18-1047

No. USCA 11 No. 17-14673

IN THE
SUPREME COURT OF THE UNITED STATES

CRYSTAL WADE.,

PETITIONER,

v.

FLORIDA DEPARTMENT OF JUVENILE JUSTICE.,

RESPONDENT,.

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

PETITION FOR WRIT OF CERTIORARI

CRYSTAL WADE
Self-Represented
100 E. Kentucky Ave, A4
Deland, FL 32724
(386) 279-043

QUESTION PRESENTED

Does a United States Court of Appeals ruling which affirmed the per se requirements of Wood v. Green, 323 F.3d 1309, 1314 (11th Cir, 2003), and which denied that Petitioner's request to her employer for indefinite leave to seek medical treatment was a reasonable accommodation, and thus determined that Petitioner was not a qualified individual under the Rehabilitation Act, undermine the very ability of a victim to establish a prima facie case of discrimination, and in the process thwart the intended protections of the Rehabilitation Act in the process.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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STATUTES AND RULES

PETITION FOR WRIT OF

CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals (App 1a.) of the petition and is unpublished. The opinion of the United States District court (App 14a.)

JURISDICTION

The date on which the United States Court of Appeals decided my

case was August 27, 2018. A copy of that decision appears at Appendix (1a...) The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rehabilitation Act of 1973.,87 Stat. 355, AN ACT -To replace the Vocational Rehabilitation Act, to extend and revise the authorization of grants to States for vocational rehabilitation services, with special emphasis on services to those with the most severe handicaps, to expand special Federal responsibilities and research and training programs with respect to handicapped individuals, to establish special responsibilities in the Secretary of Health, Education, and Welfare for coordination of all programs with respect to handicapped individuals within the Department of Health, Education, and Welfare, and for other

purposes. 93 P.L. 112, 87 Stat. 355, 93 P.L. 112, 87 Stat. 355.

STATEMENT OF THE CASE

Petitioner ("Wade") was hired by Department of Juvenile Justice ("DJJ") in May 2013, for the position of Juvenile Detention Officer I ("JDO"). In February 2014, Wade received a promotion to JDO II, a position which she held until her termination on September 4, 2014. Wade experienced ongoing problems with a juvenile inmate, C.K., who had threatened, harassed and assaulted Wade multiple times.

On July 30, 2014, Wade was attacked by C.K., which resulted in her having sustained physical and mental injuries, including a concussion, pain in her

right hand, arm, face, shoulders, back, neck and head, depression and Post-Traumatic Stress Disorder ("PTSD"). Also, on July 30, 2014, Wade filed the required documents to commence a workers' compensation claim against DJJ.

On August 4, 2014, Wade was cleared for return to work on light duty status. After her return to work, Wade's condition worsened, and she began to experience increased light and noise sensitivity, increased headaches, muscle spasms, eye twitching, and emotional outbursts. As a result, on August 29, 2014, Wade's treating doctor removed her from work until she could be seen by specialists for her multiple conditions.

Further, Wade requested leave under the Family and Medical Leave Act ("FMLA"), yet DJJ made no determination on Wade's FMLA request until September 4, 2014, the date on which Wade was terminated, and at which time, DJJ denied the request stating that Wade needed to provide more information.

REASONS FOR GRANTING THE PETITION

Here, through its reliance on Wood v. Green, 323 F.3d 1309, 1314 (11th Cir, 2003), the Court of Appeals affirmed the District Court's decision and stated,

> ".Although a leave of absence might be a reasonable

> accommodation in some cases, we have held that a request for an indefinite leave of absence, which may allow an employee to work at some uncertain point in the future, is not a reasonable accommodation"

(Court of Appeals opinion, page-4).

However, the Appellate opinion ignores the underlying facts, namely; that Wade's doctor removed her from work soon after the incident and until she could be seen by various specialists to evaluate her condition. As such, the accommodation requested by Wade was reasonable in that its purpose was to allow her the time to complete the treatment required for her to

return to work. The reasonableness of a medical leave of absence as an accommodation under the Rehabilitation Act was affirmed in cases prior to Wood v. Green, 323 F.3d 1309, 1314 (11th Cir, 2003) as follows:

> "This court and others have held that a medical leave of absence -- Garcia's proposed accommodation-- is a reasonable accommodation under the Act in some circumstances."

See Criado, 145 F.3d at 443-44; Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999); Cehrs, 155 F.3d 775 at 782 [**22] (citing Criado); Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 601 (7th Cir. 1998); Rascon v. U.S.

West Communications, Inc., 143 F.3d 1324, 1333-34 (10th Cir. 1998).Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 647, 2000 U.S. App. LEXIS 11030, *21-22, 10 Am. Disabilities Cas. (BNA) 865

> "As we said in Criado,
>
> whether [a] leave
>
> request is reasonable
>
> turns on the facts of the case."

