No. _____

In the Supreme Court of the United States

DANNY SNAPP,

Petitioner,

v.

BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2013 on appeal from a summary judgment dismissing claims for violation of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §12101 *et. seq*., the Ninth Circuit reversed and remanded for trial on the questions whether Snapp made a request of his employer for reasonable accommodation; and if so, whether the employer fulfilled a mandatory obligation to initiate an interactive process with Snapp to identify an accommodation. At trial on remand, both parties requested instructions on the employer's obligation to engage in the interactive process. The trial judge declined to do so and the jury rendered a verdict against plaintiff. The first question presented is:

1. At the trial of an ADA claim for failure to provide reasonable accommodation, upon proof that the employer failed to initiate an interactive process after an employee's request for accommodation, is the disabled employee entitled to a jury instruction explaining the employer's obligation to engage in good faith in an interactive process to identify an accommodation; and, the effect of an employer's breach of the obligation?

At trial, the trial judge declined to give Snapp's proposed instruction advising the jury that, if Snapp proved defendant breached a mandatory obligation to engage with him in the interactive process, defendant bore the burden of proving no reasonable accommodation was possible. On appeal, the Ninth Circuit Panel decided that the employer does not bear the burden of proving no reasonable accommodation was possible when the employer breaches its obligation

to engage in the interactive process. The second question presented is:

2. At the trial of an ADA claim for failure to provide reasonable accommodation, if a disabled employee proves that the employer breached its mandatory obligation to initiate an interactive process to identify a reasonable accommodation, does the employer bear the burden of proving that no reasonable accommodation was possible to avoid liability?

At trial, Snapp proposed a jury instruction defining the plaintiff's and defendant's burdens with respect to "reasonable accommodation" and "undue hardship" in the way outlined in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). The Ninth Circuit Panel held that *US Airways'* applied only to summary judgment decisions and did not apply at trial. The third question presented is:

3. Does *US Airways v. Barnett*, *Inc.,* 535 U.S. 391 (2000) describe the burdens of proof and production at trial on a claim for failure to provide a reasonable accommodation or merely set forth a framework for the court's analysis of evidence on motions for summary judgment?

PARTIES TO THE PROCEEDING

The caption to the case contains the names of all parties to this proceeding.

The Petitioner, Danny Snapp, the Plaintiff-Appellant below.

The Respondent, Burlington Northern Santa Fe Railway Company, Defendant-Appellee below.

United Transportation Union was a Defendant below and is no longer part of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITY

Danny Snapp respectfully petitions for a writ of certiorari to review the Opinion of the Ninth Circuit Court of Appeals in this case.

OPINIONS AND ORDERS ENTERED IN THIS CASE

The Opinion of the Ninth Circuit (App. 1) is reported at *Snapp v. United Transportation Union*, 889 F.3d 1088 (9th Cir. 2018). The Order of the Ninth Circuit denying plaintiff's Petition for Panel Rehearing and Suggestion for Rehearing *En Banc* (App. 36) and the trial court's Judgment following a 5 day jury trial (App. 34) are not reported. The Ninth Circuit's Memorandum decision in a prior appeal in this case (App. 38) is reported at *Snapp v United Transportation Union*, 547 Fed. Appx. 824 (9th Cir. 2013).

BASIS FOR JURISDICTION OF SUPREME COURT

The Ninth Circuit filed its Opinion on May 11, 2018 and its Order denying plaintiff's Petition for Panel Rehearing and Suggestion for Rehearing *En Banc* on August 1, 2018. This Court has jurisdiction to review the lower courts' decisions on a writ of certiorari under 28 U.S.C. § 1254(1).

RULES AND STATUTES INVOLVED IN THE CASE

The rules and statutes involved in the case are 42 U.S.C. § 12111, 42 U.S.C. § 12112, 42 U.S.C. § 1981a, 29 C.F.R. § 1630.2, and 29 C.F.R. § 1630.9. They are set forth in the Appendix at App. 42-74.

STATEMENT OF THE CASE

Facts Relevant to the Petition

Danny Snapp worked in a variety of positions for the Burlington Northern Railway Co. ("BNSF") 28 years from 1971 until 1999. He became a member of the United Transportation Union (the "UTU" or "the union") and earned seniority as a clerk, a brakeman/switchman and a yardmaster. Snapp was evaluated as having very high or superior performance, willing to work, willing to move and as promotable. In 1986, BNSF promoted Snapp to a management position as a Division Trainmaster.

In 1994, Snapp was working 12 hour rotating shifts, had low energy and was feeling tired all the time. He went to the doctor who informed him he suffered from sleep apnea. Snapp went through soft palate surgery in 1996 and facial reconstructive surgery in 1998 for the condition.

In 1999, a BNSF supervisor confronted Snapp and told him the company wanted him to leave the property. The supervisor told him BNSF had a copy of a physician's report and they felt he could not work in a safe and efficient manner.

In November 1999, the BNSF Medical Director informed Snapp the medical reports indicated Snapp was permanently disabled from work due to sleep apnea. He directed Snapp to attend a fitness for duty evaluation with a physician chosen by BNSF. Snapp participated in the evaluation.

Subsequently, Snapp applied for long term disability benefits through BNSF's third party

administrator CIGNA/Life Insurance Company ("Cigna"). In February 2000, the BNSF Medical Director informed Snapp Cigna approved Snapp's initial claim for long-term disability and if Cigna determined Snapp was ineligible for long-term disability benefits, Cigna was told to contact BNSF's Medical Officer to plan Snapp's return to work.

Snapp experienced frustrations with Cigna's management of his disability benefits. Initially, Cigna quit paying him without explanation for several months. In December 2001, CIGNA terminated Snapp's disability benefits. Snapp contacted BNSF and BNSF assisted in getting disability benefits reinstated.

