No. 18-7112

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In The

**SUPREME COURT OF THE UNITED STATES**

BRIEN O. HILL

Petitioner,

vs.

ASSOCIATES FOR RENEWAL IN EDUCATION, INC.

Respondent,



On Petition for Certiorari to the United States Court of Appeals for the District of Columbia

# PETITION FOR A WRIT CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1) Whether the elements for the hostile work environment claim in this cause have been raised to a standard of violation of Title VII SEC. 2002e-2. [Section 703] on behalf of Respondent whereas, as a matter of law, the above claim should be represented / presented to a jury subsequent to the United States Court of Appeals for the District of Columbia Circuit's July 27, 2018, reversal of Summary Judgment granted in favor of Respondent on Petitioner's claim of failure to accommodate a known disability, when Respondent refused to reassign Petitioner an aide / co-teacher?

2) Whether Respondent's continual sixteen month denial of Petitioner's request(s) for the reassignment of a co-teacher to assist in his assigned classroom, reaches the standard of violation of the Americans with Disabilities Act of 1990, as Amended (ADA') and is payable separately in damages, when viewed as a separate ADA violation claim from the trail verdict in Petitioner's favor where Petitioner alleged that Respondent refused for sixteen months to relocate Petitioner back to his pre-assigned lower level classroom?

## List of Parties

1) Brien O. Hill Plaintiff and Petitioner

2) Associates for Renewal in Education. Inc., Defendant and Respondent

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES

**STATUTES**

## OPINIONS BELOW

The order of the United States Court of Appeals for the District of Columbia Circuit denying rehearing *en banc*, filed August 28, 2018, is reported at Brien O. Hill v. Associates for Renewal in Education, Inc., No. 15-7064, and is reprinted, respectively, in the Appendix hereto. See App., p. 3.

The opinion of the United States Court of Appeals for the District of Columbia Circuit filed July 27, 2018, is reported at Brien O. Hill v. Associates for Renewal in Education, Inc., No. 15-7064, and is reprinted, respectively, in the Appendix hereto. See App., p. 11 - 19.

The opinion of The United States District Court wherein the Court held that Respondent has standing to survive Summary Judgment, filed September 29, 2015, is reported at Brien O. Hill v. Associates for Renewal in Education, Inc., 1:12-cv-00823-JDB, and is reprinted, respectively, in the Appendix hereto. See App., p. 21-34

## JURISDICTION

On May 22, 2012, Petitioner brought suit against Respondent in the United States District Court for the District of Columbia alleging that Respondent violated Title VII and the ADA by failing to accommodate Petitioner's known amputated left disability when Respondent failed to reassign Petitioner back to a lower level classroom, cultivated the creation of a hostile work environment for Petitioner by removing Petitioner's assigned classroom co-teacher.

On September 29, 2014, the United States District Court for the District of Columbia filed an Order and Memorandum & Opinion wherein both Petitioner's hostile work environment and failure to accommodate a known disability / the removal of Plaintiff's assigned co-teacher claims were defeated in cross Motion(s) Summary Judgment. See App., p. 20, 21-34.

On May 18, 2015, judgment on the verdict in favor of the Petitioner was issued on Petitioner's surviving trial tried claim alleging Respondent failed to accommodate a known disability by not reassigning Petitioner back to a lower level classroom.

On June 15, 2015, Plaintiff filed a Notice of Appeal as to the United States District Court for the District of Columbia's Order on Motion for Summary Judgment, Memorandum & Opinion and Clerk's Judgment (in-part). See App., p. 36.



On July 27, 2018, the United States Court of Appeals for the District of Columbia Circuit issued an Opinion reversing the United States District Court for the District of Columbia's Summary Judgment ruling on Plaintiff's claim alleging that Respondent's failed to accommodate a known disability when it did not assign Petitioner a co-teacher and the United States Court of Appeals for the District of Columbia Circuit stayed the United States District Court for the District of Columbia ruling on Plaintiff's claim of hostile work environment. See App., p. _____.

On Aug. 3, 2018, Petitioner filed a petition with the United States Court of Appeals for the District of Columbia Circuit clerk for rehearing *en banc*. See App., p. 5-10.

On August 28, 20018, the United States Court of Appeals for the District of Columbia issued an order denying Petitioner's petition for rehearing en banc. See App., p. 3.

