No._____

IN THE SUPREME COURT OF THE UNITED STATES

BRIAN PRESTON

Petitioner

v.

GREAT LAKES SPECIALTY
FINANCE, INC. D/B/A AXCESS
FINANCIAL SERVICES

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Brian Preston, *Petitioner*
1994 Woodlyn Drive North
Cincinnati, OH 45230
Telephone: (513) 443-2108
E-Mail: brian@legal.brianpreston.com
Appearing *pro se*

QUESTIONS PRESENTED

1. In determining whether a "work-from home" or "telecommuting" accommodation offered by an employer is "reasonable" under the Americans With Disabilities Act, as amended, should federal courts accord primacy to the employer's view of the essential elements of the at-issue employee's job? Or, should the competing views of the employer and employee on that question, supported by competent and admissible evidence, be deemed a question of fact to be decided by a jury?

2. In determining whether an employer has an affirmative duty to engage in a good faith interactive dialogue with a disabled employee to fashion such a reasonable work place accommodation as contemplated by the Americans with Disabilities Act, whether in the context of the employee's request for an initial accommodation or a request that an existing accommodation be modified, can the employer avoid its affirmative duty by claiming that theemployee is not a qualified employee within the meaning of the Act?

3. In deciding whether to grant Petitioner's Petition for Writ of Certiorari to resolve a split in the circuits on the above two questions, should this Court take into the consideration empirical statistics reflecting a substantial increase of employees over the last several years who work from home, as well as a substantial increase of employees over the last several years whose disabilities would be accommodated by allowing them to work from home?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceedings in the court whose judgment is sought to be reviewed are:

- Brian Preston, plaintiff and appellant below, and petitioner here.

- Great Lakes Specialty Finance, Inc. d/b/a Axcess Financial Services, defendant and appellee below, and respondent here.

There are no publicly held corporations involved in this proceeding.

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The Sixth Circuit Opinion, the subject of this petition, has now been published at724 Fed. Appx. 453 (6th. Cir. 2018). (Appendix ("App.") 1-5). The subsequent Sixth Circuit Order denying *en banc* review is reproduced at App. 6 The District Court's decision granting summary judgment is reproduced in the appendix to this petition at App. 7-22

BASIS FOR JURISDICTION IN THIS COURT

The Sixth Circuit filed its opinion on March 19, 2018, *Preston v. Great Lakes Specialty Finance, Inc. d/b/a Axcess Financial Services,* 724 Fed. Appx. 453 (6th Cir. 2018). The Sixth Circuit issued its Order denying *en banc* review on May 8, 2018. This Court has jurisdiction under 28 U.S.C. Sec. 1254(1) to review on writ of certiorari the Sixth Circuit's March 19, 2018 and May 8, 2018 decisions.

STATUTORY PROVISIONS AT ISSUE

Petitioner brought the underlying action under the Americans with Disabilities Act, as amended, 42 U.S.C. Section 12101 *et seq.,* The Americans with Disabilities Act As Amended ("ADAAA") 42 U.S.C. 12112(a) and (b)(5)(a) states in pertinent part as follows:

(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), the term "discriminate against a qualified individual on the basis of disability" includes—

(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;

STATEMENT OF THE CASE

After receiving his M.B.A. from The University of Cincinnati in 2011, Plaintiff-Appellant-Petitioner Brian Preston ("Preston") was hired by Defendant-Appellee-Respondent Axcess Financial Services ("Axcess") in late May of 2012 as a Senior Financial Analyst, and began his employment on May 31, 2012. (RE 26 at Page ID# 109-111).[1]

Axcess is in the business of loaning money to subprime and under-collateralized borrowers. It has retail outlets throughout the country, where it primarily does business as Check & Go. Axcess is the corporate parent with its headquarters in suburban Cincinnati, Ohio.

Preston was tasked with the responsibility for analyzing proposed new, as well as existing, loan products, to determine their financial performance and identify opportunities for growth and improvement into the future. This entailed a review and evaluation of numerous factors, including the lending laws of each state in which Axcess and its subsidiaries do business, historical default rates by

[1] Since I am not working with a professional printer in filing my Petition, I don't know of any other way of citing to the record other than how my attorney cited to the record before the Sixth Circuit.

customers in various areas of the country, prevailing interest rates and a projection of future interest rates, the impact on customer demand of Axcess' contemplated decision to raise interest rates or handling charges, etc. In order to perform these crucial job functions effectively, Preston and the other Financial Analysts would have to employ sophisticated and complex computer modeling skills to create extensive spreadsheets displaying all of the variables mentioned above and how they would impact on the Company's bottom-line profitability.

Shortly after hire, Preston was placed under the supervision of Laura Middendorf, and regularly met with her and the other financial analysts in her working group.(Deposition of Laura Middendorf, RE 27 at page ID#239).