In June 2005, Snapp's physician, Dr. Herzberg, reported to Cigna that Snapp's condition had improved. Herzberg reported Snapp was capable of medium manual work activity and released him to modified work with limitations that he could not work graveyard or swing shifts and should have a short commute to work. At the time, Herzberg did not tell Snapp of his reports to Cigna.

Subsequently, Snapp received correspondence from Cigna requesting a sleep study. Snapp arrived at the testing location and was presented with a release to sign indicating he was financially responsible for the test. Snapp declined to sign and the technician declined to perform the test absent the signed release. Cigna scheduled testing a second time. Snapp called, advised he would not sign a consent form and wanted his attorney to approve documents he was asked to sign. The health care provider declined to do so and reported to Cigna he should go elsewhere for care.

During this same time period, Snapp had conversations with BNSF about his difficulties with Cigna and a return to work. In July 2005, Snapp wrote BNSF and forwarded a release authorizing BNSF to obtain information from Cigna for evaluation of a return to work.

In November 2005, Cigna terminated plaintiff's long term disability benefits citing an absence of evidence of continuing disability. Cigna stated that Snapp's last sleep study was in February 2000.

Snapp appealed Cigna's decision and filed complaints with the Illinois Attorney General. Cigna upheld the termination of benefits and plaintiff's complaints were denied. Following Cigna's termination of benefits, no one from BNSF initiated conversations with Snapp about a return to work.

On January 2, 2008, a BNSF employee, Emory, wrote Snapp advising him that Cigna notified BNSF that Snapp's long-term disability benefits ended, that Snapp was entitled to 60 days of unpaid leave, that BNSF was under "no obligation to provide [him] with a salaried position" and if he didn't obtain a position with BNSF, he would be terminated.

Snapp took a number of actions in response to Emory's letter. Snapp sent a letter to Emory on January 6, 2008 advising that he welcomed a return to work and asking (1) for return to work under disability with reasonable accommodations which could be reimbursed by CIGNA as a form of vocational rehabilitation benefit; or, (2) for a continued and on-going long term disability leave of absence until issues were presented in court.

Emory responded on January 10, 2008. She directed Snapp to Cigna for any appeals or issues related to his claim or benefits; advised Snapp that her letter indicating that he must secure a position by March 2, 2008 stands or he would be terminated; and directed Snapp to BNSF's web-site or to the Human Resources representative in his region to access current openings. At trial, Emory testified that she was not trained in the ADA and reasonable accommodation at the time she communicated with Snapp.

No one from BNSF responded to Snapp's request to return to work under disability with reasonable accommodation.

Snapp met with his VA physician, Dr. Boudreau, in January 2008 seeking a release to return to work. On January 14 Boudreau wrote a "To Whom It May Concern" letter advising that, based upon new information, it was possible Snapp could return to light duty work in a job that did not involve operating heavy equipment or duties that could result in injury if he became drowsy or fell asleep. On February 2, Boudreau issued a second letter stating light duty work could be considered after treatment is further optimized.

On February 1, 2008, Snapp wrote the General Chairman of the Yardmasters Union, a branch of the UTU. He advised UTU he wished to place himself in a yardmaster position using his yardmaster seniority and apply for a leave of absence under the Americans with Disability Act and/or the Family Medical Leave Act and requested assistance from the UTU in doing so.

Snapp learned there was a yardmaster, Griffin, who was intending to retire. On February 28, 2008, plaintiff

wrote to BNSF officials and the UTU seeking to exercise his seniority as a yardmaster to displace Griffin who was junior to him in yardmaster seniority. Plaintiff requested a medical leave of 90 days "under the Family Medical Leave/ADA Act" to finalize testing with the possibility of corrective surgery. He advised BNSF and UTU that he expected a full release within the 90 day period. Snapp understood that Griffin was prepared to retire and Snapp's proposed exercise of seniority with a 90 day leave of absence for medical testing would have permitted Griffin to complete the period until his retirement. He knew of Griffin's position and believed it consistent with his medical restrictions for light duty work. He enclosed Boudreau's medical release for light duty work which had his restrictions on it.

On March 3, 2008, Emory wrote plaintiff terminating his employment because he had "not secured a position with BNSF…" and he did not meet qualifications for early retirement. On March 4, 2008, another BNSF employee, Miskulin, wrote plaintiff advising that BNSF had "no record" of plaintiff having yardmaster seniority and that the UTU "concurs" that Snapp does not have yardmaster seniority.

Snapp testified at trial that no one from BNSF contacted him to discuss his limitations from sleep apnea and what could be done to accommodate him; and no one initiated an interactive process with him to develop an accommodation. Snapp testified, "that job was left up to me." BNSF's authorized representative testified at trial, that BNSF did not initiate an interactive process to arrive at a reasonable accommodation for Snapp.

On March 6, 2008, Snapp wrote BNSF and the UTU. Snapp asserted that he held seniority as a yardmaster and as a brakeman/switchman, he sought to preserve his seniority rights and requested that all parties reconsider their position and give him a 90 day medical leave of absence. On March 30, 2008, the Yardmaster General Chairman wrote Snapp advising him the Union's position was he had forfeited his yardmaster seniority by failing to maintain his name on the union roster and failing to request a leave of absence prior to going out on disability.

In April 2009, Snapp learned of an opening for a "retarder operator", a brakeman switchman position, in Pasco. Snapp knew that he held brakeman switchman seniority and believed the retarder operator position fit his restrictions. Snapp had sleep apnea tests completed with a dental appliance called an "APAP" with much success. Snapp wrote BNSF advising of his intent to exercise his seniority for the retarder operator position effective May 18, 2009. The UTU supported Snapp because he still held train service seniority with UTU.

In May 2009, Snapp returned to see his VA physician, Dr. Boudreau. Boudreau found that Snapp had obtained a dental appliance, with the appliance his sleep apnea was "well controlled" and Snapp had achieved the "best control" of his sleep apnea since his diagnosis.

