No. 19-8717

IN THE SUPREME COURT OF THE UNITED STATES

LANCE E. FELTON
Petitioner

v.

CITY OF JACKSON, MISSISSIPPI
Respondent

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

A. While a Patrol Lieutenant employed with the City of Jackson, Mississippi ("the city"), Lance Felton ("Felton") suffered post-traumatic stress disorder ("PTSD") due to a work-related incident. The question is whether the city failed to accommodate Felton's disability pursuant to the Americans with Disabilities Act ("ADA").

B. The ADA requires an employer to engage in an interactive process with an employee who requests an accommodation for a disability. The interactive process establishes the changes needed to enable the employee to continue to work. The question is whether the city failed to engage in the interactive process.

C. After Felton suffered PTSD, the city later terminated Felton. The questions is whether Felton's termination was pretextual.

II. PARTIES TO THE PROCEEDING

The parties in the United States Court of Appeals for the Fifth Circuit and this matter are Lance Felton and the City of Jackson, Mississippi.

III. TABLE OF CONTENTS

Questions Presented.....i

Parties to the Proceeding.....ii

Table of Contents.....iii

Table of Authorities.....iv

Petition for Writ of Certiorari.....1

Opinions Below.....1

Jurisdiction.....1

Statutory Provisions Involved.....2

Statement of Case.....9

Reasons for Granting the Writ.....14

Lance Felton has a viable and supported Americans with Disabilities Act claim.....14

The City of Jackson, Mississippi failed to engage in the "interactive process".....19

The City of Jackson, Mississippi's termination of Lance Felton was pretextual.....24

Conclusion.....25

Appendix

Opinion of the United States District Court for the Southern District of Mississippi, Northern Division (June 24, 2019).....A

Judgment of the United States District Court for the Southern District of Mississippi, Northern Division (June 24, 2019).....B

Opinion of the United States Court of Appeal for the Fifth Circuit (January 8, 2020).....C

Judgment of the United States Court of Appeal for the Fifth Circuit (January 8, 2020).....D

Americans with Disabilities Act, 42 U.S.C. Section 12101.....E

Americans with Disabilities Act Amendments Act of 2008, Pub.L.No. 110-325, 122 Stat. 3553 (2008).....F

Family Medical Leave Act of 1993, 29 U.S.C. Section 2601.....G

Civil Rights Act of 1964, Title VII.....H

CFR Section 825.312.....I

A copy of Dr. Scott Coffey's evaluation report regarding Lance Felton, dated May 5, 2014,.....J

Correspondence to Lance Felton from the City of Jackson, Mississippi, dated September 17, 2015.....K

FMLA Request Form.....L

Intended Disciplinary Action - Termination correspondence.....M

Termination correspondence.....N

Complaint.....O

Motion for Summary Judgment.....P

Medical records of Lance Felton.....Q

Public Employees Retirement System documents of Lance Felton.....R
Excerpts from the deposition of Lee Vance.....S

Jackson Police Department Divisions.....T

IV. TABLE OF AUTHORITIES

Cases

Burton v. Freescale Semiconductor, Inc., 798 F.3d 222 (5th Cir. 2015).....24
Caldwell v. KHOU-TV, 850 F.3d 237 (5th Cir. 2017).....25
Cannon v. Jacobs Field Servs. N. Am., Inc., 813 F.3d 586 (5th Cir. 2016).....14
Deval v. Ptech Drilling Tubulars, LLC, 824 F.3d 476 (2016).....24
EEOC v. Chevron Phillips Chem. Co., 570 F.3d 606 (5th Cir. 2009).....14,17,19,22
E.E.O.C. v. LHC Grp., Inc., 773 F.3d 688 (5th Cir. 2014).....17
Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997).....23
Humphrey v. Memorial Hosps. Ass'n, 239 F.3d 1128 (9th Cir. 2001).....20
Jenkins v. Cleco Power, LLC, 487 F.3d 309 (5th Cir. 2007).....23
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).....14
Moss v. Harris County Constable Precinct One, 851 F. 3d 413 (5th Cir. 2017)....17,23
Rodriguez v. Eli Lilly & Co., 820 F.3d 759 (5th Cir. 2016).....14
Rogers v. Int'l Marine Terminals, Inc., 87 F. 3d 755 (5th Cir. 1996).....15
Turco v. Hoechst Celanese Corp., 101 F. 3d 1090 (5th Cir. 1996).....17
Waldrip v. Gen. Elec. Co., 325 F.3d 652 (5th Cir. 2003).....15

