No. _____

In the
Supreme Court of the United States

SHELIA HOLMES,
Petitioner,
v.

GENERAL DYNAMICS MISSION SYSTEMS, INC.,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employer's steel-toed shoe requirement is an essential function of a disabled employee's job for purposes of determining whether she is a "qualified individual" under the ADA where the employer had not required the disabled employee to meet that requirement for more than a decade due to her disability and, as well, had allowed a similarly-situated employee to be excepted from the requirement?

PARTIES TO THE PROCEEDINGS

Petitioner is Shelia Holmes. Respondent is General Dynamics Mission Systems, Inc. ("General Dynamics" or the "Company").

STATEMENT OF RELATED PROCEEDINGS

- *Holmes v. General Dynamics Mission Systems, Inc.*; No. 19-1771 (4th Cir.) (opinion issued and judgment entered on December 9, 2020).
- *Holmes v. General Dynamics Mission Systems, Inc.*; 1:18cv19 (W.D. Va.) (order granting summary judgment on July 1, 2019).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Shelia Holmes respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Fourth Circuit's decision is unpublished but is reproduced App at 1-11. The District Court's final order granting General Dynamics' motion for summary judgment under Fed.R.Civ.P. 56 is unreported and is reproduced at App. at 26. And the District Court's opinion supporting its summary judgment order is unreported and is reproduced at App. at 12-25.

JURISDICTION

The Fourth Circuit entered its opinion and judgment order on December 9, 2020. This Petition is timely filed within timely filed within 150[1] days of this denial, and this Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act ("ADA") provides, in relevant part, that:

> "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,

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[1] This time period is the extended period set by this Court due to COVID-19.

> employee compensation, job training, and other terms, conditions, and privileges of employment."

42 U.S.C. § 12112(a).

For purposes of this provision, a "qualified individual" is:

> "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."

42 U.S.C. § 12111(8).

STATEMENT OF THE CASE

A. Holmes' Disabling Conditions.

Holmes is an individual who, from birth, has suffered from a congenital condition known as brachymetatarsia -- where a person has one or more abnormally short or overlapping toes. JA258.[2] Holmes has this condition on more than one of her toes on both of her feet, so it is called brachymetapodia. *Id*. The condition is exacerbated when Holmes wears steel-toed shoes (or similar shoes as described below) because the shoes cause friction between her toes and causes ulcerations on her feet. *Id*.

Holmes also is a diabetic. JA258. As such, constricting her deformed toes with steel-toed (or similar) shoes causes Holmes' feet to swell and, in turn,

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[2] "JA" refers to the Joint Appendix filed in the Fourth Circuit.

causes her to have circulation problems that can be extremely dangerous. *Id.* Such problems can cause the loss of a limb or, more severely, loss of life. *Id.*

Both of Holmes' physical conditions interfere with one or more of her major life activities, including but not limited to, walking and standing. JA259.

B. Holmes' Work History At General Dynamics.

1. For Fifteen Years, Holmes Did Not Wear Steel-Toed Shoes On The Job And It Was Not A Problem.

From 1998 to June 1, 2016, Holmes was employed by General Dynamics. During that time, she worked almost exclusively as a shelter fabricator. JA265-269. She had many different supervisors during that time. JA272-275.

For virtually her entire history with the Company, Holmes performed her job duties without wearing steel-toed shoes or any kind of composite footwear or other rigid foot protection. JA260. *See also* JA271; JA276. Instead, she wore tennis shoes or other loose-fitting shoes, which allowed her to work even with her disabling conditions. JA260.

During this fifteen-year period, Holmes was not required to wear steel-toed shoes. To be sure, she was aware as far back as 2003 that the Company was attempting to implement a requirement for workers who worked in production and fabrication areas to wear steel-toed shoes. *See* JA44-45. However, she had a doctor's note that said that her disabling conditions

prevented her from wearing steel-toed shoes. JA277-278. She testified as follows about how she handled the issue and the note with her supervisors:

> I asked them, they said put it [the doctor's letter] in my toolbox and have it handy so if a supervisor comes by, you can show it to them, and it laid in the top of my toolbox, and any time I changed supervisors, I brought them over there and showed it to them, and no supervisor had no objection until John Harmon.