On May 15, 2009, BNSF's Regional Director of Human Resources denied Snapp's exercise of seniority in the retarder operator position advising that his employment terminated on March 3, 2008, that BNSF had no record Snapp had any craft seniority and if he wished to apply for employment he would need to go to

the company website, review positions, submit his application and "compete" with other applicants. While the Regional Director claimed BNSF had no record that Snapp held seniority in any craft, in fact, Snapp produced a report from BNSF's computer database obtained on May 18, 2009 that showed Snapp still held brakeman/switchman seniority.

The UTU asserted a claim on Snapp's behalf relating to BNSF's decision denying Snapp's return to work through a Public Law Board. Prior to the date of hearing, Snapp attempted to withdraw the claim and BNSF opposed the request. Without Snapp's participation, the Public Law Board concluded that Snapp forfeited his train service seniority by failing to exercise seniority or otherwise return to service within 60 days of the January, 2008 letter from BNSF.

At trial, Snapp offered evidence of ways that BNSF could have accommodated him. Snapp testified that BNSF could have given him a 90 day leave of absence within which he believed he could get a full release to return work.

Plaintiff offered evidence of BNSF's "transitional work program" under which BNSF had light duty work available for limited time periods to allow injured/disabled employees to transition back to regular positions. Snapp testified that he was qualified to perform the kinds of work available in the transitional work program and the tasks would fit his physical restrictions.

Snapp offered evidence BNSF could have reassigned him to vacant, suitable work. There was evidence BNSF is an employer with 43,000 employees; BNSF

had numerous vacant positions available during the period January 2, 2008 through trial; BNSF's authorized representative admitted that BNSF had positions for someone like Snapp that were "very viable" in customer service, marketing and human resources; and Snapp highlighted and submitted into evidence vacant jobs he was qualified to perform and which met his medical restrictions.

Proceedings Below

Danny Snapp brought this action against the UTU and BNSF alleging a failure to accommodate under the ADA and a common law claim for wrongful discharge under Washington law in August 2010. Snapp voluntarily dismissed claims against the Union after filing. Against BNSF, the district court granted summary judgment against Snapp on all claims. On appeal, the Ninth Circuit reversed ruling "there is a genuine factual dispute over whether BNSF engaged in good faith in a required interactive process, and failure to do so would constitute discrimination under the ADA." *Snapp v. United Transp. Union*, 547 F. App'x 824, 826 (9th Cir. 2013)("*Snapp I*").

On remand, after a trial the jury rendered a verdict for the defense and Snapp appealed ("*Snapp II*"). On appeal in *Snapp II,* Snapp argued *inter alia*: (1) the district court erred in failing to give any jury instruction on the employer's duty to engage in the interactive process; (2) the district court erred in failing to instruct the jury that BNSF bore the burden of proving no accommodation was possible under *Morton v. United Parcel Serv., Inc*, 272 F.3d 1249, 1256 (9th Cir. 2001) and *Barnett v. US Air, Inc.,* 228 F.3d 1105, 1111-1116 (9th Cir. 2000); and (3) the district court

erred in instructing the jury that Snapp held a burden of proof with respect to reasonable accommodation, rather than a burden of production under *US Airways, Inc. v. Barnett*, 535 U.S. 392 (2002).

The Panel rejected Snapp's appeal finding *inter alia* that *Barnett* and *Morton* are limited to summary judgment decisions and do not apply at trial; and, *US Airways* is merely an analytical tool for use at summary judgment, not a description of burdens of proof at trial. *Snapp v. United Transp. Union*, 880 F.3d 1088, 1110, 1112 (9th Cir. 2018). The Panel did not directly decide whether the trial judge erred in failing to instruct the jury on the interactive process. *Snapp, supra*, 880 F.3d at 1100, n. 2.

Snapp now requests that this Court grant certiorari to review the decisions of the lower courts.

REASONS FOR GRANTING THE PETITION

This case presents questions of significance regarding an important federal statute granting civil rights to disabled employees, the Americans with Disabilities Act.

The ADA provides, in pertinent part: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to …discharge of employees…" 42 U.S.C. § 12112(a). Discrimination is defined to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability …, unless [the] covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the

business of such covered entity." 42 U.S.C. § 12112(b)(5)(A).

The EEOC regulations set forth an "interactive process" as the mechanism for identifying a reasonable accommodation:

> "To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations."

29 C.F.R. § 1630.2(o)(3).

The use of the phrase "may be necessary" recognizes that in some circumstances the employer and employee can easily identify an appropriate reasonable accommodation. *Barnett v. US Air Inc*., 228 F.3d 1105, 1112 (9th Cir. 2000). Nevertheless, the EEOC's interpretive guidance describes the interactive process as a mandatory obligation,

> "…the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible interactive process that involves both the employer and the [employee] with a disability."

29 C.F.R. § 1630, App. S 1630.9.

The EEOC's Enforcement Guidance also specifies the nature of the interactive process:

> "The employer and the individual with a disability should engage in an informal process to clarify what the individual needs and identify the appropriate accommodation."

Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Compliance Manual (CCH), S 902, No. 915.002 (March 1, 1999), at 5440.

The courts of appeals generally recognize that the employer has a mandatory obligation to engage in good faith in the interactive process and this obligation is triggered by an employee's request for accommodation or the employer's knowledge of a need for accommodation. *Barnett v. US Air, Inc.,* 228 F.3d 1105, 1112 (9th Cir. 2000); *Fjellestad v. Pizza Hut of America, Inc*, 188 F.3d 944, 952 (8th Cir. 1999); *Taylor v. Principal Financial Group*, 93 F.3d 155, 165 (5th Cir. 1996). The courts of appeals also recognize that the employee shares in the obligation to participate in good faith in the interactive process. *Beck v. University of Wisconsin*, 75 F.3d 1130 (7th Cir. 1996); *Taylor v. Phoenixville School Dist.,* 184 F.3d 296, 312 (3d Cir. 1999); *Klieber v. Honda of America Mfg.,* 485 F.3d 862, 871 (6th Cir. 2007); *Smith v. Midland Brake, Inc.,* 180 F.3d 1154, 1172 (10th Cir. 1999).