Statues

29 U.S.C. Section 2612.....2,10
29 U.S.C. Section 2613.....2,11
42 U.S.C. Section 12101.....2,9,12
42 U.S.C. Section 12102.....3,15
42 U.S.C. Section 12112.....4,21
29 CFR Section 825.305.....4,11
29 CFR Section 825.312.....5,20
29 CFR Section 1630.1.....5,15
29 CFR Section 1630.2.....6,7,8,16,19,22

V. PETITION FOR WRIT OF CERTIORARI

Lance Felton, a former Patrol Lieutenant employed with the City of Jackson, Mississippi, respectfully petitions this court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

VI. OPINIONS BELOW

The decision by the United States District Court for the Southern District of Mississippi, Northern Division, dismissing Lance Felton's complaint with prejudice is reported as *Lance E. Felton vs. City of Jackson, Mississippi, et al.*, and has a civil action number of 3:18CV74TSL-RHW. The same is attached hereto as **Appendix A** (Memorandum Opinion and Order) and **Appendix B** (Judgment).

The decision of the United States Court of Appeals for the Fifth Circuit denying Lance Felton's direct appeal and affirming the judgment of the district court is reported as *Lance Felton v. City of Jackson, Mississippi*, and has a case number of 19-60563. The same is attached hereto as **Appendix C** (Memorandum Opinion) and **Appendix D** (Judgment).

VII. JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit denying Lance Felton's direct appeal and affirming the judgment of the district court was on January 8, 2020. Felton invokes this Court's jurisdiction under 28 U.S.C. Section 1254(1), having timely filed this petition within ninety days of the United States Court of Appeals for the Fifth Circuit's judgment.

VIII. STATUTORY PROVISIONS INVOLVED

1. Americans with Disabilities Act, 42 U.S.C. Section 12101: attached hereto as **Appendix E** due to length.
2. Americans with Disabilities Act Amendments Act of 2008, Pub.L.No. 110-325, 122 Stat. 3553 (2008): attached hereto as **Appendix F** due to length.
3. Family Medical Leave Act of 1993, 29 U.S.C. Section 2601: attached hereto as **Appendix G** due to length.
4. Civil Rights Act of 1964, Title VII: attached hereto as **Appendix H** due to length.
5. **29 U.S.C. Section 2612(a)(1)(D):**
    a. (a) In general-(1) **Entitlement to leave.** Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following: (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.
6. **29 U.S.C. Section 2613(a):**
    a. (a) In general-An employer may require that a request for leave under subparagraph (C) or (D) of paragraph (1) or paragraph (3) of section 2612(a) of this title be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, or of the next of kin of an individual in the case of leave taken under such paragraph (3), as appropriate. The employee

shall provide, in a timely manner, a copy of such certification to the employer.

7. 42 U.S.C. Section 12102(1)(A)-(B):

a. (1)Disability-The term "disability" means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment.

8. 42 U.S.C. Section 12102(2)(A)-(B):

a. (2) Major life activities-

i. (A)In general-For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

ii. (B) Major bodily functions-For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

9. 42 U.S.C. Section 12102(4)(A):

a. (4) Rules of construction regarding the definition of disability-The definition of "disability" in paragraph (1) shall be construed in

accordance with the following: (A)The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

10.42 U.S.C. Section 12112(b)(5)(A):

a. (b)Construction-As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes—(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity...