Preston's initial work station consisted of a small cubicle that contained his desk and computer. It was located directly adjacent to a photocopier/printer and walkway. It was also adjacent to the cubicles of the other Financial Analysts and Middendorf.

Preston has long suffered from a neurological brain disorder, ultimately diagnosed by a doctor in 2012 as Autism Spectrum Disorder. ("ASD"). One of the major deficits of ASD is heightened sensory sensitivities to visual and audio stimuli in the victim's environment. These sensory issues can exist across all five senses, and when a stimulus in the individual's environment overexcites one or

more of these sensory systems, the victim's ability to fully function can significantly declines or even shuts down. Minor noises or flickers or flashes which would not bother the average person are extremely distracting and disturbing and overwhelming to those suffering from ASD. According to Preston's treating psychiatrist, Dr. Teresa Anderson, his sensory issues were such that "a ticking clock, coughs overheard from a co-worker or people chatting at the water cooler can be so distracting as to become irritating. (*Id.*, Exhibit 6, at Page ID # 190-192). Given the extremely cerebral nature of Mr. Preston's work and the tremendous level of concentration required for him to do the financial and statistical analyses on his computer, these distractions were particularly vexing and counterproductive in the work environment in which he needed to perform efficiently and effectively. (*Id.* at Page ID # 124.

For the first few months of his employment Preston chose not to discuss his problems with either Middendorf or higher levels of management for fear that his co-workers and managers might start to question his sanity or stigmatize him as bizarre, or intellectually challenged. (*Id*, page ID# 124-125). Instead, he compensated by taking his assigned projects home to work on after hours and over the weekend using his home computer system. However, by working too long and too hard at home, he ended up exhausted both mentally and physically. (*Id.*, at Page ID# 124).

Preston first tentatively approached Middendorf about an accommodation sometime in August 2012, a few months into his employment at Axcess. Without mentioning "accommodations" *per se,* , he told her that he was unusually sensitive to and distracted by the office lighting and the day-to-day water cooler chit-chat, copy machine noise, and the like. Middendorf responded that he would have to officially work through Human Resources to formally request accommodations. (*Id.*, at Page ID# 122-123). Preston didn't pursue the matter any further at that time for the reasons set forth above. (*Id.*, at Page ID# 123).However, when Mr. Preston finally realized that he could not continue compensating for his disability by working at home, he officially initiated the accommodation process. On September 28, 2012, he requested a meeting with Middendorf, and HR manager Jennifer Fonseca to address the negative impact his work environment had on his health due to his sensory disabilities, as well as to identify accommodations which might alleviate these distractions. (*Id.* at Exhibit 5).

A meeting was scheduled for October 3, 2013. In preparation, Preston emailed Fonseca attaching a letter dated September 26, 2012 from his treating psychiatrist, Teresa Anderson to Middendorf stating that the assignment of a private office would be the optimal accommodation, (RE Preston Affidavit at ¶17, RE 26 at Page ID # 190-193) stating:

> I am currently treating Mr. Preston for developmental sensory issues that, for him to be able to function fully within a work environment, he needs certain allowances. If he could work in an area that is isolated from others (low sounds and light pollution) he would tend to become far more productive in his endeavors. *Frequent interruptions are not only distracting but ultimately disruptive to his concentration and focus, sometimes to the point of putting him behind for the rest of the day. (Id.* Exhibit 6 at BP000430) (emphasis added)

Dr. Anderson recommending working from home, or "telecommuting" as a secondary recommendation.

> If it is possible, a situation where he could work from home partially, *if not full time*, would be ideal. Mr. Preston thrives in environments *where he can control the amount of stimulation he receives. Id.* (emphasis added).

Mr. Preston also sent Fonseca mail on October 2, attaching a memorandum detailing a range of possible accommodations, which generally were reduced to a private office or working from home. *Id.* at Exhibit 7 Page ID# 194-196).

The October meeting was designed as an exploratory session where both Preston, Middedorf and Fonseca would brain storm a range of alternative accommodations, without committing to any of them at the time. Preston again went to great lengths to explain how easily he was distracted by aural, olfactory and visual stimuli and how it interfered with his work, stressed him out, and overstimulated him to the point that he had a hard time falling asleep when he returned home after work. (*Id.* at Page ID # 424-426). He told Middendorf and

Fonseca that the only effective accommodations would either *be a private office or working from home, or a combination of the two.* Between the two, he preferred the separate workspace, since he liked getting up in the morning and having someplace to go for work. (*Id.*at Page ID# 427).

