

In The
Supreme Court of the United States

ADONIA K. SMITH,

Petitioner,

v.

LOUDOUN COUNTY PUBLIC SCHOOLS,

Respondent.

On Petition for Writ of *Certiorari* to the
United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION

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**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR *CERTIORARI***

COMES NOW, the Defendant/Respondent, Loudoun County Public Schools, by counsel, respectfully opposes the Petition for Writ of *Certiorari* to review the judgment and decision of the Fourth Circuit Court of Appeals and remand the matter to the trial court for a trial on the merits of Petitioner's claim for wrongful discharge. In support thereof, Respondent respectfully submits the following Brief in Opposition to Petition for Writ of *Certiorari*:

I. COUNTER STATEMENT OF THE CASE

Adonia Smith ("Smith"), who is deaf, was hired by Loudoun County Public Schools ("LCPS") in 2007 and worked at Frances Hazel Reid Elementary School ("Hazel Reid") where she taught two deaf students in a self-contained classroom. During Smith's first year of employment, numerous accommodations were put in place including American Sign Language ("ASL") interpreters, audio visual equipment, and an Ojo video interpreting device. In January 2008, at the request of Hazel Reid administrators, the LCPS employees met and developed a plan to further assist Smith in communication including the provision of a TTY, a special device that would allow her to use a telephone to communicate, a provision of written materials for training sessions, including faculty meetings, as well as continuing to provide ASL interpreters for those meetings through contract with a qualified company. A process was established

so Smith could more quickly obtain an ASL interpreter for meetings, training, parent/teacher conferences, school events, or any meetings where the need arose.

During the 2008-2009 and 2009-2010 school years, the school used the Sorenson video phone system. Two were installed at Hazel Reid to assist staff, students or parents, as needed. One was in an unlocked research classroom directly across the hall from Smith's classroom and the other in the audio/visual room off of the library. One phone had been in Smith's classroom for a time, but was later moved to another room so that two other teachers could provide instruction to homebound students. When not in use, the room was locked because it had valuable equipment, but keys were available in the administrative offices and with the principal or assistant principal.

ASL interpreters were provided to all hearing impaired employees, including Smith, on the following basis: full-time during the first two weeks of school; scheduled in-person interpreting for staff development, meetings (including parent/teacher conferences or faculty meetings); any additional scheduled training throughout the year; job evaluation meetings; Individualized Education Plan ("IEP") meetings; employer sponsored events, including team building activities; assemblies; and other school programs. Interpreters were provided upon request for any other conferences, events, meetings, and situations. Even when occasional last minute requests were made, interpreters were provided. When Smith requested a specific interpreter, the administration made every effort to obtain that person if he or she was available.

During Smith's first year of employment, she worked closely with Kathy Clark ("Clark"), another teacher in the deaf and hard of hearing program and Smith's mentor, and communicated with her through ASL and other means. Throughout her employment she worked with other employees who were able to communicate with her including Sally Bien ("Bien") and Christine Miner ("Miner"). Smith's first two years, until February/March of 2009, were uneventful in terms of her ability to collaborate and interact with co-workers. Smith's essential job functions were to teach the two deaf and hard of hearing students assigned to her; prepare and maintain the paperwork associated with special education teaching including the student's IEP; and to case manage her deaf and hard of hearing students. Both of Smith's students in 2008-2009 had IEPs. IEP requirements are governed by federal and state law, and special education students must have an IEP each year. It was Smith's job as case manager to draft the IEP after obtaining input from parents or others who worked with a child and to circulate the proposed IEP two weeks in advance of a scheduled meeting to allow for comments and changes. ASL interpreters were available upon request for these meetings. IEPs contain educational goals the teacher expects to achieve during that school year. By law, these goals must be measured on a regular basis. Quarterly reports have to be created and sent home during the school year. It was Smith's job to adequately state those goals and assess progress throughout the year.

Eileen McCartin ("McCartin") began employment with LCPS as the deaf and hard of hearing specialist for the school year 2008-2009.