Criado, 145 F.3d at 443; [**21] See also Kennedy v. Dresser Rand Co., 193 F.3d 120, 122 (2d Cir. 1999).

> "It is simply not the case, under our
>
> precedent that an employee's
>
> request for an extended medical
>
> leave will necessarily mean, as the
>
> district court suggested, that

> the employee is unable to perform the essential functions of her job."
>
> "Some employees, by the nature of their disability, are unable to provide an absolutely assured time for their return to employment,
>
> but that does not necessarily make a request for leave to a particular date indefinite. Each case must be scrutinized on its own facts. An unvarying requirement for definiteness again departs from the need for individual factual evaluation."

Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 647, 2000 U.S. App. LEXIS 11030, *20-21, 10 Am. Disabilities Cas. (BNA) 865.

In the case at bar, Wade was unable to provide an assured time for her return to employment due to the fact that she required evaluation by several medical specialists. However, the foregoing in no way made her request for a leave of absence indefinite. The Eleventh Circuit Court of Appeals reliance on *Wood* has affirmed the District Court's application of per se rules in this case without due consideration to the underlying facts which gave rise to Wade's request for medical leave, as *Wood,* although cited across the Circuits, dealt with a plaintiff who had been given extensive leave of absence over many years' treatment of a medical condition.

The foregoing is distinguished below in the Ninth Circuit Court of Appeals case of Ambrose v. J.B. Hunt Transp., Inc., wherein as in Wade's case, plaintiff was summarily terminated from employment prior to her obtaining medical evaluations of her condition and information as to when she could return to work if given leave to obtain treatment.

> "likewise, this is distinguishable from the situation in *Wood* where the plaintiff had been given extensive leave over the course of many years to treat the medical condition. It is not clear that no reasonable juror could find on the facts of the present case that the

employer was moving forward as fast as possible to a termination decision before the employee could obtain a medical evaluation of what his condition was and how soon he could perform the essential functions of his position if given the reasonable accommodation of leave for medical treatment. Thus, the "more compelling facts" dicta referenced in *Wood* are presented by this case. Accordingly, there is a genuine issue of fact as to whether Plaintiff could have been accommodated through an allowance of time for medical care and treatment."

Ambrose v. J.B. Hunt Transp., Inc., 2014 U.S. Dist. LEXIS 18361, *54, 2 Wage & Hour Cas. 2d (BNA) 27, 29 Am. Disabilities Cas. (BNA) 333, 16 Accom. Disabilities Dec. (CCH) P16-004

Further, while the Ninth Circuit acknowledged in *Kirsch v. TDY Indus* [see below], the holding in *Wood,* that an employer is not obligated to grant indefinite leave as a reasonable accommodation, it clarified that the duty to accommodate is a continuing duty. No such effort was made in Wade's case.

> "Defendant correctly asserts that an employer is not obligated to eliminate essential job functions as a reasonable accommodation, nor is an

> employer required to provide accommodation which would cause undue hardship. The court acknowledges also that an employer is not obligated to grant indefinite leave as a reasonable accommodation,"

as the Eleventh Circuit held in Wood v. Green, 323 F.3d 1309, 1314 (11th Cir, 2003).

However, [*28] the Ninth Circuit is clear that,

> "the duty to accommodate is a continuing duty that is not exhausted by one effort."

Dark v. Curry County, 451 F.3d 1078, 1089 (9th Cir. 2006) (quoting Humphrey v. Mem'l Hosps. Ass'n., 239 F.3d 1128, 1139-

40 (9th Cir. 2001)). Furthermore, employers must also consider reassignment to a vacant position for which an employee is qualified as an accommodation.

See Dark, 451 F.3d at 1089-90. Kirsch v. TDY Indus., 2011 U.S. Dist. LEXIS 150680, *27-28, 18 Wage & Hour Cas. 2d (BNA) 554, 25 Am. Disabilities Cas. (BNA) 772, 2011 WL 5554544

The reliance on *Wood* by The Eleventh Circuit, and various others, as a default eliminator of the request for an indefinite leave of absence as a reasonable accommodation, regardless of the circumstances, serves to undermine the very protections contemplated by the Rehabilitation Act. As such, this Petition

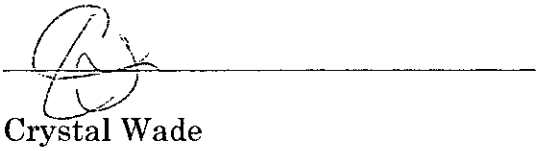
should be granted to provide direction to the appellate level as to;

(1) reconciliation of these conflicting appellate decisions; (2) the avoidance of per se requirements based upon the findings in *Wood;* and (3) the necessity of an individual factual determinations on a case by case basis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Crystal Wade

Date: November 24, 2018