Axcess was cool to that accommodation. Fonseca opined, without citing evidence,that such an office would not effectively block out the noises that assaulted Preston when he worked in a cubicle. (*Id.* at Page ID# 424). She added that office space was at a premium. Preston again reiterated a need for closed work environment and mentioned various open or soon-to-be open offices Fonseca suggested that some open but unused space might be walled off as "large closet" an idea to which Preston was receptive. (*Id.*). but no such formal offer of accommodation materialized

Fonseca was also pessimistic about the notion of Preston telecommuting. Fonseca and Middendorf said that allowing Preston to telecommute would interfere with one of his "essential job functions" which were to be in the office to attend meetings and give presentations as needed. Preston reassuringly responded that he would be willing to make himself available on an as-needed basis for those purposes (*Id.* at Page ID# 427-428).

A follow up accommodation between Preston, Middendorf, and Fonseca took place on October 12, 2012. . (Exhibit C, RE 304, Page ID # 439-450) The

meeting started off with Fonseca asking Preston how he had coped with his sensory problems at his earlier jobs wherein he did similar analytical work. Preston responded that he had either been assigned a private office or had been allowed to perform that portion of his work at home. (Exhibit C to RE 30 at Page ID# 439-443). He said that the only space that would work was a private enclosed space, whether it was an office or even a large enclosed closet. (*Id.* at Page ID# 445-448).

Fonseca said that she had considered a small enclosure a little larger than a closet, but she thought that the machinery contained therein might cause too much noise for Preston, but there was no other space to spare.(*Id.* at Page ID# 446-447). Significantly, she did not ask *Preston* to check out the space to see if *he* thought it would be too noisy. Fonseca again expressed the notion of a closed space accommodation in terms of how "unfair" it would appear to other workers, who also might want their own office, and how resentful they might be if Mr. Preston was given an office and they weren't. (*Id.* at Page ID # 448.) The meeting ended on the note that Axcess was still investigating all alternatives for a reasonable accommodation.

On October 23, 2012, Preston emailed Fonseca (RE 26, Exhibit 11 to Preston Deposition, Page ID # 204) in which he shared with her his most recently-

received diagnosis from Dr. Anderson of Autism Spectrum Disorder ("ASD"), which would be confirmed in a letter provided by Dr. Anderson to Fonseca in a few days. *Id.* Which in fact Fonseca did receive. (Fonseca Deposition, RE 28,Page ID # 130).[2] His email reiterated his need for a private work environment (Exhibit 11 to Preston Deposition, RE 26, Page ID # 201).

Preston's October 23 email closed with a reference to an attached Job Accommodation Network ("JAN") education booklet on "Employees with Asperger Syndrome, published by the Department of Labor. (Id. at Page ID # 202-217). He directed Fonseca to that portion of the JAN Publication which talked about accommodating employees with ASD with private workplaces wherein outside stimuli could be minimized. That would also include telecommuting. (*Id.* at Page ID # 210). Fonseca never bothered to respond.

On November 1, 2012, Fonseca mailed Preston a letter. (Exhibit 12 to Preston Deposition, RE 26, Page ID # 219-221) offering an accommodation It took on a very strident and hostile tone. . Fonseca stated that Middendorf had voiced concerns about the quality of Preston's work prior to his raising the

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[2] The letter was from Dr. Anderson and it was dated October 25, 2012. (See Attachment A to Fonseca Deposition (RE 28, Page ID # 334). Dr. Anderson elaborated that ASD did not all reflect Mr. Preston's intellectual capabilities, but rather his sensory systems such as visual, olfactory and auditory. The letter went on to say he needed to work in an environment devoid of most stimuli which a normal person would disregard as mere background noise. *Id.*

accommodations issue on September 28. (*Id.*) However, the record evidence adduced in this case shows Fonseca's claim to be altogether false. Middendorf raised her concerns about all these projects only *after* September 28.[3] Fonseca herself chastised Mr. Preston for being habitually late with his project submissions and being unable to multitask, (*Id.*) ignoring the fact that it was the lack of a proper working environment conducive to his sensory challenges that caused his timeliness problem in the first place.

Finally, Ms. Fonseca got around to addressing the accommodations issue. She first rejected out-of-hand Mr. Preston's request for a private enclosed office based on the so-called lack of physical space. She offered no elaboration. (RE 26, Page ID # 221). She said nothing about Mr. Preston's willingness, expressed to her at the October 3 and 12 accommodation meetings, to work in *any* enclosed working space, even if it was an existing or constructed "large closet". Ms. Fonseca also summarily rejected Mr. Preston request to work full time from home as unreasonable, again without citing any specific rationale, other her self-serving declaration that such an accommodation would not allow him to perform the essential elements of his job. (*Id.*) The only accommodation she was willing to offer Mr. Preston was working from home Tuesdays through Fridays of each week. but working in the office every Monday. (*Id.*)

Ms. Fonseca further stated that this accommodation would take effect Monday, November 15, 2012, and then be re-evaluated on Friday, December 7, 2012, at which time "there will be a review of the accommodation to ensure that *it is still necessary*, as well as an assessment made as to whether you are performing the essential elements of your job as a Senior Financial Analyst." (*Id.*) (emphasis added). In a conciliatory tone, she added that she retained an open mind as to the possibility for further interactive dialogue between Axcess and Preston about other potential accommodations should this one not work out. But in a 180-degree turnaround, she proceeded to tell him *he would be fired if he couldn't perform the essential elements of his position* [by December 7]"*with the reasonable accommodations the company was willing to provide." (Id.*) (emphasis added)