McCartin provided resource support to the school including Smith and the principal in the preparation of IEPs, assisted in obtaining interpreters, and training on methodologies in the field of teaching deaf and hard of hearing students. Smith received a satisfactory performance evaluation in June 2008 signed by Liz Fye (“Fye”), principal at the time. Smith’s contract was renewed for the following year, and she continued to work at Hazel Reid in 2008-2009. In each year of Smith’s employment, she was under an annual contract. In the 2008-2009 school year, ADA accommodation responsibilities transitioned from risk management to the employee benefits division. Employee benefits organized a process for providing ASL interpreters to deaf employees upon request from WeInterpret. The interpreters were qualified ASL interpreters and met the standards required under Virginia law. In November 2008, McCartin conducted a one hour observation of Smith and prepared a positive written report. Throughout the rest of the school year, McCartin noted timeliness issues related to Smith’s completion of required paperwork and IEPs. McCartin observed that Smith lacked the required prepared lesson plans and minimal or no substitute teacher plans were available when Smith was absent.

On February 25, 2009, Fye held a mandatory meeting for all deaf and hard of hearing staff. Fye informed the teaching staff that the school system was going to start utilizing a “total communication approach” in teaching deaf and hard of hearing students. Total communication is a philosophy where a teacher will use whatever method works to communicate with a deaf or hard of hearing child. It

could include ASL, but also non-ASL sign language, spoken language, and pictures, to find the method of communication that will be most successful with each child. Smith staunchly disagreed with the total communication approach and advocated for teaching all deaf and hard of hearing students to use only ASL. She advocated deaf culture, meaning deaf people should not try to become hearing but should primarily communicate in ASL. She went so far as to complain, in writing, to her student's guardians in the hope that they too would complain to LCPS. After this staff meeting, on March 3, 2009, Smith sent a written email request to Principal Fye, following up on verbal request, to have a full-time ASL interpreter during the school day. She stated that if she had an interpreter, it would be a "big help" to her for her "interaction with school administrators, teachers, staff members, parents, and students who do not know ASL."

On March 13, 2009, the assistant principal reprimanded Smith for being "angry and hostile" to a substitute teacher when a student attempted to interpret between Smith and the substitute teacher. He also expressed disappointment that Smith had not heeded his "plea on two occasions for teamwork and professionalism."

In Fye's evaluation of Smith in June 2009, she noted areas for improvement which included lesson plans and assessments needing to be more detailed and to be completed in a timely manner. Fye commented that Smith needed to work on establishing and using a format for her plans on the computer and that it would be beneficial for Smith to keep a binder with each child's IEP, schedule, lesson plans and assessments to provide documentation on

their mastery of goals. Smith was told she needed to work on the knowledge base of the curriculum and standards of learning. The evaluation stated that Smith was continuing to learn the IEP process and needed to work on completing it in a timely manner; that she started her IEPs on time but were often not completed within the allotted time. Smith was advised to review her case manager's handbook for writing and completing IEPs. In response, Smith did not complain that she needed an interpreter, or that Fye's observations were wrong. She argued that the regular classroom teacher was unwilling to share with her and her attitude was condescending, and that she needed no assistance in doing her job.

Smith was employed in 2009-2010 in the same position, with the same job functions on another one year contract. In June 2009, Smith was provided a schedule of meetings for which ASL interpreters were pre-arranged and asked whether she had additional requests. In that school year, the school administrators changed and Ellen McGraw ("McGraw") was the assistant principal and Brenda Jochems ("Jochems") was the principal.

In the 2008-2009 school year, Smith continued to teach the same two special education deaf students as she taught the previous year and, in the fall of 2009 had another student with profound hearing loss who could also speak ("B"). B was Smith's student for a short time before transferring back to his home school with accommodations included in his IEP.