JA280.

2. In 2013, Notwithstanding That Nothing At All Changed In Holmes' Working Conditions Or Her Other Work Duties, General Dynamics Refused To Allow Holmes To Continue To Wear Her Normal Tennis Shoes At Work.

Despite fifteen years of allowances with respect to footwear, in 2013, General Dynamics changed its mind on the issue and told Holmes that she could not work without wearing steel-toed shoes or similar footwear. JA260. Nothing about the nature or structure of Holmes' workplace changed in any way at that time. *Id*. She still used the same tools and equipment, still worked in the same work area, and still performed exactly the same job functions. *Id*. The only thing that changed was that General Dynamics now wanted her to wear steel-toed (or similar) footwear. *Id*.

In response, Holmes told the Company that she could not wear such shoes because of her disabilities. *Id*. Her then-supervisor looked at her prior doctor's

note, said that was "fine with him," and said he would have to speak with Lisa Greenway, who was the Environmental, Health and Safety Manager at the Marion plant, and get back to her on whether she needed to wear steel-toed shoes. JA283. He never required her to wear them, however. *Id.*

Further, Holmes told the Company at that time that other employees had also been allowed to work at the same plant (in her very same area) without having to wear steel-toed boots or similar footwear. JA260. She also followed up with an additional medical note about not being able to wear steel-toed shoes or outer footwear involving steel. *See* JA287.

The Company was unmoved, however, and refused to allow Holmes to come back to work without wearing steel-toed or similar protective footwear. In fact, Holmes' new supervisor, who had just replaced her old supervisor, antagonistically told Holmes to "Get off my damn floor if you don't have steel toes on." JA284. He said this despite the fact that Holmes, as she had done before with every one of her prior supervisors, showed him the note from her podiatrist about not being able to wear steel-toed shoes. JA285-86.

Ultimately, after a long period of time during which the Company tried to convince Holmes that she had no choice but to wear steel-toed or similar shoes, it terminated her. According to General Dynamics, it determined that Holmes was "unqualified" for her position because she was, in the Company's eyes, "unable to wear safety compliant foot protection that is required of all employees working in production areas." JA288. General Dynamics also told Holmes that it had

failed to identify a "reasonable accommodation that would allow [her] to meet [its] uniformly applied safety requirement" with respect to safety footwear. *Id.*

C. General Dynamics' So-Called Steel-Toe Footwear Requirement.

In addressing the issue of wearing steel-toed (or similar) shoes, General Dynamics has professed that, at all relevant times, it has required its employees who work in production areas (such as Holmes) to wear steel-toed shoes, or similar protective footwear, as part of their conditions of employment. *Id.*

Indeed, in its 30(b)(6) deposition, the Company said it had had this footwear policy in place for decades and certainly as far back as 1998, when Holmes was first hired. JA293. In its termination letter to Holmes (JA288), in its EEOC position statement (JA296-301 page 5) and even in its sworn Interrogatory Answers (JA302-318, page 5), the Company maintained that this policy has been "uniformly applied." The Company also went even further in its Interrogatory Answers, stating, upon information and belief, that other than Holmes, none of its Marion, Virginia employees had been terminated between January 1, 2010 and June 1, 2016 for "failing to wear steel-toed or similar shoes while on the job at the Facility because all other employees have complied with the requirement." JA310-311 (emphasis added). In other words, the Company took the position that the steel-toed shoe requirement has been a staple requirement for its production-level workforce since at least 1998.