Axcess' offered accommodation of telecommuting four out of five days per week was a step in the right direction. But its arbitrary requirement that Preston show up at the office for the entire day on Monday and face the same dysfunctional environment that plagued him in the past continued to inhibit his productivity. This was reflected in his November 19, 2012 email to Middendorf, in which he said:

> My productivity is already being significantly impaired on Mondays as I do not have the tools necessary to perform at a high level (i.e. I am working on a small laptop screen instead of large dual-screen monitors where I am able to take in and parse information at a greater RE39, Page ID # 795-796)

He echoed similar sentiments to Middendorf in a subsequent email dated November 27, 2012 (Exhibit 6 to Middendorf Deposition, RE 39, Page ID # at 798) in response to an inquiry by Middendorf into the hold-up in his delivery of the model of the Ohio Title project.

> Since I am at the office today with only a small laptop screen, I cannot quickly write and edit queries very effectively. (I need more screen real estate). If you want, I can go back home where my big monitors are and begin writing and probably have figures to populate the model . . . . Short of that, I am get [ting] as much done as I can *but I just don't have good resources the day I am here. (Id).*

Preston's two post-accommodation emails to his immediate supervisor and HR representative were tantamount to a request for a renewed ongoing dialogue to look into the modification of Axcess' current accommodation which wasn't working out. However, Axcess refused to engage in such a dialogue.

On December 7, 2012, Axcess discharged Preston. The reasons were provided in an internal Company personnel form entitled "Termination for Brian Preston."

> Brian has missed delivery dates for the following projects and/or assignments: Ohio Title Analysis due on 11/21/12, Sweep Analysis due on 10/15/12,[prior to the accommodatin] and Lead to Store Analysis on 10/5/12 [also prior to the accommodation]. Discussed with Brian on multiple occasions, verbally and via email on 10/16/12 and 11/26/12, that continually missing project deadlines does not meet job requirements, nor does it support the business. Based on his continued failure to improve in this area, his employment is being terminated effective immediately.

Fonseca Deposition, RE 28, Page ID # 329-330).

PROCEDURAL BACKGROUND

Preston sued Axcess for various violations of the ADAAA, including, but not limited to, refusing to grant him a reasonable accommodation for his disability, and discriminating against him by terminating him, for requesting an accommodation in the first place, and requesting additional dialogue when the accommodation it implemented was deemed ineffectual. Axcess moved for summary judgment , and The District court granted the Motion. (App. 7-22). The District Court held that Preston was not a qualified individual with a disability, with or without an accommodation. And assuming *arguendo* that he was, the accommodation Axcess offered Preston, telecommuting four days out of five per week was reasonable. In so doing, it found that being at the office one day per week for the entire day was an essential element of the job, even though Axcess never offered cited any record evidence to back this up. The District Court also ignored Preston's argument that Axcess had rebuffed his post-accommodation requests to renew the interactive accommodative dialogue. It also failed to give proper weight to the role Axcess' pre-exiting hostility played in its decision to summarily terminate him barely one month into his accommodation.

The Sixth Circuit, in a four-and-a-half-page decision, affirmed summary judgment in *Preston v. Great Lakes Specialty Finance, Inc. d/b/a Axcess Financial* Services, 724 Fed. Appx. 453 (6th Cir. 2018). (App. 1-5) In so doing, the Sixth Circuit never addressed the question on appeal as to whether Axcess' implemented accommodation of a four-days-out-of-five accommodation was "reasonable", as found by the District Court. Instead, it ruled that "if the employer claims that the disabled employee would be unqualified to perform the essential elements of the job even with the "proposed" accommodation, the disabled individual must prove that he or she would in fact be qualified for the job if the employer were to adopt the proposed accommodation [citations omitted]" (App 3). The Sixth Circuit has in essence saddled disabled employees with burden of proving that his/her proposed accommodation would allow him/her perform the job *before such accommodation is ever implemented.* The Sixth Circuit did not elaborate on what "proposed accommodation" meant, whether it was proposed by the employer or the employee. But its subsequent language suggests the latter. The Sixth Circuit framed the issue on appeal as to whether Preston could perform the essential elements of his job even if Axcess had given him his proposed accommodation of working from home, or telecommuting, five days, not four days per week. Again, the District Court had never addressed this issue. Nonetheless, the Sixth Circuit held that the district court "correctly rejected Preston's argument" (App.

___), even though that was never the case. The issue of whether Preston could have performed his job with a five-day telecommute accommodation had never been litigated in the lower court.