11.48 U.S.C. Section 12112(a):

a. (a)General rule-No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

12.29 CFR Section 825.305(b):

a. Timing. In most cases, the employer should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of

unforeseen leave, within five business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration. The employee must provide the requested certification to the employer within 15 calendar days after the employer's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or the employer provides more than 15 calendar days to return the requested certification.

13. 29 CFR Section 825.312:

a. attached hereto as **Appendix I** due to length.

14. 29 CFR Section 1630.1(a)(4):

(a) Purpose. The purpose of this part is to implement title I of the Americans with Disabilities Act (ADA), as amended by the ADA Amendments Act of 2008 (ADAAA or Amendments Act), 42 U.S.C. 12101, et seq., requiring equal employment opportunities for individuals with disabilities. The ADA as amended, and these regulations, are intended to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, and to provide clear, strong, consistent, enforceable standards addressing discrimination.

(4) Broad coverage. The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of "disability" in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.

15. 29 CFR Section 1630.2(j)(1)(i)-(ii):

a. (j) Substantially limits - (1) Rules of construction. The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity: (i) The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. "Substantially limits" is not meant to be a demanding standard. (ii) An impairment is a disability within the meaning of this section if it substantially

limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

16. 29 CFR Section 1630.2(o)(1):

a. (o) Reasonable accommodation. (1) The term reasonable accommodation means: (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

17.29 CFR Section 1630.2(o)(3):

(o) Reasonable accommodation. (3) 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 potential reasonable accommodations that could overcome those limitations.

IX. STATEMENT OF CASE

Facts

The Americans with Disabilities Act is a federal law that prohibits discrimination on the basis of disability in employment. 42 U.S.C. Section 12101. In this case, Lance Felton suffered a disability caused by a work-related incident while employed with the City of Jackson, Mississippi. Thereafter, Felton was terminated. Consequently, this matter presents several questions that include (1) whether the city failed to accommodate Felton's disability pursuant to the ADA; (2) whether the city failed to engage in the interactive process; and (3) whether Felton's termination was pretextual.

On December 5, 1995, Felton was hired as a police officer with the City of Jackson, Mississippi. After twenty-one (21) years, he had attained the rank of Patrol Lieutenant. Notably, Felton was a decorated veteran of Operation Desert Storm, Operation Iraq Freedom, and had twenty-two (22) years of honorable service in the military. On April 24, 2014, Felton was on patrol in the city when a suspect Felton was attempting to arrest for armed robbery and aggravated assault, tried strike and run over Felton with his vehicle. In defense, Felton fired his weapon at the suspect.

Pursuant to the city's policy, because Felton fired his weapon while on duty, Felton was placed on administrative leave while the incident was investigated and a mental evaluation was conducted. Dr. Scott F. Coffey ("Dr. Coffey"), a Consulting Psychologist at the University of Mississippi Medical Center, evaluated Felton. Dr. Coffey indicated in his evaluation report dated May 5, 2014, that Felton was unable

to return to work at full duty. R. at 22. Moreover, Dr. Coffey's report provides,

> In short, Lt. Felton appears to be experiencing acute distress following the above referenced incident. Based on the results from this psychological screening, Lt. Felton is deemed NOT fit to return to duty at this time. The need for, and value of, psychological therapy for managing his distress was discussed with Lt. Felton and he acknowledged his willingness to accept additional referral for same. I have spoken with clinical psychologist Matthew Tull, Ph.D., who is an Associate Professor at the University of Mississippi Medical Center and is an expert in PTSD who stated he will be pleased to accept this patient as a referral once a Workers Comp agreement has been established....

See Dr. Coffey's May 5, 2014, evaluation report attached hereto as **Appendix J.**

Felton remained on administrative leave until September 17, 2015. On September 17, 2015, the city informed Felton via a correspondence the following:

> The report indicates that you are not capable of returning to duty as a law enforcement officer with the Jackson Police Department at this time. You may utilize any accrued sick or personal leave benefits available until such time that you are able to provide a statement from a physician that you are able capable of returning to work. R. at 24.