Smith was expected to have prepared lesson plans in her classroom open and on her desk for administrators to review during classroom observations. She was also expected to submit plans

to school administrators periodically throughout the school year. Lesson plans were important so that progress towards student goals could be measured pursuant to the students' IEPs. Jochems and McGraw frequently had to request Smith's lesson plans as they were not always available in the classroom or submitted for review. They worked with Smith in meetings at which ASL interpreters were in attendance and through Smith's LEA representative to help her understand what was expected in terms of lesson plans and monitoring of student progress. Smith made it known to Jochems, McGraw and McCartin that she disagreed with LCPS' policies as they related to teaching deaf students. Smith's philosophical opposition to the teaching methods and practices developed by LCPS resulted in frequent conflicts between Smith and school administrators. In order to assist Smith in fall 2009, Jochems arranged for Bien, an experienced educator to mentor Smith particularly in the preparation of lesson plans and have weekly meetings with her.

During the fall of 2009, Smith received letters of reprimand from Jochems, McGraw and McCartin related to interpersonal relationship issues, unprofessional outbursts, conduct in meetings, treatment of other deaf and hard of hearing staff who did not exclusively utilize ASL, as well as conflict with the school pathologist, who was working with one student because he could speak, with whom Smith had a philosophical disagreement about deaf culture and communicating with deaf children. These same employees with whom Smith was admonished for having interpersonal conflict, she had collaborated and worked with prior to the

staff meeting in February 2009 when LCPS announced the “total communication” philosophy.

In the fall of 2009, difficulties arose in obtaining Smith’s cooperation in scheduling classroom observations. The first classroom observation was conducted by either McCartin, in her oversight role as the deaf and hard of hearing specialist, or Rick Berry, another special education department supervisor. The second observation was scheduled for November; however, Smith sent an email to McGraw requesting bereavement leave during which time she stayed home and McGraw attempted to reschedule the classroom observation. After multiple communications with Smith, it was ultimately rescheduled to November 19, 2009.

Smith was placed on the December list in 2009. The purpose of placing an employee on the December list is to alert them that they are at risk for non-renewal of their contract for the following year and to support the employee so they can improve their performance before any decision about renewal is made. The reasons for Smith’s placement on the December list were documented in a memorandum and included insufficient planning, insufficient assessments and data keeping of the academic progress and growth of students, insufficient completion of IEPs in a timely fashion (one IEP at that time was six months overdue), and strained professional relationships that caused undue stress in the workplace. Before placing Smith on the December list, Jochems consulted with people in personnel and her supervisor. Following Smith’s placement on the December list, in addition to Bien’s continued mentoring, Jochems and McGraw met with Smith weekly with an ASL interpreter to assist

her in understanding and completing lesson plans, IEPs, and other issues. These meetings frequently lasted over two hours. Another employee was assigned to assist Smith in the preparation of the IEPs, Lori Lester (“Lester”), a special education consulting teacher who could communicate with Smith. Lester assisted in gathering the required documentation for the Virginia grade level assessment (“VGLA”) binders which, by law, had to be completed for each student by a certain date and others were assigned to assist Smith.

Smith continued to have interpersonal issues working with staff throughout the first quarter of 2010. In January, Jochems emailed Smith advising her of some improvement but identified continuing areas of concern including her failure to provide lesson plans, ongoing conflicts between Smith and various interpreters, which resulted in complaints to administrators. There was also discussion of the need to remain focused at their weekly meetings and clarification as to the multiple mentors provided to assist her and reasons for their assistance. These continuing issues were documented in Smith’s mid-year evaluation of February 2010, including her deficiency in mastering areas of instruction. She had yet to demonstrate a balanced approach to teaching ASL and the Standards of Learning (“SOL”) curriculum at a pace that allowed the children to reasonably advance, and neither of her students showed any reading progress that year. It was noted that Smith did not consistently exhibit a cooperative approach in the performance of professional duties and failed to develop a positive rapport with her colleagues. Her performance was rated

unsatisfactory and Jochems noted that Smith would not be recommended for renewal of her contract.

