No. 19-252

In the Supreme Court of the United States

MICHAEL ADAM BOOTH,
Petitioner,

v.

NISSAN NORTH AMERICA, INC.,
Respondent.

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

PETITION FOR REHEARING

Constance Mann
The Law Office of Constance Mann
1107 Battlewood Street
Franklin, Tennessee 37069
(615) 724-1800
cmannlaw@msn.com
Counsel for the Petitioner

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PETITION FOR REHEARING

Mr. Booth requests his Petition for Writ of Certiorari be granted, the Sixth Circuit opinion be vacated, and this matter be remanded to the Sixth Circuit for further consideration in light of their published decision of *Babb v. Maryville Anesthesiologists P.C.*, __ .3d __ ; WL 778336; LEXIS 33165 (6th Cir., Nov. 6, 2019).

The Sixth Circuit opinion in *Babb* is an intervening circumstance of substantial or controlling effect when they confess to and reverse the error Petitioned to this Court via Writ of Certiorari. Said confession is intervening having been published a mere two days after Mr. Booth's Petition was denied.

Whether Mr. Booth was disabled under the ADAAA is a controlling issue that permeates the entire Appellate outcome, when very little attention was paid to the remaining legal elements. We know this because of statements like, "out of the gait…" he fails, and "it might have been closer if".

In sum, prior to the ADAAA, a regarded as disability claim required the

employer to be "mistaken"; i.e. there is no disability, but they think there is. On this issue the Booth court aligned itself as indistinguishable from the *Ferrari v. Ford Motor Co.*, 826 F.3d 885, 893 (6th Cir. 2016). Both rejected disability because an employer cannot be *mistaken*, if the employee keeps working in some form for the employer.

The Sixth Circuit in *Babb* dismisses the *mistaken* requirement and identifies *Ferrari* by name as decided in error. In light of this confession, there is a substantial chance, the Sixth Circuit will correct this error in Booth, if given the chance.

LEGAL HISTORY

The facts are mostly undisputed. Mr. Booth had work restrictions since 2004. Nissan claimed he could not perform his job with the restrictions on or about 2016. If *disability* is found, the jury question is whether Nissan made Booth remove the restrictions in violation of the ADAAA, or whether they were "helping" him, when they forced him to return to the doctor. Booth never reached the jury question because the Sixth Circuit held he was not disabled. Per the Sixth Circuit, work restrictions

are not a disability. Then, they held Booth could not succeed on the issue of disability under the "regarded as" disabled prong because of *Ferrari v. Ford Motor Co.*, 826 F.3d 885, 893 (6th Cir. 2016). Per the Court, "Because Booth has advanced no evidence of his disability beyond his work restrictions, he cannot show that he is disabled and has therefore failed to carry his burden at summary judgment. We affirm the district court's grant of summary judgment on that claim." *Booth v. Nissan N. Am., Inc.*, 927 F.3d 387, 394 (6th Cir. 2019). (Petition for Writ of Certiorari, Appendix, page 16, hereafter *Writ*).

The issue is whether Mr. Booth was *regarded as disabled* under the broader definition of the American With Disability Act, Amendment Act of 2008. (Hereafter, ADAAA). The Sixth Circuit affirmed summary judgment claiming Mr. Booth was not disabled relying on their own published opinion of *Ferrari v. Ford Motor Co.*, 826 F.3d 885 (6th Cir. 2016), because it was the only published decision issued after the ADAAA. (Appendix to Writ, pages 15-16) The gravamen of the Petition for Writ of Certiorari argued *Ferrari* was wrongly decided based upon pre-amendment

standards. (Petition for Writ of Certiorari pages 30-31). The Petition for Writ of Certiorari was denied on November 4, 2019.

Two days after Mr. Booth's Petition was denied by the High Court, the Sixth Circuit acknowledged the *Ferrari* requirement of *mistake*, was decided in error in the published case of *Babb v. Maryville Anesthesiologists P.C.*, __ .3d __ ; WL 778336; LEXIS 33165 (6th Cir., Nov. 6, 2019). "To the extent we have issued decisions in recent years holding to the contrary—and, regrettably, we have—that was error. *See Ferrari*, 826 F.3d at 893; *Johnson v. Univ. Hosps. Physician Servs.,* 617 F. App'x 487, 491 (6th Cir. 2015)."

GROUNDS

A. The Booth Court aligned their opinion with *Ferrari* when claiming the employer must be *mistaken* when they regard an employee as disabled.

Per *Ferrari v. Ford Motor Co.*, 826 F.3d 885, 893 (6th Cir. 2016)., "[A] plaintiff may seek relief under the ADA if his employer ***mistakenly*** believes that he is substantially limited from

performing a major life activity, such as work". *Ferrari v. Ford Motor Co.*, at 893.

The pre-amendment elements in Ferrari were;

"Individuals may be regarded as disabled when (1) [an employer] **mistakenly** believes that [an employee] has a physical impairment that substantially limits one or more major life activities, or (2) [an employer] ***mistakenly*** believes that an actual, nonlimiting impairment substantially limits one or more [of an employee's] major life activities." *Ferrari* citing *Daugherty v. Sajar Plastics, Inc.*, 544 F.3d 696, 703, 704 (6th Cir. 2008).

The Ferrari Court held that the "mistaken" element required for a *regarded as claim* was not fulfilled because the Plaintiff continued working for the employer as an apprentice. They opined the employer cannot be "mistaken" if they continue to employ the complainant. The Booth Court followed Ferrari's requirement that the employer be "mistaken" and concluded Nissan could not be mistaken because they continued to employ Booth on the assembly line "without interruption". (Writ Appendix, Sixth Circuit Opinion, page 15).