The Sixth Circuit then undertook for the first time its own analysis of Preston's hypothetical five-day work week, and the time it would have taken him to complete his assignment on the Ohio Title Project. And it concluded that Preston could never have completed the project even if he had five days per week to do so. (App. 4)

On April 3, 2018, Preston filed a Petition for Rehearing and Rehearing *En Banc.* (RE. 38). Preston advanced several arguments in support of Rehearing or Rehearing *En Banc.* (1) Instead of addressing the key issue raised and decided bv the District Court as to whether a *four day* telecommute was reasonable, the Sixth Circuit ducked the issue altogether and decided the case on whether Preston could have performed his job even if he had been given his requested accommodation of a *five day* telecommute . This was an issue the District Court had never addressed, and the parties had never been given the chance to address in their briefs to the Sixth Circuit; (2) the Sixth Circuit engaged in improper fact-finding in determining that Preston would have been unable to perform his job even if given five days per week to do so, without considering contrary record evidence adduced by Preston to the effect that he had been repeatedly pulled of his Ohio Title project

to work on other projects, thereby preventing him from completing it in timely fashion. Preston cited to the Court record evidence that had been presented to the District Court to establish this. (RE 38 at 4-5); (3) The Sixth Circuit, in upholding the decision of the District Court held that only a four day telecommute accommodation was reasonable, had decided the issue as a matter of law, rather than a matter of fact, even though there was conflicting competent evidence as to whether Preston's presence on the entire fifth day every week was truly an essential element of the job, *and* even though there was conflicting evidence as to whether Preston could function effectively if he were required to report to work every fifth day for the entire day, enduring, as he would have to, the distracting auditory and visual stimuli of the workplace and the lack of a private work area. (*Id.* at 6-12); (4) The Sixth Circuit, in upholding the decision of the District Court, gave no weight whatsoever to Axcess' failure to engage in the ongoing interactive accommodative dialogue with Preston when it requested that he do so, in the wake of the hurdles he was facing having to be physically present on the job one entire day per week. (I*d.* at 12.); and (5) the Sixth Circuit neglected altogether to address the issue Preston raised on appeal that he had adduced direct and unrebutted evidence that Axcess harbored retaliatory animus towards him because he had sought an accommodation in the first place, which formed the basis of his ultimate termination. (*Id.* at 13-14)

REASONS WHY CERTIORARI IS WARRRANTED

I REVIEW IS WARRANTED BECAUSE THE SIXTH CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH THE DECISIONS OF THE COURTS OF APPEALS OF OTHER FEDERAL JUDICIAL CIRCUITS IN THE FOLLOWING RESPECTS:

A. THE SIXTH CIRCUIT'S HOLDING THAT THE OFFERED FOUR DAY TELECOMMUTE WAS REASONABLE AS A MATTER OF LAW IS CONTRARY TO THE LAW OF THE THIRD CIRCUIT IN *SKERSKI V. TIME WARNER CABLE CO.*, 257 F.3d 273, 283 (3d Cir. 2001), THE LAW OF THE NINTH CIRCUIT IN *HUMPHREY V. MEMORIAL HOSPITALS ASSOCIATION*, 239 F.3d 1128 (9th Cir. 2001), AND THE LAW OF THE ELEVENTH CIRCUIT IN HOLLY V. CLARISON INDUS. 492 F. 3d 1247, 1258 (11th Cir. 2007) ALL OF WHICH HAVE HELD THAT REAONABLENESS OF SUCH AN ACCOMMODATION IS AN ISSUE OF FACT.

The Sixth Circuit found that Axcess' offered accommodation of a four-day, rather than a five-day, telecommute for Preston was reasonable. In so doing, it accepted without question, as did the District Court, Axcess' self -serving testimony that it was an essential element of Preston's job that he make himself physically available on the job on the fifth work day for the entire day. The Sixth Circuit did so even though Axcess never was able to articulate *why* it was important that Preston be there for a full day. (See excerpt of relevant portion of Fonseca's deposition testimony cited in Preston's Memorandum in support of his Petition for Rehearing *En Banc.* (RE 38 at 6-7).

The Sixth Circuit's position appears consistent with the deferential stance taken by the First and Tenth Circuits towards an employer's sole judgment as to what constitutes an essential element of a job, and by ready transfer, what constitutes a reasonable accommodation. See, e.g., *Mason v. Avaya Communications , Inc.*, 357 F. 3d 1114, 1119 (10th Cir. 2004) where the Tenth Circuit stated:

> The ADA requires us to consider "the employer's judgment as to what functions of a job are essential" [citation omitted]. The employer describes the job and functions required to perform that job [citation omitted]. *We will not second guess the employer's judgment when its description is job-related, uniformly enforced, and consistent with business necessity [*citation omitted].

(emphasis added).

The court added:

> In cases arising out of the ADA, we do not sit as a "super-personnel department" that second-guesses' employers' business judgments

Id. at 1122.