The Jurisdiction of this Court to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit is invoked under 28 U.S.C. SS 125 (1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

### Fifth Amendment To The United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation.

### Seventh Amendment To The United States Constitution

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

### Americans with Disabilities Act of 1990 (ADA) [42 U.S. Code SS 12101].

**(a) FINDINGS** The Congress finds that-

1) Physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be serious and pervasive social problem;

3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rule and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is

justifiably famous, and costs the United states billions of dollars in unnecessary expenses resulting from dependency and lack of productivity.



**(b) PURPOSE** It is the purpose of this chapter-

1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

## STATEMEMNT OF THE CASE

### A. Facts Giving Rise To This Case

An amendment to S. 933 – ADA of 1990, S.Amdt. 713 – 101st Congress (1989 – 1990), enacted on September 7, 1989, furthered the ADA' of 1990, to require a judge to consider if a defendant who is accused of discrimination on the basis of disability has acted in good faith.

Pursuant to Fed. R. App. P. Rule 35 (b) (1) (A) (B) Petition for Hearing or Rehearing *En Banc*. A party may petition for a hearing or rehearing en banc.

1) The petition must began with a statement either:

the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

The proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

Petitioner is a disabled person under the definition of the ADA' and objects to the United States Court of Appeals for the District of Columbia Circuit's repudiation of his Petition for e*n banc* questioning of Respondent's lack of good faith actions, in regard to Petitioner's claim for a co-teacher, and here argues for separate owed compensatory and punitive damages, aside from Petitioner's exclusive trial verdict claim for relocation back to the lower level of Respondent's facility, satisfied by Order of Condonation in both compensatory and punitive damages.

**(A.) The District Court Proceedings**

On May 22, 2012, Petitioner filed suit against Respondent, seeking legal sanctions and non-repudiative relief as well as damages. Petitioner alleged that his amputated stump was injured in May 2007, when he fell at work and injury continued when he was constrained and worked alone for sixteen months after his fall at work until his firing in December 2008. Petitioner did not allege that respondent required his fellow co-teachers to work alone. However, Plaintiff did challenge the Respondent's *raison d'être* for his demotion and discharge. Found in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), this Court held: The trier of fact's rejection of employer's asserted reasons for it's actions does not entitle Plaintiff to judgment as a matter of law. Pp 505-525.

In this case before the United States District Court for the District of Columbia rejected Plaintiff's claims that Respondent's reasons for his demotion and discharge were pretextual asserting that Respondent saved money when it fired Plaintiff. See App., p. ___ rebuking Plaintiff's claims that money owed by his fellow full time co-workers in Respondent's group healthcare plan at the onset of healthcare coverage for his mentally disabled brother, terminally ill mother and he, rose to a level of concern that he was demoted and reassigned to part-time employment which removed his healthcare coverage entirely. The *Hicks*, *raison d'etre* finding above applied first to Petitioner's assertions as to reasons for Respondent's actions, appose to Respondent's claims first, as done above,

does not establish absolute entitlement for Respondent to be awarded judgment (in this case survival of summary judgment) as a matter of law.



### C. The Appellate Court Proceedings

On June 15, 2015, Petitioner filed a notice of appeal from the District Court's Order. On July 27, 2018, the United States Court of Appeals for the District of Columbia Circuit issued a Order wherein a panel **ORDERED** and **ADJUDGED** that the Summary Judgment ruling of the United States District Court for the District of Columbia appealed from in this cause, be affirmed in part; be reversed, vacated, and remanded in part for further proceedings, in accordance with the Opinion of the United States Court of Appeals for the District of Columbia Circuit filed on July 27, 2018. Contrary to the United States District Court for the District of Columbia's findings the United States Court of Appeals for the District of Columbia Circuit held that if permitted to trial, a reasonable jury could find in favor of Petitioner on his claim of Respondent's failure to accommodate a known disability by it's refusal to assign Petitioner a co-teacher. the United States Court of Appeals for the District of Columbia Circuit also found that Petitioner had no ground for a separate award of damages form his trial verdict on his tried claim of Respondent's failure to accommodate a known disability by failing to relocate Petitioner back down to the lower level of it's facility.

