Should Resolve The Split Of Authority Among The Circuits About Whether A Mixed Motive Plaintiff Seeking Relief Under The ADA Must Prove But-For Causation Or May Prove Causation By Showing Only That The Discriminatory Animus"Played A Motivating Part" In Her Termination.

The practical difference between but-for causation and mixed-motive causation is significant. If mixed-motive causation controls, then an employee like petitioner has a viable claim for wrongful discharge under the ADA even if her discharge resulted from both permissible and impermissible considerations as long as her disability "was *a* motivating factor" in that decision. On the other hand, if but-for causation controls, then petitioner must prove that her termination would not have occurred without considering her disability, a more difficult burden when an employer like respondent asserts that it would have discharged petitioner for poor performance alone, regardless of her disability .

There is an acknowledged split of authority among the circuit courts of appeals about whether a mixed motive plaintiff seeking relief under the ADA must prove but-for causation or can satisfy her burden of proof on causation by showing only that the discriminatory animus"played a motivating part" in her termination. The Fourth Circuit in this case and in *Gentry v. E.W. Partners Club Mgmt. Co.*, 816 F.3d 228, 235-236 (2016); the Sixth Circuit in *Lewis v. Humboldt*

Acquisition Corp., 681 F.3d at 317-320; and the Seventh Circuit in *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 958-963 (2010), have all concluded that a plaintiff claiming wrongful discharge under the ADA must prove that discriminatory animus was the but-for cause of her termination. The remaining Circuits which have addressed the question, on the other hand, have reasoned that the motivating factor test of *Price Waterhouse* as codified in Title VII applies to a claim for wrongful discharge under the ADA. See *Lewis*, *supra*, 681 F.3d at 324-325 (Clay, J., concurring in part and dissenting in part) (listing seven Circuits); *Pinkerton v. Spellings*, 529 F.3d 513, 518 n.30 (5th Cir. 2008) (listing seven Circuits).

This Court should resolve this important and recurring question in the Circuits, as it has done with other ADA cases which have produced a division of opinion among the courts of appeals on other issues. See, e.g., *Chevron, USA Inc. v. Echazabal*, 536 U.S. 73 (2002); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

CONCLUSION

For all of these reasons identified herein, petitioner respectfully requests that this Court grant her petition for a writ of certiorari and review the judgment and decision of the United States Court of Appeals for the Fourth Circuit, remand the matter to the federal district court for the Eastern District of Virginia, Alexandria Division, for trial on the merits of her claim for wrongful discharge; or provide her with such other relief as is fair and just in the circumstances.

Respectfully submitted,

Dennis P. Derrick
Counsel of Record
7 Winthrop Street
Essex, MA 01929-1203
(978)768-6610
dennisderrick@comcast.net