See also the decision of the First Circuit in *Kvorjak v. State of Maine*, 259 F. 3d 48, 55 (1st Cir. 2001) ("In the absence of evidence of discriminatory animus, courts generally give "substantial weight" to the employer's judgment as to what functions are essential.")

Other circuits, by contrast, take a more even-handed approach and regard the issue of what are, and what are not, the essential elements of the job, and hence what ends up being a reasonable versus an unreasonable accommodation as questions of fact, not questions of law. In the Ninth Circuit, *Humphrey v. Memorial Hospitals Association*, 239 F. 3d 1128 (9th Cir. 2001) addressed the situation of an employee who, owing to her sever obsessive compulsive disorder (OCD) was unable to leave her house either on time to get to work, or get to work altogether. At issue was whether her requested accommodation of a leave of absence or working from home all the time was reasonable. The employer cited various reasons why it would be unreasonable, including her inability to perform her job off the premises, and moved for summary judgment. However, the Ninth Circuit, unlike the other circuits cited above, did not embrace the employer's argument in whole cloth. In denying the Motion, the Ninth Circuit rather held that the employee had adduced sufficient record evidence to create an issue of fact as to whether she could have performed the essential elements of her job.

> There is at least a triable issue of fact as to whether Humphrey would have been able to perform the essential duties of her job with the accommodation of a work-at=home position. Working at home is a reasonable accommodation when the essential functions of the position can be

> performed at home and [such an] arrangement would not cause undue hardship for the employer.[4]
>
> *Humphrey* at 1136.

The Court concluded that

> A reasonable jury could conclude that if Humphrey was relieved of the stress of having to leave the house , she could perform her trancriptionist duties and thus was "qualified" under the ADA.
>
> *Id.* at 1137.

The Ninth Circuit's position on this issue is consistent with the views of other circuits addressing this very issue. In *Holly v. Clarison Indus. LLC*, 492 F. 3d 1247, 1258 (11th Cir. 2007) the Eleventh Circuit ruled

> At the summary judgment stage, the employer's judgment will not be dispositive on whether a function is essential when evidence on the issue is "mixed." *Feldman v.Olin Corp.*, 692 F.3d 748, 755 (7th Cir. 2012); *If an employer's judgment about what qualifies as an essential task were conclusive, "an employer that did not wish to be inconvenienced by making a reasonable accommodation could, simply by asserting that the function is essential, avoid the clear congressional mandate that employers mak[e] reasonable accommodations."*
> (emphasis added).

The Third Circuit also falls in line with the Ninth and Eleventh Circuit. In *Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 283 (3d Cir. 2001), the Third Circuit reasoned that conflicting deposition testimony concerning a job's

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[4] In support of its position, the Ninth Circuit cited a comprehensive compendium of EEOC Guidelines pertaining to reasonable accommodations, *Id.*, which are entitled to a high degree of deference by this Court.

essential functions required reversal of a grant of summary judgment to the employer.

> Although the employer's judgment and the written job descriptions may warrant some deference, [the plaintiff] put forth considerable evidence that contradicts [the employer's] assertions," creating a "genuine issue of material fact [concerning] essential function."

Skerski at 293.

There also exists a related circuit split on the aforesaid relevant burden of proof. Whereas the Sixth Circuit would impose a heavy burden on disabled employees to prove they would in fact be qualified for the job if the employer were to adopt their proposed accommodations, the Ninth Circuit takes the polar opposite approach.

> MHA contends that Humphrey is not otherwise qualified because the results of the leave of absence were speculative. *However, the ADA does not require an employee to show that a leave of absence is certain or even likely to be successful to prove that it is a reasonable accommodation.* In *Kimbro v. Atlantic Richfield Co.* [citation omitted], we held that a leave of absence was a reasonable accommodation for an employee whose cluster migraine headaches , a condition for which there was no specific treatment, caused him sporadically to miss work

Id., at 1136. (emphasis added).

The difference between the circuits on this crucial point is not a mere matter of semantics. It spells the difference in whether the disabled employee has a decent chance to make out his/her *prima facie* case of a failure-to-accommodate,

and advance the case to the next stage where the employer is forced to argue that to grant the accommodation would impose an undue hardship upon it. Existing First, Sixth and Tenth Circuit law promoting a deferential attitude towards the employer's assessment of the essential elements of the job prejudices the employee's chances of surviving summary judgment. Under the law of the Third, Ninth, and Eleventh Circuits, however, employees have a far better chance of surviving summary judgment. To be sure, they may still lose at trial if a jury, after having reviewed the evidence and making findings of fact accord more weight to the employer's evidence than the employee's, and finds that the employee's requested accommodation would not allow him to be able to perform the essential elements of his job, and thus was unreasonable. But at least the employee will have had his day in court to adduce his own supporting evidence whereby a jury could find he in fact could have performed the essential elements of his job with the accommodation he had requested, thereby rendering the accommodation "reasonable".[5]

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[5] If Third, Ninth or Eleventh Circuit law had been available to Preston, he would have been given the opportunity to explain why the four-day telecommute given to him by Axcess was inherently unreasonable. He would have been able to cite to the Court at the summary judgment stage and the jury at the trial stage, record testimony that forcing him to spend an entire day at the office every fifth day resulted in his having to put up with the same debilitating aural and visual distractions which impeded is ability to work efficiently, and effectively precluding his ability to work at home with his more powerful and efficient computer system.