See correspondence from the city dated September 17, 2015, attached hereto as **Appendix K.**

In April 2016, Felton exhausted his accrued sick and personal leave benefits. The city, still concerned about Felton's fitness and ability to return to work at full duty, advised Felton to utilize his available leave time under the Family Medical Leave Act ("FMLA"). Pursuant to the FMLA, "an eligible employee shall be entitled to a total of twelve workweeks of leave during any 12-month period...because of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. Section 2612(a)(1)(D). Moreover, FMLA

provides, "An employer may require that a request for leave...be supported by a certification issued by the health care provider of the eligible employee..." 29 U.S.C. Section 2613(a).

Additionally, under the regulations, an employer must request a medical certification at the time an employee gives notice of the need for leave or within five business days. If the leave is unforeseen, the employer should request medical certification within five days after the leave began. 29 CFR Section 825.305(b). The city did not inform Felton of the same nor provide Felton with the certification form for his health care provider to complete. R. at 396.

Notwithstanding the same, Felton went to the VA Medical Center ("VA") to complete the FMLA Request form. R. at 27-30. See the FMLA Request Form attached hereto as **Appendix L**. A physician and Felton discussed Felton's "chronic post traumatic disorder" and the condition, in the opinion of the physician, needed "evidence-based psychotherapy," and that the prognosis was "guarded". The physician did not know when Felton's condition would improve. More appointments with the physician followed. On June 27, 2016, Felton's FMLA leave was exhausted.

After his leave options were exhausted, the city ordered Felton to return to work. On July 7, 2016, Felton obliged. Upon his return, the city requested a correspondence from Felton's treating physician supporting his return, but Felton could not provide the same. Felton still suffered from PTSD, and Felton's treating physician opined that Felton was simply not ready to return to work. Thus, it was not possible to provide documentation from a medical provider to the contrary. The city

was aware of the foregoing. Additionally, the city made no efforts to discuss accommodations for Felton's condition in spite of Felton's efforts to do so.

Though Felton suffered from PTSD and against Felton's physician's orders, Felton continued to report for work, and on each occasion, the city ordered Felton to leave and return home. Felton was later ordered by Jackson Police Department Assistant Chief Allen White ("White") to stop "clocking in," alleging that it was causing issues with payroll. The city made no further effort to communicate with Felton. Felton received a correspondence that stated as follows:

> On July 6, 2016, Chief White presented you [Felton] with a letter which specifically stated that you [Felton] were to report to work the next day (July 7, 2016) and that you [Felton] were to have a clearance letter from your healthcare provider, detailing whether you [Felton] were fit to return to duty. You [Felton] signed the letter acknowledging your receipt of it and that you [Felton] understood its content. Intended Disciplinary Action - Termination. R. at 34-36.

See Intended Disciplinary Action - Termination correspondence attached hereto as **Appendix M.** On December 5, 2016, after a pre-termination hearing, the city terminated Felton due to an alleged violation of Attendance, Punctuality and Sick Leave policies. See Termination Letter attached hereto as **Appendix N.**

Procedural History

On January 31, 2018, Felton sued the city in the United States District for the Southern District of Mississippi, Northern Division, and alleged violations under the ADA, 42 U.S.C. Section 12101, Title VII, Civil Rights Act of 1964, and FMLA. See *Complaint* attached hereto as **Appendix O.** On March 3, 2019, the city filed a *Motion*

for Summary Judgment alleging that Felton did not have a disability as defined under the ADA; Felton was terminated because he did not engage in the interactive process; and Felton violated the Sick Leave, Attendance and Punctuality policies. Felton contested each allegation. See *Motion for Summary Judgment* attached hereto as **Appendix P**.

On June 24, 2019, the district court granted the motion for summary judgment and dismissed Felton's complaint with prejudice. Felton appealed to the United States Court of Appeals for the Fifth Circuit. Felton asserted that the district court erred in dismissing his ADA claims as (1) he was a qualified individual with a disability; (2) it was not him but the city that frustrated the interactive process; (3) the city failed to accommodate his disability; and (4) his termination for violating the city's attendance policies was pretextual.