On August 28, 2007, the United States Court of Appeals for the District of Columbia Circuit stayed the above judgment on Petitioner's hostile work environment claim and an issuance of mandate was entered. Thereafter, Petitioner timely filed a petition for rehearing *en banc.*

On August 28, 2018, the United States Court of Appeals for the District of Columbia Circuit issued an Opinion wherein with the absence of a request by any member of the court for a vote; it was **ORDERED** that the petition be denied.

## REASONS WHY CERTIORARI SHOULD BE GRANTED

### I.

Review is Warranted Because The Opinion By The Majority Panel of the United States Court of Appeals for the District of Columbia Circuit Conflicts With An Opinion Of the United States District Court for the District of Columbia As Well As Affirmations Contained in Opinions Of This Court.

July 27, 2018 the US District of Columbia Circuit issued an opinion wherein it held that Petitioner's reasonable accommodation claim for a co-teacher to be assigned to his classroom was triable as a matter of law. See App., p. 11-19. In reaching this decision the United States Court of Appeals for the District of Columbia Circuit panel* impliedly found that Petitioner's request for a co-teacher was a protected ADA accommodation request. Separately, the District Circuit found that Petitioner failed to state a *prima facie* case on his claim of hostile work environment. Review of the majority's opinion is necessary and appropriate here since the above the United States Court of Appeals for the District of Columbia Circuit Opinion conflicts in-part with a decision of the United States District Court for the District of Columbia and also this Court, in regard to Petitioner's claim alleging that Respondent failed to accommodate Petitioner's known disability by not assigning a co-teacher to his classroom.

The protections observed under both Title VII of the Civil Rights Act of 1964, and the ADA, define harassment as unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. These protections go on further to state that; harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

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*Hon. Assoc. Justice Kavanaugh was a member of the panel at the time this cause was argued by the *Amicus'* but did not participate in the opinion attached hereto.

Thus, the District Circuit Court's one comprehensive payment ruling found at; See App., p. 18-19 for all damages sought by Petitioner on each of his separate claims for damages specifically, Petitioner's hostile work environment and failure to assign an aide claims, does not as a matter of law require each above alleged violation claimed by Petitioner to be payable exclusively through the award of damages Petitioner received at trial for the verdict in his favor for his separate alleged ADA violation claim where Respondent failed to accommodate a known disability by refusing to relocate Petitioner back to a lower level classroom.

## II.

## Review Is Warranted Because the Majority's Decision Affirming the District Court's Dismissal of Petitioner's Hostile Work Environment Claim Conflicts With The Holding in National R.R. Passenger Corp. v. Morgan

In *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the Court ruled that an employer may be liable for all acts contributing to a hostile work environment as long as one of the contributing acts occurred within the applicable 180/300 day filing period. The Court had an opportunity to review the decision in *Mohasco Corp. v. Sliver,* 447 US 807, 826 (1980). Therein, *Mohasco,* the Court held; A Title VII Plaintiff raising claims of discrete discriminatory or retaliatory acts must file his charge within the appropriate 180-or-300-day period, but a charge alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period; in neither instance is a court precluded from applying equitable doctrines that may toll or limit the time period. Pp. 5-20. Additionally in *Morgan*, the Court held that; (a) strict adherence to Title VII's timely filing requirements is the best guarantee of evenhanded administration of the law.

Also in *Morgan,* the court found that to survive summary judgment *Morgan* had to "raise genuine issue of disputed fact as to 1) the existence of continuing violation - be serial or systemic, and "2) the continuation of the violation into the limitations period, Id., at 1016. Because *Morgan* alleged three types of Title VII claims, namely, discrimination, hostile work environment and retaliation the Court of Appeals considered the allegations with respect to each category of claim separately and found that the pre-limitations conduct was sufficiently related to the post-limitations conduct to invoke the continuing

violation doctrine for all three. Similarly, found here in this cause before the Court Petitioner has alleged three categorized employment violations; 1) discrimination, 2) hostile work environment and 3) retaliation and Petitioner's claims are too ripe as in *Morgan*, to survive summary judgment given that; 1) time barring in this matter is not at issue as found in *Morgan,* and 2) the equitable doctrine used by the Court in its considerations of the above three claims in *Morgan*, were done so separately with respect to each category of claim.