In sum, the intervention of this Court is needed to resolve a split in the circuits on this very important issue.

B. THE SIXTH CIRCUIT'S FAILURE TO TAKE INTO CONSIDERATION AXCESS' REFUSAL TO ENGAGE IN AN ONGOING POST-ACCOMMODATION DIALOGUE WITH PRESTON ABOUT THE EFFECTIVENESS OF THE FOUR-DAY TELECOMMUTE IS CONTRARY TO THE LAW OF THE NINTH CIRCUIT IN *HUMPHREY V. MEMORIAL HOSPITALS ASSOCIATION*, 239 F.3d 1128 (9th Cir. 200), AND ALSO CONTRARY TO THE LAW OF THE FIFTH CIRCUIT IN *DILLARD V. CITY OF AUSTIN*, 837 F.3d 557 (5th Cir. 2016), WHICH IMPOSES A DUTY ON EMPLOYERS TO ENGAGE IN SUCH A DIALOGUE IF REQUESTED BY THE EMPLOYEE.

As noted earlier, soon after Axcess implemented the four-day telecommute accommodation, Preston began experiencing difficulties in performing his job responsibilities on the fifth day, wherein he had to spend the entire day in the office under the same distracting work environment which triggered his request for an accommodation in the workplace. And he followed up with several emails to Middendorf and Fonseca about the need to revisit the efficacy of the four-day

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Preston also would have been able to cite to record testimony that he truly would have been able to successfully perform his job under a five-day telecommuting accommodation. He would have been able to demonstrate to the Court and the jury that he would have been able to timely complete and submit his Ohio Title project had he not been sidetracked by orders from his managers to drop what he was ding to take up other intervening projects.

commute. In at least one of these communications, he also took issue with Axcess' complaints about his delay in completing the Ohio Title project, citing the many times he had been pulled off this project to work on something else. Preston was essentialy asking Axcess to engage in a further and ongoing interactive dialogue with him to modify the current accommodation in order to enable to better perform the essential elements of his job, which Axcess repeatedly refused to do The Sixth Circuit disregarded all of this evidence when it rendered its initial panel decision. Nor did the Sixth Circuit regard these facts as relevant when Preston presented them again in his Petition for Rehearing and Rehearing *En Banc*. The Sixth Circuit denied the Petition in its entirety, without comment.

The Sixth Circuit is not alone in marginalizing the efforts of a disabled employee to arrange an interactive dialogue with his employer to implement an effective and reasonable accommodation, or to re-think and adjust a previously-implemented accommodation that may not have worked out to be as effective as originally anticipated. In *White v. York International Corp.*, 45 F. 3d 357, 363(10th Cir. 1995). the Tenth Circuit held there was no obligation under the ADA for an employer to engage in such a dialogue unless the employer has already determined to its own satisfaction that the employee is "qualified":

> The interactive process is triggered only if the employee is "qualified," and, as discussed above, the term "qualified" is defined to include the concept of reasonable accommodation. *Thus, the employer necessarily must make a*

> *threshold determination that the disabled employee may be accommodated, and is, therefore, qualified within the meaning of the ADA*. It is at that point, the regulations recommend, that the employer and employee work together in order to identify how best to accommodate the employee.
>
> (emphasis added)

Ninth Circuit law, by contrast, accords no such "gatekeeper" role to the employer, rather mandating that the employer engage in the interactive accommodative dialogue with the disabled employee without preconditions. In *Humphrey v. Memorial Hospitals Association, supra,* the Ninth Circuit held that the employer's obligation was ongoing. Relying on EEOC guidelines in effect at the time, the Court held:

> The employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation *and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed.* This rule fosters the framework of cooperative problem solving contemplated by the ADA, by encouraging employers to seek to find accommodations *that really work.*
>
> *Humphrey*, at 1137-1138 (emphasis added).

Humphrey's view of the employer' post-initial accommodation duty has become the law of the Fifth Circuit as well. *Dillard v. City of Austin, Texas*, 837 F.3d 557 (5th Cir. 2016).