But this was never true for Holmes and others like her (who had medical problems). First and most importantly, Holmes, from 1998 through 2013, uniformly did not wear steel-toed or similar shoes. JA260; JA271; JA276. In fact, she did just the opposite and wore tennis or loose-fitting shoes for roughly fifteen years and did so because of her medical conditions. JA260. None of her supervisors during that entire time (prior to the fall of 2013) told her that her medical paperwork was invalid or that her health conditions did not justify her not having to wear steel-toed shoes. Again, it was just the opposite: her supervisors consistently – uniformly – accepted her medical documentation as a valid reason to not have to wear steel-toed or similar shoes. JA280.

Second, the Company allowed the same exception for other employees who were similarly situated to Holmes. Indeed, another production-area employee, Gary Anderson – aka "Nanner" -- was excused from wearing steel-toed shoes because he suffered from hammer toe. *See* JA292; JA295; JA320-324; JA328-329. As Wayne Holmes (Shelia's husband, who also worked for many years at General Dynamics before retiring in 2017), testified, his supervisor, stated in front of his whole work group at the daily morning meeting on July 14, 2014 that "everyone" needed to have on "steel toe shoes except Nanner . . . because he has hammer toe." JA320-326. And this meeting occurred *after* Holmes was told to "get off my damn floor" because she was not wearing steel-toed shoes. *Id.* Eventually, General Dynamics revoked the exemption for Mr. Anderson, but for quite a while, his

exemption was in place even though no such exemption was allowed for Holmes.

Finally, even though General Dynamics maintained that it has trained its employees about its so-called uniform footwear policy and that such policy is an "essential function" of production area jobs such as the one held by Holmes, (i) the actual job description for Holmes' position does not include any language about requiring safety shoes or steel-toed shoes (*see* JA105-106; JA131-132); and (ii) job descriptions currently available online for fabricators and other similar production area employees do not mention wearing steel-toed or safety shoes (indeed, two of the posting don't even mention safety at all) (JA333-335; JA336-338; JA339-340).

D. General Dynamics Rejected Holmes' Proposed Accommodation Even Though (i) It Had Allowed Exactly That Accommodation For 15 Years, (ii) It Made A Similar Accommodation For A Similarly Situated Employee; (iii) OHSA Interpretations Allow For Accommodations; And (iv) It Never Called OHSA To Inquire About Accommodations.

Despite the above facts, General Dynamics rejected Holmes' proposed accommodation. It did so, even though it had allowed exactly that accommodation for 15 years for Holmes; it made a similar accommodation for a similarly-situated employee (Mr. Anderson, who, like Holmes, had a medical condition with respect to one of his feet); OSHA interpretations allow for accommodations; and no one at General Dynamics ever

called anyone at OSHA to determine whether or not it was possible to accommodate Holmes' request to avoid having to wear steel-toed, or similar, shoes at work. JA294.

Regarding the issue of the Company's prior practices for both Holmes and Anderson, in each case, the General Dynamics supervisors involved agreed that the request to be exempt from wearing steel-toed shoes for medical reasons was appropriate. This is important because, at General Dynamics, like most companies, supervisors are expected to know company policies and enforce company policies. JA290-291. In other words, they are the "on the ground" implementers of company policy.

Regarding OSHA interpretations, OHSA itself identifies the use of "non-metallic toe caps" as a possible accommodation for workers whose diabetes makes it difficult, if not, impossible to wear steel-toed shoes. OSHA Std. Interp.1910.132 (2012); 2012 WL 11879053 (JA341-342). In this same context, OSHA also makes clear that "employers are required to protect their employees from hazards in the workplace but the protection afforded must not cause the employee harm." *Id.* (emphasis added). And finally, that same interpretative guidance shows that the employer shall select "PPE that properly fits each affected employer." *Id.* (emphasis added).