When an employee fails to participate in good faith in the interactive process, most courts have held that the employee's claim fails. *EEOC v. Kohl's Dept. Stores, Inc*., 774 F.3d 127, 133 (1st Cir. 2014); *Beck supra*, 75 F.3d at 1136; *Treanor v. MCI Telephone*

Corp., 200 F.3d 570, 575 (8th Cir. 1999); *Templeton v. Neodata Services, Inc*., 263 F.3d 617, 619 (10th Cir. 1998); *Stewart v. Happy Hermans Cheshire Bridge, Inc,* 117 F.3d 1278, 1286 (11th Cir. 1997)(all affirming summary judgment where employee failed to participate in good faith in interactive process).

Nonetheless, the lower courts disagree as to the effect of an employer's failure to engage in the interactive process following a request for accommodation. Several circuit courts take the position that an employer cannot prevail at summary judgment or on a motion for judgment as a matter of law if there is a genuine factual dispute as to whether the employer engaged in good faith in the interactive process. *Barnett, supra*, 228 F.3d at 1116; *Fjellestad, supra*, 188 F.3d at 952; *Taylor, supra*, 184 F.3d 296 (3d Cir. 1999); *Brady v. Wal-Mart Stores, Inc.,* 531 F.3d 127, 136 (2d Cir. 2008) Other circuit courts hold that if the record is insufficient to establish a reasonable accommodation, summary judgment must be granted for the defendant even if the employer failed to engage in good faith in the interactive process. *McBride v. BIC Consumer Products Mfg*., 583 F.2d 92, 101 (2d Cir. 2009); *Equal Employment Opportunity Comm'n v. Ford Motor Co.,* 782 F.2d 753, 766 (6th Cir. 2015); *Willis v. Conopco, Inc*., 108 F.3d 282, 285 (11th Cir. 1997); *Hennagir v. Utah Dept of Corrections*, 537 F.3d 1255 (10th Cir. 2009).

Given the disagreement among the circuit courts at the summary judgment stage as to the effect of an employer's breach of the duty to engage in the interactive process, there is no clear guidance for trial

judges as to how to instruct juries in reasonable accommodation cases.

Snapp's case is an ideal one for resolving the disagreement among the circuit courts and clarifying the ADA. The questions raised in this petition were all properly raised in the district court, preserved on appeal and framed by evidence in the trial record. The questions all involve jury instructions and burdens of proof at trial of claims of denial of a reasonable accommodation under the ADA and thus are critically important in all ADA reasonable accommodation claims.

I. AT TRIAL OF A FAILURE TO ACCOMMODATE CLAIM UNDER THE ADA, UPON PROOF OF NOTIFICATION OF DISABILITY AND A REQUEST FOR ACCOMMODATION, A DISABLED EMPLOYEE IS ENTITLED TO A JURY INSTRUCTION ON THE EMPLOYER'S OBLIGATION TO ENGAGE IN AN INTERACTIVE PROCESS

One of Snapp's principal arguments on appeal was that the trial court erred in failing to give any instruction informing the jury of the employer's obligation to engage in the interactive process; and, failing to explain the impact of an employer breach of the obligation to engage in the process.

In *Snapp I,* the Ninth Circuit Memorandum decision focused the factual issues of the trial on remand on the interactive process. The *Snapp I* panel held that:

> "Once a disabled employee has given an employer 'notification of [his] disability and the desire for accommodation'…(citations omitted), 'there is a mandatory obligation to engage in an informal interactive process to 'clarify what the individual needs and identify the appropriate accommodation.'"

App 39.

The *Snapp I* Panel identified evidence that Snapp sent BNSF a job application letter and a letter from his physician referring to his disability and need for accommodation; found that a reasonable factfinder could find the letter to be a notification of disability and a desire for accommodation which could include reassignment to another position; and concluded,

> "Such a request would have obligated BNSF to engage in an interactive process with Snapp. Consequently, there is a genuine dispute over whether BNSF engaged in good faith in a required interactive process, and failure to do so would constitute discrimination under the ADA…"

App 40.

On remand, thus, the focus of the trial was on whether Snapp provided notification of disability and requested accommodation; and on whether BNSF engaged in good faith in the interactive process under the ADA.

Both parties understood that the interactive process was a central focus of the trial on remand; and, as a

result, both the plaintiff and the defendant requested jury instructions regarding the interactive process.

Snapp submitted two proposed instructions relating to the interactive process, Plaintiff's Proposed Instructions No. 27 and 28. Plaintiff's Proposed Instruction No. 27 identified the "trigger" for the employer's obligation to engage in the process, the substance of the interactive process and the burdens of proof with respect to reasonable accommodation in the event of an employer's breach of the duty.

Plaintiff's Proposed Instruction No. 27 provided in pertinent part:

> "When the employee or someone on his behalf requests accommodation, the employer has a mandatory duty to initiate an interactive process to clarify what the individual needs and to identify the appropriate accommodation.
>
> The interactive process is a process to identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations including but not limited to the following steps: (A) an analysis of the subject job and its essential functions; (B) Ascertainment of job-related limitations imposed by the disability; (C) Identification of potential accommodations and the effectiveness of each; and (D) Consideration of the preference of the employee.
>
> If plaintiff proves defendant failed to initiate the interactive process or to participate in good faith in the interactive process, your verdict should be

> for plaintiff [unless defendant proves an affirmative defense]."[1]

App 77.

Plaintiff's Proposed Instruction No. 28 defined the method for the employer to avoid liability upon proof of a failure to engage in the interactive process. Plaintiff's Proposed Instruction No. 28 told the jury:

> "Defendant is not liable for a breach of the duty to provide reasonable accommodation if defendant proves that no reasonable accommodation of plaintiff's disability was possible."

App 79.