We now turn to *Babb*, where the mistaken requirement is rejected, and *Ferrari* is reversed as error.

B. The Sixth Circuit confessed to *Ferrari*'s error on the mistaken requirement and reversed it, two days after Booth's Petition was denied.

The Sixth Circuit confesses the "mistaken" requirement was an error in published opinion of *Babb v. Maryville.* They identify *Ferrari* as a case that was wrongly decided in light of the Amendment. The Sixth Circuit goes on to memorialize Mr. Booth's precise arguments to the High Court in his Petition; i.e. that the stringent standards in *Sutton v. United Air Lines*, 527 U.S. 471, 119 S. Ct. 2139 (1999) on the definition of disability have been rejected by Congress. (Writ, pages 24-27)

The Sixth Circuit acknowledged and corrected an ongoing problem between panel decisions. "Because there appears to be some confusion in our circuit as to what a plaintiff must do to establish a "regarded as" ADA claim under the current statute, we pause to emphasize the correct legal standard for reviewing such a claim."

> Accordingly, to state the threshold condition of a "regarded as" ADA claim, an employee need only show that their employer believed they had a "physical or mental impairment," as that term is defined in federal regulations.

The belief no longer needed to be "mistaken". Booth clearly meets this threshold, when the employer believed Booth had a physical impairment, which is why they demanded it be removed.

Per Babb,

> **To the extent we have issued decisions in recent years holding to the contrary—and, regrettably, we have—that was error. See *Ferrari*, 826 F.3d at 893**; *Johnson v. Univ. Hosps. Physician Servs.*, 617 F. App'x 487, 491 (6th Cir. 2015). Emphasis added.

Therefore, the "regarded as" provision of the ADA now provides that an employee makes out a "regarded as" claim: if the [employee] establishes that

he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*. *42 U.S.C. § 12102(3)(A).*

Babb v. Maryville Anesthesiologists P.C., __ .3d __; WL 778336; LEXIS 33165 (6th Cir., Nov. 6, 2019) distinctly holds the *Ferrari* definition of disability as error on the exact principles argued in Mr. Booth's brief.

C. The threshold question of disability penetrates every single element in this discrimination claim.

Because the Sixth Circuit now agrees with the legal analysis in the Petition for Writ of Certiorari and has rejected the *disability* analysis relied upon by the panel, there is a reasonable probability the lower court will find the threshold question of *disability* was met, if given the opportunity. We make this request so the Sixth Circuit, who relied heavily on *Ferrari* and the analysis therein, should consider the possible impact of the *Babb* decision, and, if

necessary, revise its ruling in light of the changed circumstances.

The panel rejects the entire discrimination case squarely on the issue of disability. They go on to state other issues might have been closer if Booth had argued "regarded as". Per the Court;

"Like his disability discrimination claim, Booth's failure-to-accommodate claim fails out of the gate because he has not advanced an argument, supported by evidence that he is disabled under the ADA". (Writ, Appendix, page 18).

"We note that this issue would have been closer, had Booth argued that Nissan regarded him as disabled… (Writ Appendix, page 18, FN 3). "Closer" is the zenith when a case is dismissed at the summary judgment stage. Close issues are to be resolved in favor of the non-movant such as Mr. Booth.

D. The regarded as disabled prong was raised both in the District Court and on appeal.

The confusion caused by various panel definitions of *disability* and particularly the "regarded as" prong is further emphasized when the Booth

panel claims Booth never raised a *regarded as* disabled claim in his brief.[1]

The brief did not address disability as an issue, because the trial court did not address disability as an issue. However, when Nissan raised same in their Appellant brief, Mr. Booth argued the regarded as issue in his Reply. (Sixth Circuit, Re 21, Reply by Booth page 16, raising *regarded as*, citing the *regarded as* portion of the statute and citing caselaw supporting *regarded as*).

> Mr. Booth alleges he was disabled pursuant to the ADA when Nissan claimed he could not perform any job in the plant. Watts v. UPS, 378 Fed. Appx. 520 (6th Cir. 2010) *unpublished*. "When a defendant flatly bars a plaintiff from working at any job at the defendant's

[1] "We note that this issue would have been closer, had Booth argued that Nissan regarded him as disabled when it warned Booth that he would be jobless unless he changed his work restrictions. But Booth does not make this argument in his brief. (Writ, Sixth Circuit Opinion, Appendix page 18, Footnote 3).

> company, that is generally sufficient proof that the employer **regards the plaintiff as disabled** in the major life activity of working so as to preclude the defendant being awarded judgment as a matter of law". Watts at 526. *See also*, **42 U.S.C.S. § 12102(2)(C)**. (Sixth Circuit Reply, Record 21, page 16)[2]

To further emphasize this issue, "regarded as" was also argued at the trial level. "Moreover, Nissan regarded him as disabled, when suddenly telling him he could not work anywhere in the plant. (UDF 44 and Resp 20)" (Record 31, page 2, Page ID # 424).

CONCLUSION

While it is not the High Court's primary purpose to correct a confessed error of a Federal District Court, sometimes timing falls to this Court. The time is ripe when there is a change

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[2] **42 U.S.C.S. §12102(2)(C)** is the regarded as section of the ADAAA; "being regarded as having such an impairment".

in the law that directly affects a pending case. The Supreme Court is where we are and because law is ever changing, it may fall on this Court to remand the matter and give the lower Court the opportunity to right the wrong and apply changed legal precedent. That is Booth's request here.

Respectfully Submitted,

s/Constance Mann
Constance Mann
The Law Offices of
Constance Mann
1107 Battlewood Street
Franklin, TN 37069
(615) 724-1800
cmannlaw@msn.com
Attorney for the Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2

s/Constance Mann

Constance Mann

Counsel for Petitioner