Even more, when responding to questions about appropriate footwear policies for employers, OHSA expressly noted that a court allowed "sturdy work shoes" to substitute as "steel-toe footwear" and that it "believes that what is reasonably prudent with regard

to foot protection may depend on the frequency of the employees' exposure to foot injury, the employer's accident experience, the severity of any potential injury that could occur, and the customary practice in the industry." *See* JA343-344

Finally, OSHA has expressly made clear that with respect to PPE, "when use of the equipment makes it impossible for employees to perform their work or exposes them to more hazardous conditions than they would be exposed to without such equipment, they are not required to use the equipment." JA345-346 (emphasis added). Regarding Holmes, the steel-toed shoe requirement is not a mere inconvenience, but as she explained to General Dynamics, it is a severe health problem because of her congenital foot condition and her diabetes.

E. The Underlying Litigation.

Following her termination, Holmes sued the Company for violating the ADA. JA2. After the close of discovery, General Dynamics moved for summary judgment, arguing that the steel-toed shoe requirement was an essential function of Holmes' job and/or that the requirement could not be reasonably accommodated. *See e.g.*, JA33-35; JA36-64.

The District Court heard oral argument and soon thereafter, granted the Company's summary judgment motion. JA519-560; JA561-572; JA573. In doing so, the Court framed the dispositive issue in the case as follows:

> The key question presented in this case is whether an employer must wholly exempt an

> employee from a requirement to wear safety equipment that is intended to protect her from serious injury, and to protect the company from financial harm, because she has a physical condition that prevents her from wearing the safety equipment.

JA567-568 (emphasis added). The Court then answered the question in the negative, stating:

> After reviewing the record evidence and considering the parties' arguments, I conclude that the ADA imposes no such requirement on an employer.

JA568.

Important to the District Court's decision was its belief that "[i]t is undisputed that at least as of 2013, General Dynamics viewed wearing protective footwear as an essential function of the Shelter Fabricator position." JA570. It also relied on its belief – albeit not supported with any record evidence – that failing to enforce the steel-toed safety shoe requirement "could have jeopardized its certification and standing with various organizations and agencies." JA571. And it posited that "had [Holmes] suffered a foot injury, the company may have been subjected to lost production time and increased workers' compensation costs." *Id.*

The District Court, however, conspicuously declined to grapple with virtually all of the contrary evidence presented by Holmes. Nowhere in its explanation of its decision, for example, did the Court address the fact that – after 2013 – the Company allowed at least one

other employee to be exempted from the steel-toed shoe policy. Nor did the Court address the fact that OSHA guidance allowed for exemptions from personal protective equipment requirements when compliance would hurt the employee – which was clearly the case with Holmes. And finally, the Court failed to seriously address the fact that the Company – despite its protestations of a uniform policy application – had specifically allowed Holmes (through the actions of her supervisors) to be exempt from the steel-toed policy for almost fifteen years. Indeed, the best the Court could do was to try to minimize this evidence by saying "[t]he fact that company supervisors had previously been lax in enforcing the protective footwear policy does not prevent the company from deciding to tighten application of its safety rule." JA571.

On appeal, the Fourth Circuit affirmed the District Court's decision, finding that Holmes was not a "qualified individual" under the ADA. App. at 12. In doing so, the Court of Appeals rejected Holmes' evidence that General Dynamic had exempted Holmes for years from having to meet the steel-toed shoe requirement. *Id.* Instead, it said that Holmes could not be exempted from a valid safety requirement, even though that's exactly what General Dynamics had allowed for years. *Id.*

This Petition followed.

REASONS FOR GRANTING THE WRIT

I. This Case Presents An Important Question Of Federal Disability Law.

This case presents an important question involving the rights of disabled individuals under the ADA vis-à-vis putative safety requirements – namely, can an employer do an about-face as to so-called safety rules and undo an accommodation that it had previously allowed for years? This kind of behavior is almost certainly happening on a daily basis at workplaces all over the country, especially after the worldwide outbreak of COVID-19. While certain changes in a company's safety rules are most assuredly justified based on new safety concerns, companies should not be allowed to change existing accommodations for disabled individuals without validly addressing why their previous allowances are now no longer valid. That is what happened below. Guidance from this Court on what types of allowances are – and are *not* – allowed is critical.