## III

## Review Is Warranted Because the Majority Improperly Found That Plaintiff's Hostile Work Environment Claim Could Not Stand

The panel of the District Circuit held that this cause has not brought rise to whether a hostile work environment claim is available under the ADA and with the United States District Court for the District of Columbia having yet to decide nor reach to do so here; *Cf. Lanman v. Johnson Cty.*, 393 F. 1151, 155-56 (10th Cir. 2004) (joining three other circuits in holding that the ADA's incorporation of language from Title VII shows Congress's intent to allow hostile-work-environment claims to proceed under the ADA),. See; *Steele v. Thiokol Corporation*, 241 Fd at 1248, *Flowers v. S. Reg'l Physician Srvs. Inc.*, 247 F.3d 229 (5th Cir. 200); *Fox v. General Motors Corp.*, 247 Fsd 269 (4th Cir. 2001): *Shaver v. Indep. Stave Co.*, 350 F.3d 716 (8th Cir. 2003); for the findings therein, Petitioner continues here in this matter under the proposed congressional establishment clause found in *Cf. Lanman,* held here as actionable.

Accordingly, Petitioner here cites the flexibility of this Court's analysis of hostile-work-environment claims best exemplified for this cause before the Court in *Singletary v. District of Columbia,* 351 F. 3d 519 (DC Cir. 2003), where it was held that; (concluding that a reasonable fact finder could find a hostile work environment when Plaintiff was assigned to a storage room containing brooms and boxes of debris, lacked heat, ventilation, proper lighting, and a working phone, and to which plaintiff lacked keys so he was at risk of getting locked in), in that, the Court correctly concluded that a reasonable jury could find return a verdict in favor of Plaintiff on his hostile work environment claim. Equally, as found in *Singletary,* Petitioner here was 1) reassigned (in Petitioner's case while injured), 2) lacked use of a classroom aide as prescribed by Respondent in Petitioner's lower level classroom, 3) cited on his annual employee

evaluation for failure to adhere to a basement level student lavatory break schedule, See App., p. 21-34) was divided from all other same position employees, and 5) placed at



a grave disadvantage in severe cases of facility evacuation and emergency drills. See App., p. 21-34.

The United States Court of Appeals for the District of Columbia Circuit reviews a grant of Summary Judgment *de novo,* viewing the "evidence in the light most favorable to the nonmoving party," and drawing all reasonable inferences in his or her favor. *Settled in, Minter v. District of Columbia*, 809 F.3d 66, 68 (D.C. Circuit. 2015) (quoting *Breen v. Dept of Trans.*, 282 F.3d 839, 841 (D.C. Cir. 2002)). Summary judgment is appropriate only if, "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law," meaning that "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," *Anderson v. Liberty Lobby* Inc., 477 U.S. 242, 247-48 (1086). Now, to prevail on his hostile-work-environment claim Petitioner has shown uncontested through record in that; 1) for sixteen months Respondent's incessant refusal to accommodate Petitioner's know disability became a condition of Petitioner's daily continued employment. 2) Petitioner's written and verbal request for the enrollment of his terminally ill parent, mentally incapacitated brother, and the addition to Petitioner's own pending medical bills after his May 2007, fall at work on through to his August 2007, demotion and December 2008, discharge were all met by a reassignment to part time employment that instantly rendered Petitioner ineligible for the group healthcare coverage afforded Petitioner as a full time employee for four consecutive years prior. 3) Respondent removed Petitioner's in class aide and reassigned August 2007, to work alone (while injured) instructing the facility's largest classroom of students, See App., p. 11-17.

## IV.

## Review Is Warranted Because The Majority Failed To Recognize This Court's Flexible Approach To Deciding Establishment Clause Cases.