Defendant's Proposed Instruction No. 27 identified the employer's duty to engage in the interactive process and set forth factors in avoidance of liability without reference to a burden of proof. Defendant's Proposed Instruction advised:

> "When the employee requests a reasonable accommodation, the employer has an obligation to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations.

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[1] Plaintiff contended that, upon proof of a breach of the duty to engage in good faith in the interactive process, any matter in avoidance of liability would be an affirmative defense. Since defendant did not plead an affirmative defense to the duty to engage in good faith, plaintiff objected to amending the pleadings to add the defense. Nevertheless, plaintiff included the bracketed matter in the alternative if the court overruled plaintiff's objection

> An employer is not required to engage in a futile interactive process. If no reasonable accommodation exists that would allow an employee to do his job, an employer cannot be liable for failure to engage in the interactive process."

App 78.

The district court gave no instruction on the interactive process and the failure to instruct was prejudicial to the plaintiff.

At trial, plaintiff presented extensive testimony, including admissions from an authorized representative, both that defendant did not engage in an interactive process with respect to Snapp; and that defendant had no explanation for the failure to engage in an interactive process with Snapp. Snapp's counsel addressed the evidence of defendant's failure to engage in the interactive process in the opening statement and closing arguments.

Because the district court did not instruct the jury on the interactive process, the jury was left to speculate as to whether the employer had a duty to engage in such a process, what any such obligation might be and whether the breach of any such obligation would be significant. The jury could have interpreted the court's failure to instruct as a rejection of Snapp's evidence and his attorneys arguments regarding the interactive process.

The circuit courts have addressed the importance at trial of an employer's breach of the obligation to engage in the interactive process. In *Taylor v. Phoenixville*

School District, 184 F.3d 296 (3d Cir. 1999), for example, the Third Circuit stated that,

> "…because employers have a duty to help the disabled employee devise accommodations, an employer who acts in bad faith in the interactive process will be liable if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations. In making that determination, *the jury is entitled to bear in mind that had the employer participated in good faith, there may have been other, unmentioned possible accommodations*."

Taylor, supra, 184 F.3d at 317-318. Emphasis added. *See also*, *Barnett v. US Air, Inc*., 228 F.3d 1105, 1115 (9th Cir. 2000).

The Seventh Circuit applies the concepts of "good faith" and "reasonable efforts" to the interactive process stating that a party who "obstructs or delays the interactive process is not acting in good faith" and [a] party that fails to communicate, by way of initiation or response, may also be acting in bad faith." *Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130, 11356 (7th Cir. 1996).

The Seventh Circuit has approved a model civil jury instruction advising juries that either parties' failure to act in good faith in the interactive process may considered in deciding whether a reasonable accommodation exists:

> "Once an employer is aware of an [employee's/applicant's] disability and an accommodation has been requested, the employer must discuss with the [employee/

> applicant] [or, if necessary, with his doctor] where there is a reasonable accommodation that will permit him to [perform/apply for] the job. Both the employer and the [employee/applicant] must cooperate in this interactive process in good faith.
>
> Neither party can win this case simply because the other did not cooperate in this process, but you may consider whether a party cooperated in this process when deciding whether [a reasonable accommodation existed][to award punitive damages]."

Federal Civil Jury Instructions of the Seventh Circuit, No. 4.08. (2017 rev)

In Snapp's case, the district court gave jury instructions 11 and 13 concerning the duty to provide reasonable accommodation, neither of which addressed the interactive process. The trial judge's instructions regarding reasonable accommodation demonstrate the prejudice in failing to instruct regarding the interactive process.

In Instruction No. 13, the court informed the jury, in pertinent part, that to "establish defendant's duty to provide a reasonable accommodation," Snapp had to prove by a preponderance of the evidence that,

> "1. the employee requested an accommodation due to a disability; and
>
> 2. the employer could have made a reasonable accommodation that would have enabled the

> employee to perform the essential functions of the job."

App 82.

The trial judge's instruction relieves the employer of any duty to identify appropriate reasonable accommodation. Under the judge's instructions, the jury could incorrectly believe defendant was under no obligation to do anything with respect to Snapp to identify an accommodation. In Snapp's case, for example, several major accommodations Snapp discussed at trial (such as reassignment to vacant positions and placement in BNSF's transitional work program) were not discussed prior to his termination. Under the trial judge's instructions, the jury could have concluded that Snapp failed to prove BNSF could have accommodated him because there were no meetings where Snapp identified these as potential accommodations. Since the trial judge did not advise the jury of BNSF shared obligation, the jury had no reason to believe that BNSF breached a duty to assist in identifying a reasonable obligation,

Adding to the prejudice, the trial judge's instructions suggest that the employer's duty to provide a reasonable accommodation is triggered by proof of a request for accommodation and proof that a reasonable accommodation is available. Contrary to the district judges' instruction, the courts of appeals have held that an employer's duty to accommodate is triggered by an employee's request for accommodation or the employer's recognition of the need for accommodation, and nothing more. *See*, *Barnett,*

supra, 228 F.3d at 1114; *Fjellestad v. Pizza Hut of America, Inc*., 188 F.3d 944, 953 (8th Cir. 1999); *Taylor, supra*, 184 F.3d at 315; *Beck, supra*, 75 F.3d at 1137.

If the trial judge disagreed with either of the parties' proposed instructions, the court was obligated to give a correct instruction on the subject. *Merrick v. Paul Revere Life Insurance Co.*, 500 F.3d 1007, 1017 (9th Cir. 2007). In deciding on appeal whether Snapp was entitled to an instruction on the interactive process, the Panel acknowledged the trial court's obligation to give a correct instruction but then never addressed Snapp's contention that the district court erred in failing to instruct the jury on the interactive process. *Snapp, supra,* 889 F.3d at 1097.

The Supreme Court should grant the petition and decide, in a case where the issue is properly framed by the evidence, whether a disabled employee is entitled to an instruction informing the jury of the employer's obligation to engage in the interactive process and the effect of the breach of this obligation.