Here, General Dynamics did not dispute that Holmes has a physical condition which substantially limited one or more of her major life activities. Nor did it dispute the implications of the medical conditions suffered by Holmes. Instead, the Company's main argument, which both the District Court and the Court of Appeals accepted, was that wearing "steel-toed," or similar protective shoes is an "essential function" of Holmes' former job. However, the record evidence showed that at the very least, a genuine dispute of material fact existed as to this issue. The case should have been allowed to go to a jury.

The ultimate question here is whether wearing steel-toed shoes is truly an essential function of Holmes' job. Such a question is typically a fact-intensive one, is decided on a case-by-case basis, and is usually decided by a jury where there is conflicting evidence on the issue. *See, e.g., Anderson v. Embarq/Sprint*, 379 Fed.Appx. 924, 927 (11th Cir. 2010) ("Determining whether a particular job duty is an essential function involves a factual inquiry to be conducted on a case-by-case basis."). *See also Snead v. Fla. Agricultural & Mechanical Univ. Bd. of Trustees*, 724 Fed.Appx. 842 (11th Cir. 2018) (finding a genuine dispute over whether twelve-hour shifts were an essential function of the job); *Holly v. Clairson Indust., LLC*, 492 F.3d 1247 (11th Cir. 2007) (finding a genuine dispute of fact to exist on the question of whether punctuality was an essential function of the job); *Ponce v. City of Naples*, 2018 WL 1393748 at *8 (M.D. Fla. March 20, 2018) (finding a genuine dispute of fact on the question of whether driving a truck, picking weeds, and sweeping were essential functions of the job); *Smart v. DeKalb County,* Ga., 2018 WL 1089677 at *11 (N.D. Ga. Feb. 26, 2018) (finding a genuine dispute of fact with respect to whether possessing a valid CDL was an essential function for construction supervisors).

Federal appellate courts, including the Fourth Circuit, have generally used the following guidance on how to determine whether a job duty is essential. As has been explained:

> Not all job requirements or functions are essential. A job function is essential when "the reason the position exists is to perform that

> function," when there aren't enough employees available to perform the function, or when the function is so specialized that someone is hired specifically because of his or her expertise in performing that function. 29 C.F.R. § 1630.2(n)(2). "[I]f an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." 42 U.S.C. § 12111(8). Other relevant evidence can include "the employer's judgment as to which functions are essential," "the amount of time spent on the job performing the function," "the consequences of not requiring the incumbent to perform the function," and the work experience of people who hold the same or similar job. 29 C.F.R. § 1630.2(n)(3).

Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562, 570 (4th Cir. 2015).

An employer's assertion about which functions of a job are essential, however, "is not, by itself, dispositive; record evidence describing how employees actually perform their jobs can create an issue of fact as to whether a job function is 'essential' under the ADA." *Williams v. ABM Parking Services, Inc.*, 296 F. Supp.3d 779, 784-785 (E.D. Va. 2017) (emphasis added). Indeed, if an employer's judgment was conclusive, then any "employer that did not wish to be inconvenienced by making a reasonable accommodation could, simply by asserting that the function is 'essential,' avoid the clear congressional mandate." *Holly*, 492 F.3d at 1258.

Here, an analysis of the relevant factors with the record evidence showed, at best for General Dynamics, a sharp dispute existed about whether wearing steel-toed shoes on the job is an essential function. Holmes' years of contrary past experience, for example, showed it was not. While General Dynamics claimed its "steel-toed shoe" policy had been in place continuously since at least 1998, this was not true for the fifteen years between that same time and 2013 -- when Holmes neither wore steel-toed shoes nor was required to wear them. To the contrary, she performed her job for that entire time without incident and remained a "qualified" employee during that entire period time. Nothing about the so-called policy changed during these fifteen years, and nothing about the risks or hazards for Holmes' job did either.