On March 1, 2010, the superintendent informed Smith that he would recommend to the School Board that her contract not be renewed for the 2010-2011 school year. On March 4, 2010, Smith complained to the school intern, Karen Shields, about Scott, an employee who was part of the deaf and hard of hearing team at the school and familiar with ASL, trying to communicate with her about a school assembly. The conflict escalated with communications to and from Jochems. The issue was compounded when Smith arrived late, completely missing the meeting related to the assembly. In early 2010 an inspection by Jochems and McGraw revealed that Smith's VGLA binders contained none of the required documentation which should have started in September 2009 and been updated throughout the year. Despite the assistance provided to Smith, she had not done the work needed and the deadline for the submission of the binders was approaching. Smith refused the assistance of other employees assigned to help her complete the work. One employee was to act as a substitute for Smith's students so that she would work on the binders. Smith refused to allow the substitute to teach her students and told her to leave the classroom, for which Smith received a reprimand. Smith was reprimanded again when she took the binders home over a weekend which violated state regulations and direct orders. The VGLA binders were still not completed by late March and Smith was told that a previous leave request to attend an out-of-state conference was cancelled in order for her to complete the binders. Lester tried to help Smith

but Smith resisted and communicated as much in emails to Jochems and McGraw.

Despite being told that her leave was cancelled, prior to that requested time, Smith notified the school that she was “sick” and could not work. She remained out of work for several days and was asked to produce a doctor’s note upon her return. She produced a note from a doctor indicating that she had to be out of work from April 7-14, 2010 when she had not been ill but instead attended the conference for which the leave request was cancelled because of her incomplete VGLA binders. As a result, Jochems, after consultation with personnel, her supervisor, and Mary Kearney (“Kearney”) the Director of Special Education, wrote to the superintendent requesting that Smith’s employment be immediately terminated due to ongoing conflicts and continuing problems with her completion of the required documentation, the administrators inability to locate the VGLA binders, Smith’s inability to meet deadlines, and her behavior. Smith was notified on April 30, 2010 that the superintendent was recommending to the School Board that her contract not be renewed and that effective June 22, 2010 her employment would be terminated.

The individuals involved in investigating and responding to Smith’s request for full and/or part-time daily interpreter were not the same decision makers documenting Smith’s performance issues, placing her on the December list, and ultimately recommending her termination.

Smith filed a charge of discrimination with the EEOC on January 2, 2010. However, due to administrative error by EEOC, that charge was not sent to LCPS until April 1, 2010, and not received by

LCPS until April 7, 2010. On June 3, 2015 the EEOC mailed the Dismissal and Notice of Rights to Smith. Smith filed suit within ninety days alleging three claims in violation of the American with Disabilities Act, as amended (“ADA”): failure to provide reasonable accommodations, retaliatory termination, and wrongful discharge. In January 2016, LCPS filed a motion for summary judgment for dismissal of all claims. After a hearing on the motion, the court issued a memorandum and Order granting in part, and denying part, LCPS’ motion. The district court denied LCPS’ motion as to the failure to provide reasonable accommodation. The district court granted LCPS’ motion for summary judgment on the retaliatory termination and wrongful discharge claims, outlining in detail the reasons for the court’s dismissal of these claims based on the undisputed facts and Smith’s failure to come forward at the summary judgment stage with facts or evidence to dispute or contradict the several legitimate bases for termination set forth by LCPS, not refuted by Smith, and her failure to provide any evidence that defendants proffered reasons for termination were a pretext for either retaliation or discrimination.

The case went to trial twice on plaintiff’s claim of failure to provide reasonable accommodation, on February 22 through 25, 2016, ending in a mistrial, and November 7 to 9, 2016 resulting in a plaintiff’s verdict in the amount of \$310.00. As the evidence presented clearly demonstrated, this was a nominal verdict and in no way supports a finding that she was entitled to a daily interpreter or that her interpersonal conflict issues arose because she did not have a daily

interpreter. Smith received a nominal award of damages which bore no resemblance to the damages she sought, or the evidence of her alleged emotional distress as testified to at either trial.

Upon entry of judgment on this claim, Petitioner noticed an appeal from the court's grant of summary judgment on retaliatory termination and wrongful discharge. On March 1, 2018, the Fourth Circuit Court of Appeals affirmed these rulings. Petitioner filed a petition for rehearing which was denied on March 27, 2018. Subsequently, on June 26, 2018, Petitioner filed this Petition for Writ of *Certiorari*.