II. AT TRIAL OF AN ADA CLAIM FOR DENIAL OF REASONABLE ACCOMMODATION CLAIM, WHEN AN EMPLOYEE PROVES AN EMPLOYER'S BREACH OF THE OBLIGATION TO ENGAGE IN THE INTERACTIVE PROCESS THE EMPLOYER BEARS THE BURDEN OF PROVING NO ACCOMMODATION IS POSSIBLE

The second reason the Supreme Court should grant certiorari is that there are divisions between the circuit

courts and within the circuits as to whether an employer that fails to participate in good faith in the interactive process must bear the burden of proving no accommodation was possible to avoid liability. In Snapp's case, the Ninth Circuit erred in relieving the employer of the burden of proof in such cases; and the Ninth Circuit's misstatement of the legal standard undermines the effectiveness of the ADA and prejudiced Snapp's case. *Snapp, supra*, 889 F.3d at 1100.

The Panel's Opinion in Snapp's case conflicts with the *en banc* court's decision in *Barnett v. US Air, Inc*., 228 F.3d 1105, 1111-16 (9th Cir. 2000)(*en banc*) and with *Morton v. United Parcel Serv., Inc.,* 272 F.3d 1249, 1256 (9th Cir. 2001). In *Barnett*, an *en banc* court of the Ninth Circuit found the ADA's interactive process to be the "key mechanism" for integration of disabled employees into the work force. *Barnett* held:

> (1) "[T]he interactive process is a *mandatory* rather than a permissive *obligation* on the part of employers under the ADA and that this obligation is triggered by an employee or an employee's representative giving notice of the employee's disability and the desire for accommodation." *Barnett, supra*, 228 F.3d at 1114 (emphasis added);
>
> (2) "…[E]mployers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible." *Barnett, supra*, 228 F.3d at 1116; and,

> (3) "…[A]n employer cannot prevail at the summary judgment stage if there is a genuine dispute as to whether the employer engaged in good faith in the interactive process." *Id.*

In *Morton,* a Ninth Circuit panel applied *Barnett* to a case where the employer failed to initiate the interactive process following a request for accommodation. The *Morton* panel concluded that a breach of the employer's obligation affected the parties' burden of proof on summary judgment and at trial:

> "The question whether this failure should be excused because there would in any event have been no reasonable accommodation available is one as to which the employer, not the employee, *should bear the burden of persuasion throughout the litigation."*

Morton, supra, 272 F.3d 1249, 1256. Emphasis added.

The *Morton* panel explained its application of the burden of persuasion in footnote 7:

> "*Barnett* can be read as holding that an employer who has not engaged in the interactive process is not entitled to summary judgment no matter what the evidence on summary judgment shows concerning the actual availability of a reasonable accommodation. It is odd, however, to delay until trial an issue that is fact dependent, if proof of the relevant facts – here, the facts pertinent to proving that a relevant accommodation was available – *will* be necessary at trial. We therefore understand *Barnett* as holding, instead, that the task of proving the negative that *no* reasonable

> accommodation was available rests with an offending employer throughout the litigation."

Morton, supra, 272 F.3d at 1256 n.7. Emphasis in original.

In *Snapp II,* the Panel concluded that the cited language from *Morton* was *dicta* and *Barnett* should be limited to use on summary judgment. *Snapp, supra,* 889 F.3d at 1100. In other words, the *Snapp II* Panel held that plaintiffs and defendants each have different burdens of proof at trial from those on summary judgment.

The Panel stated that *Barnett* and *Morton* did not address the complexities arising from instructing the jury regarding the interactive process and the complex nature of any such instructions would be significant; if the burden shifted at trial and the employer failed to meet the burden, the net effect might be liability without the identification of an accommodation and this outcome contradicts *Barnett*; and, if *Barnett* and *Morton* applied at trial as well as at summary judgment, the Ninth Circuit would be in conflict with decisions in other circuit courts. *Snapp, supra* 889 F.3d at 1099. None of these reasons justify the Panel's departure from *Barnett* and *Morton.*

Barnett and *Morton* are correctly decided and should apply at both at summary judgment and at trial. First, the employer's obligation to engage in the interactive process is a "substantive duty" under the ADA, not a judicially created procedure for analyzing evidence in litigation. Both the *Barnett* court and other circuit courts of appeals have rejected the argument

that employees bear the "entire burden for finding" a reasonable accommodation:

> "To put the entire burden for finding a reasonable accommodation on the disabled employee or, effectively, to exempt the employer from the process of identifying reasonable accommodations conflicts with the goals of the ADA. The interactive process is at the heart of the ADA process and essential to accomplishing its goals."

Barnett, supra, 228 F.3d at 1112. *See also*, *Beck, supra*, 75 F.3d at 1135; *Fjellestad*, *supra*, 188 F.3d at 951.

If, under the substantive law, the employee does not bear the "entire burden" and the employer is not "exempt" from the burden of identifying a reasonable accommodation, these obligations necessarily apply at trial and on summary judgment because they are substantive legal obligations. Further, the party who breaches its' obligation (whether employer or employee) is the party that should bear the burden of showing that its breach of obligation made no difference to the outcome. If the employer is not given the burden of proof in such circumstances, the employer is effectively "exempted" from the burden of identifying an accommodation; and the employer's obligation to participate in the interactive process becomes meaningless at trial.

To decide *Barnett* applies "throughout the litigation," the *Morton* court relied upon *Barnett's* plain language explaining the trial consequence of an employer's failure to engage in the interactive process:

> "The range of possible reasonable accommodations, for purposes of establishing liability for failure to accommodate, can extend beyond those proposed: an employer who acts in bad faith in the interactive process will be liable if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations. *In making that determination, the jury is entitled to bear in mind that had the employer participated in good faith, there may have been other, unmentioned possible accommodations*."