As such, this is strong evidence that Holmes was qualified for her position and that wearing steel-toed shoes was not a disqualifying job requirement. *See, e.g.*, *Mobley v. Miami Valley Hosp.*, 603 Fed.Appx. 405, 411 (6th Cir. Feb. 25, 2016) (reversing summary judgment for employer based, in part, on disputed evidence about whether plaintiff could perform the essential functions of a job for which he requested a transfer, which was also a job he had previously work; "Since Mobley worked in the surgery position for several years, it would be reasonable to infer that MVH thought he was fulfilling the essential functions during that time, however those functions might be characterized."); *Howard v. Gray*, 821 F.Supp.2d 155, 164-165 (D.D.C.2011) ("Mr. Howard's prior experience in the Financial Manager position indicates that travel to offsite locations was not an essential function of his

position, and his inability to travel did not make him unqualified for the position for purposes of the ADA and Rehabilitation Act.") (emphasis added).

The work experience of other General Dynamics employees who worked in production areas also showed a genuine dispute of material fact about whether wearing steel-toed shoes was an essential function of Holmes' job. Indeed, the record evidence – from Wayne Holmes, Shelia Holmes, and even the admissions of General Dynamics regarding Gary Anderson – showed that, notwithstanding the Company's putative steel-toed shoe requirement, the employees "on the ground" not only did not wear steel-toed, or similar, shoes, their supervisors – i.e., the "on the ground" policymakers for the Company – knew this and permitted it.

This past experience – i.e., the work experience of persons holding the same or similar jobs – at a minimum created a dispute of fact about whether General Dynamics can seriously claim that wearing steel-toed shoes is truly an essential job requirement for these types of positions. *See, e.g., Kiphart v. Saturn Corp.*, 251 F.3d 573, 585–86 (6th Cir.2001) (holding that a jury could consider whether rotating among assignments was an essential function where, "as a practical matter, very few if any teams fully rotated tasks."); *Provenzano v. Thomas Jefferson University Hosp.*, 2004 WL 1146653 at*3 (E.D. Pa. May 20, 2004) ("The past experience of the residents is evidence of what was an essential function of the job.").

Third, General Dynamics' job descriptions – both the one it provided as part of this litigation and others publicly available on its website – support the position

that wearing steel-toed shoes is not an essential job function. Indeed, it is particularly probative that the only true "job description" for Holmes' position makes no mention of steel-toed shoes or protective footwear at all. As for the other job descriptions for production area jobs, they are conspicuously silent on whether or not wearing steel-toed shoes is a requirement for the job.

Fourth, despite General Dynamics' repeated protestations during this case that the steel-toed shoe requirement is mandated by OSHA, several facts dispute this point. Most notably, the interpretive guidance issued by OSHA – which is nowhere discussed in General Dynamics' summary judgment memorandum – makes it clear that neither steel footwear nor composite footwear (which were the only types of footwear ever considered by the Company) are the end-all-and-be-all for purposes of OSHA's PPE regulations. Instead, "non-metallic toe caps" could have sufficed, but no one even considered that. In fact, General Dynamics never contacted OSHA when it was trying to figure out how to allegedly comply with its regulations. Instead, it simply assumed – improperly -- a strict inflexible requirement about steel-toed shoes. Just as important, under OSHA interpretive guidance, employees may be excused from wearing PPE – including steel-toed shoes – when the equipment would harm the employee or cause the employee hazards. Both situations exist here and would have excused Holmes from a steel-toe shoe requirement. But again, General Dynamics did not even try to contact OSHA to discover these additional nuances of OSHA guidance. As a final point, General Dynamics' continued

invocation of OSHA compliance is undercut by the fact that it never mentioned – in any specific or express way – OSHA requirements for steel-toed shoes in either its EEOC position statement or its termination letter for Holmes.