Again, the split between the Sixth and Tenth circuits on one hand, and the Ninth and Fifth on the other is not superficial but crucial to how failure-to-accommodate cases are to be litigated and decided. An employer subject to the jurisdiction of the Sixth and Tenth circuits holds the key to its own obligation to engage in interactive and proactive dialogues with employees to either fashion an initial accommodation or to correct a current accommodation mid-course. By determining on its own that the employee is not or would not be qualified to perform the job with or without a reasonable accommodation, the employer can extricate itself from the dialogue obligation imposed upon it by the EEOC. On the other hand, an employer subject to the jurisdiction of the Ninth and Fifth circuits faces an affirmative obligation to always keep an open mind on the effectiveness of an accommodation suggested by one of its employees and work together in good faith to devise a reasonable accommodation. If it turns out that no reasonable accommodation exists, it won't be for lack of an effort to find one. Similarly, such an employer must also monitor the effectiveness of an accommodation it has already implemented, and be open to the suggestion by the at-issue employee that the accommodation is not working out to the point where the employee canperform the essential elements of his job. The employer must also work with the employee in good faith to explore an adjustment of the current accommodation or the implementation of an altogether different one.

This split in the circuits has had a profound effect on the outcome of Preston's case. Had the law of the Ninth or Fifth Circuit been applicable to Preston or countless similarly-situated employees , Axcess would have been obliged to sit down with him in the wake of the implementation of the four-day telecommute, and wherein it would have learned that is was not working, and why. It would also have been obliged to work with Preston in good faith to either tweak the existing accommodation by, say, requiring him to come to the office anytime during the fifth day only on an *ad hoc* basis when his presence proved necessary. Or it could have revisited the idea of assigning him a private office or other unassigned enclosed space, or create such a space for him. Whether such an accommodation would ultimately prove successful is beside the point. At least the parties will have exhausted all possibilities. But under Sixth Circuit and Tenth Circuit law, the employer is under no obligation to even try.

Again, the intervention of this Court is needed to resolve a split in the Circuits on this very important issue.

II. THIS COURT'S RESOLUTION OF THE SPLIT IN THE CIRCUITS ON THE ISSUES RAISED ABOVE WOULD HAVE A SIZEABLE AND OVERDUE IMPACT ON THE RAPIDLY CHANGING WORKFORCE THROUGHOUT THE UNITED STATES

It should be noted at the outset that telecommuting is a growing phenomenon in the 21st Century. According to a 2017 internet article, "the State of Telecommuting in the U.S. in 2017" by Jennifer Parris[6], the number of employees telecommuting in the United States has risen by 115% in the last ten years, and that 3.9 million employees in the United States, or 2.9% , currently telecommute at least half of the week. This is not surprising given the increasingly widespread use of such remote communication devices as email, texting, skype, snap-chat and other similar technological breakthroughs. While federal courts back in the 1990's and early 2000's were reluctant to view telecommuting as a commonplace reasonable workplace accommodation, even they knew their views were subject to change over the years with the advent of new technology. *Vande Zande v. State of Wisconsin,* 44 F. 3d 538, 544 (7th Cir. 1995). That time has surely arrived.

Superimposed on this these statistics is the accompanying increased presence of disabled employees in the workforce. According to an article that appeared in USA Today back on February 22, 2018, over 344,000 disabled employees joined the U.S. workforce in 2016, which was four times the rate from

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[6] General statistics on telecommuting in U.S.:https://www.workflexibility.org/state-of-telecommuting-us-2017/

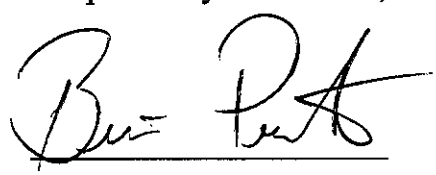
the previous year.[7] Of course, most of these individuals are given accommodations of one kind or another that allow them to be productive in the office. But a large and growing percentage of these individuals may not be able to do so, due to a wide variety of reasons, from ambulatory challenges, inability to drive, sensitive skin, respiratory, bowel problems, etc. to psychiatric/psychological disabilities which cause them tremendous difficulties in working in a social environment. For people like them, working remotely from home may provide an optimal solution to allow them to perform the essential elements of their jobs, where they can in fact do so. But the current split in the circuits on the application of the ADA to requests for telecommuting accommodations has deprived both employers and disabled employees of the guidance they need to plan and act accordingly. The Supreme Court has not accepted for consideration an ADA case of this import for many years. Its guidance would be very valuable now.

[7] https://www.usatoday.com/story/opinion/2018/02/22/people-disabilities-rapidly-joining-workforce-parallel-tv-trend-jack-markell-column/355728002/. Just looking at Autism Spectrum Disorder alone, over 3.5 Americans live with that disease. Autism Society, "Facts and Statistics" updated August 25, 2015. http://www.autism-society.org/what-is/facts-and-statistics/ It stands to reason that at least half of them are employed or employable.

CONCLUSION

For all of the aforesaid reasons, Petitioner respectfully requests this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,



Brian Preston, Petitiner.