II. REASONS FOR DENYING THE PETITION

A. Summary of Argument

There was no direct or indirect evidence of discrimination and therefore, the court was correct to analyze Petitioner's wrongful termination claim under the *McDonnell Douglas* burden-shifting framework. After applying the correct analytical framework, the court correctly concluded that Petitioner failed to provide any evidence that Respondent's reasons for termination was a pretext for discrimination.

The Petitioners' argument is that by obtaining a subsequent jury verdict for her claim for reasonable accommodation, there existed direct evidence of discrimination entitling her to analysis under the "mixed motive" framework of *Price Waterhouse*. Petitioner not only mischaracterizes the effect of the jury's finding and award of nominal

damages in favor of Petitioner's claim for reasonable accommodation, but she also misstates the lower court's summary judgment rulings. Because the lower court was correct in applying the *McDonnell Douglas* burden shifting analysis and dismissing Petitioner's claims for retaliation and wrongful termination and this Court should deny the petition for writ of certiorari.

B. The Lower Court Correctly Ruled that Petitioner Failed to Present Direct Evidence of Discrimination and Therefore, the *McDonnell Douglas* Burden-Shifting Analysis was Proper

Upon Respondent's summary judgment motion, the District Court granted judgment in favor of Respondent for retaliatory termination and wrongful discharge. The District Court, however, did not grant summary judgment as to the reasonable accommodation claim finding that there was a genuine issue as to whether the denial of a daily interpreter and an in-classroom video relay phone was reasonable. That claim went to trial twice, first ending in a mistrial, and then resulting in a plaintiff's verdict in the amount of \$310.00. It is clear that this was a nominal award which bore no resemblance to the damages sought and in no way supports a finding that she was entitled to a daily interpreter. This does not, as Petitioner suggests, support a conclusion that Respondent discharged Petitioner because of her hearing disability. In fact, as the record shows, Petitioner was terminated for various instances of insubordination, strained professional relationships, unprofessional behavior,

noncompliance with sick leave, failure to comply with deadlines, and removal of state testing binders from the classrooms in violation of state law and direct orders. She was issued multiple reprimand letters stemming from these incidents which were completely independent of her lack of access to an in-classroom interpreter or video-relay phone. As there was no direct evidence that Petitioner was terminated due to her disability, the court was correct to analyze her claim for wrongful termination under the *McDonnell Douglas* framework.

Courts are clear that "mixed-motives" cases are different from pretext cases such as *McDonnell Douglas*. In pretext cases, "the issue is whether either illegal or legal motives, but not both, were the true motives behind the decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 260 (1989) (quoting *NLRB v. Trans. Mgmt. Corp.*, 462 U.S. 393, 400, n. 5 (1983)). In mixed-motives cases, the decision behind termination is the result of multiple factors, some of which are legitimate and some, which are not. *Id.* In order to proceed on a mixed motive analysis, Petitioner was required to offer "direct evidence" that her employer placed a "substantial negative reliance on an illegitimate criterion," namely her hearing disability. *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring). Petitioner offered no such evidence.

Direct evidence are statements which "directly reflect[] the alleged discriminatory attitude . . . sufficient to permit the factfinder to infer that that attitude was more likely than not a motivating factor in the employer's decision." *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 449 (8th Cir.1993) (quoting *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171,

182 (2d Cir. 1992)); *see also Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510, 520 (4th Cir 2006). It is important to note that “not all comments that reflect a discriminatory attitude will support an inference that an illegitimate criterion was a motivating factor in an employment decision.” *Radabaugh*, 997 F.2d at 449. Whether or not Petitioner satisfied her burden in establishing direct evidence of discrimination is a determination made by the lower court. *Price Waterhouse*, 490 U.S. at 247, n. 12 (O’Connor, J., concurring).