For their part, the courts below failed to properly address these various competing facts. Indeed, noticeably absent from either the District Court's or the Fourth Circuit's decision was any mention, much less discussion, of the OSHA guidance, the job descriptions on the General Dynamics website, and the facts related to Gary Anderson – who was exempted from the steel-toe shoe requirement all the way through the summer of 2014 – i.e., at least seven months after Holmes was removed from the workplace. Instead, the courts basically gave the employer's perspective on the steel-toed issue dispositive weight, all on its own. They even went so far as to articulate hypothetical concerns about injuries and insurance or strained comparisons to seatbelts that were nowhere supported by the record evidence. In fact, any safety concerns – whether valid or not – are easily in dispute based on the record evidence of General Dynamics allowing Holmes to work in her position for 15 years without requiring her to wear steel-toed shoes. In short, the evidence in the record was more than sufficient to allow a jury to determine whether or not wearing steel-toed shows was an essential function of Holmes' job at General Dynamics.

II. The Fourth Circuit's Decision Conflicts With Precedent From The Seventh Circuit And This Court's Precedent In *Tolan v. Cotton.*

The Fourth Circuit's decision below also conflicts with precedent from the Seventh Circuit and with this Court's summary judgment decision in *Tolan v. Cotton*, 572 U.C. 650 (2014).

First, in a particularly compelling and instructive case, *Shell v. Smith*, 789 F.3d 715, 718-720 (7th Cir. 2015), the Seventh Circuit held that a dispute of fact existed as to whether driving a bus (which required a Commercial Driver's License that the plaintiff did not have) was an essential function of a Mechanic's Helper position, which was the position of the plaintiff. The company said it was, even though plaintiff had never been required to drive a bus in the twelve full years he had been on the job.

In its decision, the court of appeals rejected the notion that the position's job description – which contained the requirement at issue – was somehow dispositive on the issue, stating that "the same job description was in place when [the plaintiff] was hired. It did not change for all of the twelve years that [the plaintiff] filled the position." *Id*. at 718-719 (emphasis added). Instead, it said that the company's contrary "actual practices" meant that a dispute of fact existed on the essential function issue. *Id.* As such, it held that the "case should be allowed to proceed to a jury."

So too here. While General Dynamics has touted its written documents – although the company's job description for Holmes' position does not contain a

steel-toed shoe requirement; JA105-106; 131-132 – the actual practices of Holmes and her similarly-situated employee materially dispute these documents. As such, just as the Seventh Circuit did in *Shell*, which now stands in direct conflict with the Fourth Circuit as to how to analyze the essential functions of an employee's job, this Court should reverse summary judgment and allow the case to proceed to a jury.

The Fourth Circuit's decision also conflicts with this Court's decision in *Tolan v. Cotton*, 572 U.S. 650 (2014). As this Court explained in that case, it reversed the Fifth Circuit's affirmance of summary judgment for the defendant because the appellate court:

> failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case . . . and . . . improperly "weigh[ed] the evidence" and resolved disputed issues in favor of the moving party.

Tolan, 572 U.S. at 657.

The same is true as to the Fourth Circuit's decision below. By taking General Dynamics' "claims" of safety at face value, by refusing to confront the evidence that the Company had allowed at least one other employee (*not just Holmes*) to be excepted from its steel-toed shoe requirement, and by failing to even acknowledge the OSHA authorities cited by Holmes, the Fourth Circuit (as did the District Court) failed to review the evidence in the light most favorable to Holmes. In doing so, it improperly weighed the evidence in General Dynamics'

favor and improperly upheld the summary judgment decision against Holmes.

CONCLUSION

In conclusion, for all the reasons stated herein, the petition should be granted, the Fourth Circuit's decision affirming summary judgment for General Dynamics should be vacated, and the case should be remanded to allow Holmes to present her ADA claim to a jury.

Respectfully submitted,

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