Felton also contended that issues of material fact made summary judgment inappropriate. The court of appeals affirmed the district court's opinion that Felton had presented no evidence that (1) he could perform the essential functions of his job as a police lieutenant, even with accommodations; or (2) an alternative position was open and he could perform the essential functions of such a position, thus failing to make a prima facie case for discrimination. Essentially, the district court denied Felton's direct appeal and affirmed the judgment of the district court.

IX. REASONS FOR GRANTING WRIT

To avoid further violations of the Americans with Disabilities Act by employers that terminate employees due the employee's disability.

I. Lance Felton has a viable and supported Americans with Disabilities Act claim.

To establish an Americans with Disabilities Act ("ADA") claim, a plaintiff must present direct evidence of employer wrongdoing or proceed under the accepted burden-shifting analysis. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Rodriguez v. Eli Lilly & Co.*, 820 F.3d 759, 764 (5th Cir. 2016). The burden shifting analysis announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) requires that a terminated employee show that he has a disability, or was regarded as disabled, is qualified for the job and was terminated because of his disability.

"If he makes that showing, a presumption of discrimination arises, and the employer must 'articulate a legitimate non-discriminatory reason for the adverse employment action." *Cannon v. Jacobs Field Servs. N. Am., Inc.*, 813 F.3d 586, 590 (5th Cir. 2016); *EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 615 (5th Cir. 2009). In this matter, Felton suffered a disability (PTSD) due to a work related incident. The city was knowledgeable of Felton's disability through medical documentation provided by Felton's treating physician. Felton was qualified for the job, but due to: his disability, the city's unwillingness to accommodate the same, and Felton's inability to return to full duty within the time the city preferred, Felton was terminated.

As such, Felton requests that this court review this case and render a decision in his favor as to deter other employers from discriminating against disabled employees by termination or other means.

A. Lance Felton was disabled.

To prevail in an ADA claim, the claimant must establish that he has a disability. *Waldrip v. Gen. Elec. Co.*, 325 F.3d 652, 654 (5th Cir. 2003); *Rogers v. Int'l Marine Terminals, Inc.*, 87 F. 3d 755, 758 (5th Cir. 1996). A plaintiff can establish that he has a disability by showing that he has "a physical or mental impairment that substantially limits one or more major life activities...." 42 U.S.C. Section 12102(1)(A). "[M]ajor life activities include...learning, reading, concentrating, thinking...and working," as well as "the operation of a major bodily function, including...neurological, brain..[and] endocrine...functions." 42 U.S.C. Section 12102(2)(A)–(B). The ADA mandates that "[t]he definition of disability...be construed in favor of broad coverage of individuals...to the maximum extent permitted by the terms of [the statute]." 42 U.S.C. Section 12102(4)(A).[1]

Moreover, 29 CFR Section 1630.1(a)(4) reads, in part:

> Broad coverage. The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of "disability" in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.

[1] These provisions should be read with ADA Amendments Act of 2008 "ADAAA", Pub.L. No. 110–325, 122 Stat. 3553 (2008).

Felton suffered from the disability of PTSD due to a work-related incident. This substantially limited his life's major activities per the ADA, which includes his ability to resume his employment position held with the city. Moreover, Felton was substantially limited in that he was unable to perform a major life activity that the average person in the general population could perform and/or significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity. 29 CFR Section 1630.2(j)(1)(i)-(ii).

Felton's disability of PTSD prevented Felton from sleeping more than four hours a night and caused his inability to focus or carry out the duties of a law enforcer due to the life-threatening incident. Notably, Felton's limitations exceed the few listed. Felton had provided medical documentation to the city, the district court, and court of appeals to support the same. Felton attempted several times to return to work despite his disability, but was demanded to leave work and return home as a physician did not and would not certify him to return to full duty due to his PTSD. Consequently, Felton is regarded as disabled and the district court and court of appeals presumed the same. As such, a writ of certiorari is appropriate in this matter.