Barnett, supra, 228 F.3d at 1115 *citing Taylor v. Phoenixville School District*, 184 F.3d 296, 317-318 (3d Cir. 1999). Emphasis added.

The *Barnett* court addressed the issue of the complexity of trial in such a case. As a consequence for employers who fail to engage in the interactive process, the *en banc* court suggested that lower courts "attempt to isolate the cause of the breakdown [in the interactive process] and then assign responsibility" so that liability ensues only where the employer bears responsibility for the breakdown. *Barnett, supra*, 228 F.3d at 1115.

In Snapp's case, *Snapp I* decided there was an issue of fact as to whether Snapp's January 10, 2008 letter or his February 28, 2008 letters, both accompanied by letters from Snapp's physician, were "requests for accommodation." BNSF did not contend either at trial or an appeal that it engaged in an interactive process. Thus, if the jury concluded that Snapp's letters were "requests for accommodation," the jury would simply consider whether BNSF proved accommodation of Snapp's disability was not possible. If the jury did not

conclude Snapp's letters were requests for accommodation, Snapp's case would be over.

The *Snapp II* Panel said that "if the burden were shifted at trial, and if the employer failed to meet the burden, the net effect might be liability without identification of an accommodation" an outcome that would seem to contradict *Barnett* and would place the jury in position of assessing damages based upon speculation. *Snapp, supra*, 889 F.3d at 1098. This seems to ignore the fact that the employer possesses all information concerning the job at issue in the case and any vacant positions available for reassignment. Through discovery, the employer will access any information plaintiff possessed regarding his physical ability to perform the job. If the employer was unable to carry a burden to show no reasonable accommodation was possible, the jury would have to conclude that accommodation was possible.

The Panel pointed out that many circuits do not relieve the plaintiff of the burden of proof at summary judgment due to an employer's failure to engage in the interactive process citing *Stern v. St. Anthony's Health Cir*., 788 F.3d 276, 293 (7th Cir. 2015); *EEOC v. Ford Motor Co*., 782 F.3d 753, 766 (6th Cir. 2015); *Jacob v. NC Admin Office of the Courts*, 780 F.3d 562, 581 (4th Cir. 2015); *Hennagir v. Utah Dep't of Corrections*, 587 F.3d 1255, 1265 (10th Cir. 2009); and *McBride v. BIC Consumer Prods. Mfg. Co.,* 583 F.3d 92, 101 (2d Cir. 2009).

However, these citations demonstrate the divisions within and among the circuits and the need for clarification regarding the interactive process. In addition to the conflict in the Ninth Circuit, there are

conflicts within the Seventh and Second Circuits as to the burden of proof with decisions that are consistent with *Barnett* and *Morton.* In *Hansen v. Henderson,* 233 F.3d 521 (7th Cir. 2000), for example, a Seventh Circuit panel held:

> "When as in this case the disabled worker has communicated his disability to his employer and asked for an accommodation so that he can continue working, the employer has the burden of exploring with the worker the possibility of a reasonable accommodation…(citations omitted)…Failure to engage in the 'interactive process cannot give rise to a claim for relief, however, *if the employer can show that no reasonable accommodation was possible*."

Hansen, supra, 233 F.3d at 523. Emphasis added.

While *Hansen* was a summary judgment case, *Brady v. Wal-Mart Stores, Inc.,* 531 F.3d 127 (2d Cir. 2008) is an appeal following a trial and a judgment awarding damages in an ADA case. Post-trial defendant sought judgment as a matter of law arguing plaintiff failed to "demonstrate the existence of an accommodation that enabled him to perform his job." *Brady, supra*, 531 F.3d at 135. The trial court denied the motion concluding that evidence the employer knew the plaintiff was disabled and failed to engage in the required interactive process was sufficient to sustain liability. *Brady, supra*, 531 F.3d at 136. On appeal, the Second Circuit affirmed the judgment awarding damages. The *Brady* court did not require plaintiff to prove the existence of a reasonable accommodation.

Finally, placing the burden of proving no accommodation was possible on the employer is consistent with this Court's description of burdens of proving reasonable accommodation and undue hardship under *US Airways v. Barnett*, 535 U.S. 391 (2002) and is consistent with the remedial provisions of the ADA.

Under *US Airways v. Barnett*, plaintiff's burden of proof with respect to reasonable accommodation is to show an accommodation that is reasonable on its face or a plausible accommodation. *US Airways, supra,* 535 U.S. at 401. Once a plaintiff satisfies this burden, the employer then must show special circumstances that demonstrate undue hardship in the particular circumstances. *Id.* at 402. When a plaintiff establishes a breach of the employer's obligation to engage in the interactive process and gives testimony of an accommodation that is plausible or reasonable on its face, the burden of proving no reasonable accommodation was possible should be on the employer as a matter of undue hardship.

Finally, plaintiff's interpretation is consistent with the remedial provisions of the ADA. The remedial provisions for intentional discrimination under the ADA are set forth in 42 U.S.C. § 1981a(3). Under § 1981a(1), a complaining party under the ADA can recover compensatory and punitive damages for intentional discrimination, defined as "not an employment practice that is unlawful because of its disparate impact." Under § 1981a(3), where a discriminatory practice involves the provision of a reasonable accommodation,

> "…damages may not be awarded….*where the covered entity demonstrates* good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business."

App 62. Emphasis added.

The text of 42 U.S.C. § 1981a(3) places the burden of proving "good faith efforts in consultation with a person with the disability,…, to identify and make a reasonable accommodation" on the employer as an affirmative defense to an award of compensatory and punitive damages. In a case involving a factual dispute as to whether the employer failed to engage in an interactive process in good faith, the *Snapp II* Panel decision results in different burdens of proof with respect to responsibility for identifying a reasonable accommodation on the questions of liability and damages. The *Snapp II* Panel decision does not eliminate the potential for confusion of jurors. It increases the potential for confusion of jurors.

This Court should accept certiorari in this case to resolve conflicts within and among the circuits as to the effect of an employer's breach of the obligation to engage in the interactive process on the parties' burdens of proof at trial.