It is clear from the proffered timeline, that the decline of Petitioner’s satisfactory job performance began with the school’s announcement that it was adopting a “total communication approach” to educating deaf and hard of hearing students. Up until the Spring 2009, Petitioner’s time at Hazel Reid was met with favorable performance reviews. Following the adoption of the “total communication approach,” with which Petitioner made vehemently clear she was in complete disagreement, her behavior and professionalism began to decline. This decline in job performance is clearly tied to her disagreement with administration’s change in educating deaf and hard-of-hearing students. She received her first reprimand on March 13, 2009 for her angry and hostile behavior towards a substitute teacher and failure to head the principal’s pleas for teamwork and professionalism. Despite this, she was given a satisfactory performance review in June 2009 which did, however, note areas of improvement to include detail and timeliness of lesson plans and assessments, the need to keep binders on her students, completing the IEP process timely, and improving her collaboration with hearing teachers

by sharing lesson plans with the general classroom teacher. She received multiple letters of reprimand in October 2009 again citing interpersonal conflicts, unprofessionalism, and unproductive behavior and in November 2009, she was placed on the December List citing again insufficient and untimely lesson planning, poor and untimely IEP management, and strained professional relationships.

Petitioner argues that this is a “mixed motive” case in that Respondent had both legitimate and illegitimate reasons for terminating Petitioner. However, it is clear from the above, and the lower courts agreed, that there is no evidence on record that Petitioner’s termination was the result of anything other than legitimate reasons that stem from her subpar job performance. In fact, in a letter sent to the superintendent recommending that her employment contract not be renewed cited various issues each of which were wholly unrelated to her disability. The letter referenced four instances of blatant insubordination including unilaterally deciding to stop attending required VGLA mentor meetings, calling in sick for the same days a leave request was denied, and various email conversation disputes. The letter also accused Petitioner of creating a hostile work environment that was impacting the students. It went on to detail an incident wherein Petitioner slammed the door in another employee’s face and noted that a consulting teacher refused to work with Petitioner unless an administrator was present. She was also criticized for failing to meet deadlines, missing review and revision meetings, and issues with her VGLA binders. Three days after the letter was sent, the school learned that Petitioner brought the binders

home, which not only violated direct orders to the contrary, but also violated state law. It was then that Petitioner was informed that her contract would not be renewed. It is clear Respondent's reason for termination is not one of mixed motive or that it even evidences a discriminatory intent, but rather stems from only legitimate reasons related to poor job performance.

Because Petitioner failed to satisfy the evidentiary threshold necessary to entitle her to a "mixed motive" analysis, the court was correct to analyze her claim under the *McDonnell Douglas* burden-shifting pretext standard. Petitioner's argument was simply that she requested accommodations, which were eventually denied; this, she argues, led to her inability to communicate effectively with her coworkers, which she claims, was the primary reason for her termination. This is unsupported by the record. Respondent, on the other hand, produced substantial evidence disputing such a claim. Petitioner is incorrect in saying that the lower court applied both a "but for" causation standard for wrongful discharge in addition to the *McDonnell Douglas* burden-shifting pretext framework to her claims. The wrongful discharge claim was analyzed under the *McDonnell Douglas* framework after the court concluded that there was "no direct or indirect evidence of discrimination in Defendant's action." (Petitioner's App. 43a).

A plaintiff can prove disparate treatment either 1) by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or 2) by using the burden-shifting framework set forth in *McDonnell Douglas*. See *Trans World Airlines, Inc. v. Thurston*, 469 U. S.

111, 121 (1985) (emphasis added). When there is lack of direct evidence of discrimination, the burden-shifting analysis of *McDonnell Douglas* allows the plaintiff's claim to go forward by shifting the burden of proof to the defendant once the plaintiff has established a *prima facie* case by evidence of direct or circumstantial evidence of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If the plaintiff successfully satisfies her burden, the burden then shifts to the defendant who must articulate legitimate, non-discriminatory reasons for termination. *Haulbrook v. Michelin N. Am.*, 252 F.3d 696, 706 (4th Cir. 2001).

If the employer is able to prove that it had legitimate reasons for terminating the plaintiff, the burden shifts back to the plaintiff to establish that the legitimate reasons were simply a pretext for discrimination. *Id.* Because, as discussed above, the court concluded that there was no direct or indirect evidence of discrimination, it proceeded to analyze Petitioner's claim of wrongful discharge under the *McDonnell Douglas* scheme.