B. Lance Felton was qualified for the job and terminated because he was disabled.

In accordance with the ADA, "[a] plaintiff can establish that he is 'qualified' by showing that 'either (1) [he] could perform the essential functions of the job in spite of [his] disability,' or '(2) that a reasonable accommodation of [his] disability would

have enabled [him] to perform essential functions of the job.'" *Moss v. Harris County Constable Precinct One*, 851 F. 3d 413, 417 (5th Cir. 2017) *quoting E.E.O.C. v. LHC Grp., Inc.*, 773 F.3d 688, 697 (5th Cir. 2014) *quoting Turco v. Hoechst Celanese Corp.*, 101 F. 3d 1090, 1093 (5th Cir. 1996).

The issue in this matter is whether a reasonable accommodation by the city of Felton's disability (PTSD) would have enabled Felton to perform essential functions of the job. Felton vehemently asserts that the city refused to discuss or even consider accommodating Felton. Before Felton's employment with the city, Felton served twenty-two (22) years with the military. During that time, on December 5, 1995, Felton became employed with the city and remained employed for twenty-one (21) years with the Jackson Police Department. As a result of Felton's contributions to his field and the city, Felton received promotions and attained the rank of Police Lieutenant. Felton's personnel records attest to his dedication and high sense of duty.

However, due to a work-related incident, Felton suffered an injury that caused PTSD and such disability was obvious and apparent to the city as the city was provided with a letter from Felton's medical evaluator and provider and medical records. See medical records indicating the same attached hereto as **Appendix Q**. Upon the city's knowledge of Felton's disability, the city had a duty to engage in meaningful dialogue with Felton to determine the best means of accommodating his disability. *Equal Emp't Opportunity Comm'n v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 621 (5th Cir. 2009). The city did not.

Despite the city's allegations to the contrary, the city never requested Felton's work limitations from Felton or his health care provider and failed to submit a job description to Felton's medical provider in order to attempt to administer or even explore accommodations for Felton. Additionally, the city failed to request a fitness-for-duty certification to return to work at the time of Felton filing for FMLA leave. Most importantly, the city still failed to inform the district court and court of appeals that Felton's work limitations were provided when completing Felton's Public Employees Retirement System ("PERS") documents. See PERS documents attached hereto as **Appendix R.**

In essence, the city has attempted to convince the district court and court of appeals that the city was unaware of Felton's disability and work limitations, as they had no documentation supporting the same. As the record has reflected repeatedly, the city had medical records and letters indicating that Felton suffered from a work related injury of PTSD. However, the city failed to obtain the work limitations or request from Felton the documents determining work limitations for accommodations.

It is clear that with Felton's experience in the military and police department, especially as a leader and supervisor, Felton would be able to perform the essential functions of a job with the city with accommodations. Felton was not afforded that opportunity by the city. Felton was an employee that had been loyal, hardworking, and dedicated to the city for over twenty years, yet the city terminated Felton because he was disabled in violation of the ADA.

The city alleges in its termination letter that Felton was fired due to violation of the attendance and punctuality policies of the city. Yet, Felton returned to work and the city ordered him to leave because he did not have a letter from his medical provider "clearing" him to return to work. This letter could not be obtained as Felton was disabled and required accommodations. In accordance with the foregoing, a writ of certiorari is appropriate in this matter.

II. The City of Jackson, Mississippi failed to engage in the "interactive process".

The ADA requires an employer to engage in an interactive process with an employee who requests an accommodation for a disability to establish the changes needed to enable the employee to continue to work. *EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 694 (5th Cir. 2014). The interactive process implies the employer and the employee have a dual mandate to work together until an accommodation is attained. *EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 621–22 (5th Cir. 2009). For an employer "[t]o determine the appropriate reasonable accommodation, it may be necessary...to initiate an informal, interactive process with the [disabled employee]." 29 CFR Section 1630.2(o)(3).