As stated above in the predicated supporting congressional language that allows the Appellate Court to partner with sister Circuits for the reason that the Court has yet to settle on if hostile work environment claims can and or are allowed to be inclusive in ligation brought under the ADA, review here is warranted given that the US DC Circuit failed in its test application of the Title VII statute. Petitioner's harassment and hostile work environment claim in the US District Circuit Court's concurring argument See App., p. 18-19 the first paragraph therein reads correctly as it states; "...although we find that the Distract Court erred when it granted partial summary judgment on the claim that Hill was denied the reasonable accommodation of a classroom aide," yet continues as

untrue in paragraph two of the same page; "...While the District Court granted summary judgment as to the teacher aide theory," then concludes on its face in paragraph three of



the same page; "In sum, although ARE was granted summary judgment with regard to the failure to provide and aide," the Appellate Court's closing argument thereafter, "the District Court was quite solicitous of Hill allowing him to present evidence and argument at trial regarding his classroom-aide claim. Under these circumstances, it seems quite plausible that in finding for Hill on the reasonable accommodations claim, the jury took into account any pain and injury Hill suffered due to the failure to provide him with an aide." Petitioner concurs that it is in fact well settled that a party "cannot recover the same damages twice even though the recovery is based on two different theories." Medina v. District of Columbia, 643 F.3d 323, 326 (D.C. Cir. 2011) (citation omitted), the US District Court erred in its above evaluation of the facts of the case and claims above that "it seems plausible," that Petitioner's were unclear as to the how many failure to accommodate claims it was awarding damages for.

## V.

## Review Is Warranted Because Of The National Importance In Determining Whether A Disable Pro Se Plaintiff's First Hand Account of Hostile Work Environment and the Ignorance of Such A Claim Impedes on An ADA' Covered Person's Constitutional Rights

As noted again below the United States Court of Appeals for the District of Columbia Circuit failed to view the evidence in record in the light most favorable to Petitioner See; *Keefe Co. v. Americable Int'l, Inc.*, 169 F.3d 34, 38 (D.C. Cir. 1999) given that Petitioner provided first hand accounts and evidence throughout record that his continual real time perception of his August 2007 – December 2008, work environment as wholly malicious and causing him both consistent physical and emotion pains.

Plainly, Respondents the ADA and Title VII employment violations in this cause rose to be daily viewed by Petitioner as severe malevolent attempts to inflict unwavering psychological, physical and emotion injury that would inflict an unbearable level of pain that would ultimately force Petitioner to resign.

## VI.

**Review Is Warranted Because The United States District Court Erroneously Found That Respondent Had Standing To Survive Summary Judgment on Petitioner's Hostile work Environment Claim**

Hon. Justice Scalia [for the majority vote of 6-3] established that presenting a *prima facie* case as a member of a protected class, "even if a plaintiff discredits an employer's explanation, the employer can still win if the trier of fact concludes there was no discriminatory intent. The District Court's rejection of the employer's asserted reasons for its actions did not mandate a finding for the employee, because

1) Under Rule 301 of the Federal Rules of Evidence, a presumption did not shift the burden of proof;

2) The Supreme Court had repeatedly stated that a Title VII plaintiff at all times bore the ultimate burden of persuasion;

Additionally, the Tenth Circuit's finding in *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, 731 F. 3d 1106, held that the failure-to-accommodate liability attaches only when the applicant * provides the employer with actual knowledge of his need for an accommodation. To prevail in a desperate-treatment claim, an applicant need show only that his need for an accommodation was a motivating factor in the employer's decision, not that the employer had knowledge of his need.

Here, again, on Page One of the US Circuit Court's Closing Concurring Argument (attached hereto), the US Circuit Court's Opinion See App., p. 18-19 Page One, wherein it states in its first paragraph that; "the District Court erred when it granted partial Summary Judgment on the claim that Hill was denied the reasonable accommodation of a classroom aide." Then, it is found on it face (further on Page One) in the second paragraph of the US Circuit Court's Opinion to conflictingly state, that; "... the District Court granted Summary Judgment as to the teacher aid theory..." to Petitioner and lastly, paragraph three again on Page One the US Circuit Court reoffers the polar opposite offers, "ARE was granted Summary Judgment with regard to the failure to provide an aide.

*Applicant under the ADA extends to include and protect projected and current employees.



It is evident that the US Circuit Court was not certain in its closing concurring opinion as to the District Court's ruling on Petitioner's claim for an aide. Likewise, the following claim that the jury was to at odds with which claim there were awarding damages on at trial is a sole creation of the US Circuit Court and it's refusal to cite the *prima facie* evidence present by Petitioner throughout record arising from the corresponding confusion.

## CONCLUSION

Based on the forgoing, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted. The court may wish to consider summary reversal of the decision of the US Court of Appeals for the District of Columbia Circuit

Respectfully submitted,

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