III. THE LOWER COURT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A RELEVANT DECISION OF THIS COURT AND AFFECTS THE TRIAL OF ADA CASES NATIONALLY

Snapp contended on appeal the trial court erred in failing to give Plaintiff's Proposed Instruction No. 23. Plaintiff's Proposed Instruction defined the plaintiff's burden with respect to reasonable accommodation and defendant's burden with respect to undue hardship. The trial judge instructed the jury that plaintiff bore the burden of proving Snapp requested an accommodation due to disability; and that the employer could have made a reasonable accommodation that would have enabled [Snapp] to perform the essential functions of the job." App 82.

Snapp's Proposed Instruction explained the plaintiff's burden to show a reasonable accommodation using language from *US Airways*. Snapp's requested instruction provided in pertinent part:

> "With respect to a reasonable accommodation, plaintiff has the burden of identifying an accommodation that seems reasonable on its face. A plaintiff meets this burden by identifying a plausible accommodation or a method of accommodation that is reasonable in a typical case. Once plaintiff makes this showing, defendant bears the burden of proving specific circumstances about this particular case that demonstrate undue hardship."

App 76.

The trial court declined to give the requested instruction.

On appeal, Snapp argued that under *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) his burden was to show an accommodation that seems reasonable on its face or a plausible accommodation. Snapp argued that Ninth Circuit law prior to the ADA supported the instruction. *See*, *Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir. 1993), and *Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985).

In *US Airways*, this Court analyzed the statutory terms "reasonable accommodation" and "undue hardship" to decide if the burdens of proof with respect to the statutory terms were in conflict. *US Airways, supra*, 535 U.S. at 399-400. This Court resolved the apparent conflict between the statutory burdens of proof by adopting the "practical way" the lower courts used to resolve the tension between the statutory terms. This Court found that lower courts required the plaintiff to show an accommodation that seems reasonable upon its face, a plausible accommodation or a method of accommodation that is reasonable in the run of the cases. Upon such proof, as a matter of undue hardship, the employer bears the responsibility of proving specific circumstances about the particular case that demonstrates undue hardship. *US Airways, supra*, 535 U.S. at 402.

Two Ninth Circuit cases decided under the Rehabilitation Act of 1973 are consistent with *US Airways'* interpretation of the burdens of proof. In *Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir. 1993), in affirming a summary judgment for the plaintiff, the Ninth Circuit held that a plaintiff need

only make a "facial showing" that reasonable accommodation is possible to satisfy his burden to show he is a qualified disabled individual. The Ninth Circuit borrowed from Eighth Circuit's decision in *Arneson v. Heckler*, 879 F.2d 923 (8th Cir. 1989) in reaching this holding. *See also, Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985)(holding the burden of persuasion to prove inability to accommodate always remains on the employer).

Plaintiff's proposed instruction finds support in decisions in other circuit courts of appeals in addition to the Ninth Circuit. In *Reed v. LePage Bakeries*, 244 F.3d 254 (1st Cir. 2001), the First Circuit described the plaintiff's burden of "identifying a reasonable accommodation" as "one of production." Under this approach, plaintiff's burden

> "… is not a heavy one. It is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits. Once the plaintiff has done this, she has made out a prima facie showing that a reasonable accommodation is available, and the risk of nonpersuasion falls on the defendant."

Reed, supra, 244 F.3d at 258.

Similarly, in *Borkowski v. Valley Cent. School Distr.,* 63 F.3d 131 (2d Cir. 1995), the Second Circuit held that the plaintiff's burden with respect to accommodation is a burden of production:

> "As to the requirement that an accommodation be reasonable, we have held that the plaintiff bears only a burden of production. (citation

> omitted)…This burden we have said is not a heavy one. Id. It is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits. Once the plaintiff has done this, she has made out a prima facie showing that a reasonable accommodation is available, and the risk of nonpersuasion falls on the defendant."

Borkowski, supra, 63 F.3d at 138.

The Panel in *Snapp II* rejected Snapp's position reasoning *US Airways* adopted the *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802 (1973) "burden shifting framework" for evaluating evidence at summary judgment. *Snapp, supra,* 889 F.3d at 1101-1102. The Panel noted that burden-shifting frameworks are commonly used at summary judgment in civil rights claims and fall away at the end of the analysis leaving the ultimate burden of proof on the plaintiff. *Id.*

The manner in which the S*napp II* Panel applied *US Airways* conflicts with this Court's decision in *US Airways* and with other courts of appeals. In *US Airways*, while the Court reviewed a lower court summary judgment decision, this Court interpreted two statutory phrases, "reasonable accommodation" and "undue hardship," with burdens of proof on different parties. *US Airways, supra*, 535 U.S. at 400.

The *McDonnell Douglas v. Green* analytical framework is a judicial construct of the "order and allocation of proof" used to decide if a plaintiff has sufficient evidence of one element of his case –

discriminatory intent. *McDonnell Douglas, supra*, 411 U.S. at 800. Reconciling two statutory phrases with different burdens of proof for two parties is distinctly different from developing a method of sorting evidence offered on an element of one parties' case at summary judgment.

Of all these cases, *US Airways* and *Buckingham* are most directly applicable. *Buckingham* applies because the Ninth Circuit evaluated and decided the quantum of proof necessary to satisfy a plaintiff's burden of proving reasonable accommodation; and *US Airways* because it adopted a similar burden of proving reasonable accommodation under the ADA.

This Court should accept certiorari and resolve the conflict created by the *Snapp II* Panel. This Court should hold that the trial judge erred in failing to instruct the jury regarding the parties' respective burdens of proving reasonable accommodation and undue hardship consistent with *US Airways*.

CONCLUSION

The petition for a writ of certiorari should be granted. The decision of the Ninth Circuit should be reversed, the District Court judgment should be vacated and the case remanded for a new trial.

Respectfully submitted,

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