The employer has a duty, in law, to engage in an interactive process, or "a meaningful dialogue with the employee to find the best means of accommodating that disability." *Equal Emp't Opportunity Comm'n v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 621 (5th Cir. 2009). This should be an ongoing, reciprocal process, not one that ends with "the first attempt at accommodation," but one that "continues when the employee asks for a different accommodation or where the employer is aware that

the initial accommodation is failing and further accommodation is needed." *Humphrey v. Memorial Hosps. Ass'n*, 239 F.3d 1128, 1138 (9th Cir. 2001).

The city failed to engage in the interactive process by not discussing or even considering accommodations for Felton to continue employment with the city. As such, a writ of certiorari is appropriate in this matter.

A. Lance Felton did not cause the breakdown in the "interactive process".

The city never informed or had discussions with Felton about Felton's work limitations to determine accommodations. However, Felton did request to return to work with accommodations from the city. Lee Vance ("Vance"), Chief of the Jackson Police Department, stated in his deposition that it was possible that Felton requested accommodations and that Vance never discussed work limitations in meetings with Felton. See excerpts from the deposition of Lee Vance attached hereto as **Appendix S**. Thus, any contention that Felton caused the breakdown in the "interactive process" is false as Felton made the required accommodation request.

The city has contended that it was not aware of any restrictions Felton's PTSD presented concerning Felton's ability to perform the essential functions of his job. However, the city missed the opportunity to require certification and an opportunity to retrieve Felton's limitations by failing to request a fitness-for-duty certification to return to work at the time of Felton filing to FMLA leave. R. at 396; 29 CFR Section 825.312. Although the city may allege that it did not have knowledge of the limitations to provide accommodations for Felton, limitations were provided when the city completed his PERS documentation. R. at 398-400.

Moreover, the city failed to provide a job description to Felton's treating physicians at the VA Medical Center so that a physician could provide an adequate assessment of Felton's condition to provide the city with Felton's limitations. The city surmised that Felton's PTSD prevented Felton from discharging the core functions of his job so the city repeatedly demanded Felton to leave work and return home rather than provide Felton with accommodations. An employer's failure to make "reasonable accommodations" for a disabled employee constitutes unlawful discrimination under the ADA. 42 U.S.C. Section 12112(b)(5)(A). And this, as aforementioned, is the reason a writ of certiorari is so important in this matter.

The city terminated Felton before the beginning of the interactive process. The city continued demanding documentation that was not available as Felton's PTSD interfered. Instead of the city finding ways to work together with Felton to determine reasonable accommodations, Felton was informed he violated the city's Sick Leave and Attendance and Punctuality policies. This allegation was repeated by Vance in his deposition on February 13, 2019. See excerpt from the deposition of Lee Vance attached hereto. The record reflects when Felton specifically requested accommodations from Vance, he failed to provide or even discuss them. As such, a writ of certiorari is appropriate and pertinent in this matter.

B. The City of Jackson, Mississippi did not afford Lance Felton reasonable accommodations.

After the city failed to participate in the interactive process as described above, the city subsequently terminated Felton. The city has alleged that it afforded Felton accommodations prior to terminating Felton by giving him additional leave following

the expiration of FMLA leave. This is false. Felton was not given additional time. He was ordered to work and when he was unable to, as his healthcare provider had not cleared him, he was terminated.

Through its acts and omissions, it is apparent that the city did not intend to accommodate Felton. The city never provided a job description for Felton's health care provider to provide work limitations for accommodations. The city continued to demand documentation indicating that Felton could return to work, but the documentation was not available due to the severity of Felton's PTSD. When Felton requested accommodations from the city, the city failed to provide or discuss the same. The ADA's implementing regulations define reasonable accommodations as, *inter alia*: "Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities." 29 CFR Section 1630.2(o)(1). This approach is closely tied to the interactive process, which, in the main, asks that the parties conduct "a meaningful dialogue" [and] to craft "the best means of accommodating [a] disability". *Equal Emp't Opportunity Comm'n v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 621 (5th Cir. 2009).