In order to establish a claim for wrongful discharge under the ADA, the Petitioner was required to prove 1) that she has a disability; 2) that she was discharged; 3) that at the time of the discharge, she was performing her job at a level that met her employer's legitimate expectations; and 4) that her discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination. *Haulbrook*, 252 F.3d at 702.

The lower court concluded that she failed to satisfy the third element of a *prima facie* case for wrongful termination, which required proof that she was functioning at a level that met her employer's

legitimate expectations. As is clear from the above, Petitioner was the subject of several critical performance reviews in November 2009 and February 2009, in addition to many letters of reprimand. These negative reviews all relate to actions that are completely independent of her lack of access to video-relay phone and in-classroom interpreters and include such critiques as failing to meet deadlines, removing state testing binders from the classroom in violation of state law and direct orders, noncompliance with sick leave policy, failing to timely submit IEP binders, conflicts with WeInterpret interpreters, and other interpersonal issues wholly unrelated to any accommodation or lack thereof.

Despite her inability to make out a *prima facie* case of wrongful termination, the lower court presumes that she could, but states “even if Smith could satisfy the prima facie case, however, her claim would fail.” (Petitioner App. 44a). As demonstrated above, the court determined that Respondent presented substantial evidence of its dissatisfaction with Petitioner’s job performance, giving many legitimate and non-discriminatory reasons for her termination. The court went on to point out that Petitioner cannot (and did not) refute Respondent’s legitimate reasons for her termination nor did she demonstrate pretext. (Pet. App. 41a, 43a). The court further stated that a few favorable parental reviews and some colleague disagreement with Respondent’s assessment of Petitioner does not discredit the honesty of her employer’s belief in her poor performance. (Pet. App. 38a). This type of evidence does not demonstrate a disputed issue

regarding pretext. *See e.g., Ruff v. Target Stores, Inc.*, 226 F.App'x 294, 302 (4th Cir. 2007).

For these reasons, the District Court correctly dismissed and the Fourth Circuit Court of Appeals correctly affirmed the dismissal of both claims of retaliatory termination and wrongful discharge. Because there was no direct evidence of discrimination in its employment decision not to renew Petitioner's contract, the court was correct in analyzing her claim under the *McDonnell Douglas* burden-shifting framework and not, as Petitioner would prefer, under a "mixed motive" analysis. Further, under the burden-shifting analysis, Respondent offered many legitimate reasons for Petitioner's termination after which Petitioner failed to demonstrate that these legitimate reasons were pretext for discrimination. Therefore, this Honorable Court should deny the Petition.

**C. This is not a Mixed Motive Case and
Therefore this Court has no Reason to
Consider Resolution of any Circuit Split
Involving Causation**

As discussed at length above, this case is not one of a "mixed motive." There was no evidence on record, nor was Petitioner successful in arguing that her termination was the result of discrimination. The trial court's jury verdict in favor of Petitioner on her claim for failure to accommodate also does not help to bolster her argument that Respondent had both legitimate and non-legitimate, discriminatory reasons for her termination. The evidence, and the lower court's rulings, demonstrate that Petitioner's job performance deteriorated after the school

switched to a “total communication” approach to teaching deaf and hard-of hearing students. Petitioner was staunchly against this method of teaching in favor of strict ASL. Likely due to her unhappiness with the direction of the department, her behavior, unprofessionalism, untimeliness, failure to cooperate, blatant insubordination, anger and aggression skyrocketed with multiple reprimand letters and unsatisfactory performance reviews. These citations for poor performance had nothing to do with the denial of in-classroom interpreter and the failure to install the video-relay phone. As a result, the court determined that there was no evidence of discrimination and analyzed the claims, correctly, under the *McDonnell Douglas* burden-shifting framework.

This is not a case where there are clear legitimate and discriminatory reasons motivating Respondent’s termination of Petitioner’s employment contract. Under no set of facts presented on record would Petitioner be entitled to a “mixed motive” analysis. Therefore, there is no need for this Court to consider any supposed circuit spilt.

III. CONCLUSION

For the above reasons, the Petition for Writ of *Certiorari* should be denied.

LOUDOUN COUNTY PUBLIC SCHOOLS

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