In his dealings with the city, Felton repeatedly expressed a desire to return to work in whatever capacity the city deemed proper. Notably, divisions of the Jackson Police Department include Community Improvement, Public Safety, Communications, Administrative Support, Community Relations, Technical Services, and Standard and Training. See the Jackson Police Department Divisions

attached hereto as **Appendix T**. When Felton informed the city of his willingness to return to work in any capacity, it is because he knew the city's needs and capacity were broad enough to accommodate Felton. Having two Associate of Arts degrees and two Bachelor of Arts degrees, Felton was more than qualified for any of these jobs.

With the city, Felton has been previously employed with the Police Academy, city jail, and has served as a Watch Commander. Each of these positions would have been accommodating to Felton's PTSD. There were vacant positions in the Community Improvement Division with the city filled by other officers who were capable of working in the Patrol Division. *Jenkins v. Cleco Power, LLC*, 487 F.3d 309, 315 (5th Cir. 2007) held that reassignment to a different job may be a reasonable accommodation. See also *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997) and *Moss v. Harris Cty. Constable Precinct One*, 851 F.3d 413, 419-20 (5th Cir. 2017). In conformity with the same, Felton could have been reassigned to another position with the city such as code enforcement, park ranger, the impound lot, vehicle management, court bailiff, or communications. All of these positions were open or short staffed. It is apparent that Felton was overly qualified to work in in these alternative capacities.

The court of appeals affirmed the district court's opinion that Felton had presented no evidence that (1) he could perform the essential functions of his job as a police lieutenant, even with accommodations; or (2) an alternative position was open and he could perform the essential functions of such a position, thus failing to make a prima facie case for discrimination. However, Felton has provided alternate

positions above. Furthermore, the city could have afforded Felton the opportunity to be off work if or when Felton's PTSD flared and other officers have been afforded this accommodation for the same disability. Unfortunately, the city did not intend to accommodate Felton, and, resultantly, a writ of certiorari is necessary in this matter.

III. The City of Jackson, Mississippi's termination of Lance Felton was pretextual.

At this juncture, Felton has presented reasons supporting that his termination was pretextual *Deval v. Ptech Drilling Tubulars, LLC*, 824 F.3d 476, 480 (2016) *quoting Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 233 (5th Cir. 2015). The city has alleged that Felton violated the city's Sick Leave and Attendance and Punctuality policies. In accordance, the city allegedly terminated Felton because he was absent from work on sick leave, but failed to provide a statement from a physician concerning his absences and ability to work after the city advised Felton to submit the same.

However, (1) Felton's medical records indicating his PTSD was submitted to the city twice; (2) on May 5, 2014, the city received a correspondence from Dr. Coffey evaluating Felton and referring Felton to a specialist who agreed to evaluate Felton pending the workers compensation agreement; (3) the city possessed Felton's FMLA documents; and (4) the city ordered Felton to leave when Felton attempted to return to work without a letter from a physician "clearing" Felton for duty.

The city has alleged that Felton has had a reasonable opportunity to take remedial action by submitting documentation from a healthcare provider regarding his ability to perform the essential functions of the job. However, the city has failed

to provide Felton and his healthcare providers a job description. This job description would allow Felton's healthcare providers to determine Felton's work limitations and accommodations.

Additionally, Felton was never informed or requested to provide information to the city regarding his restrictions and work limitations. Information regarding limitations from the city was not mentioned until Felton received his letter of termination. Thus, termination on that ground was unwarranted. The foregoing reasons clearly support Felton's claim that his termination was pretextual. Essentially, the city's reasons for terminating Felton rings hollow. In the empathetic language of *Caldwell v. KHOU-TV*, 850 F.3d 237, 242 (5th Cir. 2017), an explanation is false or unworthy of credence if it is not the real reason for the adverse employment action. A writ of certiorari is appropriate in this matter.

CONCLUSION

As the city failed to accommodate Felton's disability pursuant to the ADA; the city failed to engage in the interactive process; and Felton's termination was pretextual, the petition for writ of certiorari should be granted.

Respectfully submitted,

Lance E. Felton J.D.

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