No. 20-341

In the Supreme Court of the United States

NATALIE MCDANIEL, PETITIONER

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court, in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), considered what burden of proof governs the determination that an accommodation is reasonable under U.S.C. § 12112(b)(5)(A). Regulatory factors determine what job functions may be considered essential and require a showing that production standards are imposed in fact and not just on paper. 29 C.F.R. § 1630.2(n); 29 CFR pt. 1630, App. § 1630.2(n), 395.

The questions presented are:

1. Whether the reasonableness standard articulated in *Barnett* requires that, a denial or removal of telework or other normally reasonable accommodation based on employer allegations of performance decline, must causally link performance to the accommodation by way of removal of an essential function of the position in order to render a normally reasonable accommodation unreasonable.

2. Whether forcing an employee to work in excess of her known medical restrictions, causing her to endure pain as a condition of employment, is a discrete act of discrimination so severe it constitutes constructive discharge and a hostile work environment under the ADA and Title VII.

A subsidiary question is whether career sabotaging acts that directly interfere with work performance can meet the threshold set by this Court in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

PARTIES

The petitioner is Natalie McDaniel.

The respondent is Robert Wilkie, Secretary, Department of Veterans Affairs.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Natalie McDaniel respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on January 31, 2020.

OPINIONS AND ORDERS BELOW

The January 31, 2020 order of the court of appeals which was not designated for publication is set out at App.1a-10a. However, the decision it found to be binding precedent has been published. *See Equal Emp't Opportunity Comm'n v. Ford Motor Co., 782 F. 3d 753* (6th Cir. 2015)(en banc). The February 14, 2019 opinion of the district court is set out at App. 11a-24a and is also available at 2019 WL 626547. The October 13, 2017 opinion of the district court is set out at App. 25a-41a. The April 15, 2020 order of the court of appeals is set out at App.42a-43a.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 2020. A timely petition for rehearing and rehearing en banc was denied on April 15, 2020. The deadline for filing this petition was extended from 90 to 150 days by order of this Court on March 19, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 2 of The Telework Enhancement Act of 2010 (hereafter, "Telework Act"), Pub. L. No. 111-292, 5 U.S.C. 6503, provides in pertinent part:

> "Teleworkers and non-teleworkers are treated the same for purposes of: periodic appraisals of job performance of employees; training, rewarding, reassigning promoting, reducing in grade, retaining, and removing employees; work requirements * * * other acts involving managerial discretion and when determining what constitutes diminished employee performance, the agency shall consult the performance management guidelines of the Office of Personnel Management."

Section 504 of the Rehabilitation Act of 1973 (hereafter, "Rehab Act"), 29 U.S.C. 701 et seq., provides that federal agencies shall not discriminate against an "otherwise qualified individual with a disability * * * solely by reason of her or his disability." 29 U.S.C. 794(a). For claims of employment discrimination, the Rehab Act incorporates the standards applied under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C 12101 et seq. See 29 U.S.C. 794(d); 29 C.F.R. 1614.203(b). Under the ADA, 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). A "reasonable accommodation" may include "making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, part-time or modified work schedules, * * * and other similar accommodations for individuals with disabilities." 42 U.S.C. 12111(9); see 29 C.F.R. 1630.2(o)(1)(ii) (defining "reasonable accommodation" to include, inter alia, "[m]odifications 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"). See 29 C.F.R. 1630.9 (a) ("It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.")

Section 717(a) of Title VII of the Civil Rights Act of 1964 (hereafter, "Title VII"), 42 U.S.C. 2000e-16(a), provides in pertinent part: "All personnel actions affecting employees or applicants for employment * * * in executive agencies as defined in section 105 of Title 5 * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin." Title VII also provides that "[i]t shall be an unlawful employment practice for an employer * * * to discriminate against any individual with respect to his compensation, terms conditions or privileges of employment 42 U.S.C. 2000e-2(a).

STATEMENT OF THE CASE

Allowing performance measures to rule whether an accommodation is reasonable permits employers to condition accommodation on achieving a certain level of performance. Such extreme employer deference is antithetical to the purpose of the ADA. It reasonably follows that any theory which relies on setting higher performance thresholds for disabled individuals as compared to those who are not disabled cannot be squared with the statute.

Disregarding psychiatric medical restrictions introduces an inherent safety risk that can extend

beyond the individual into the work environment with dire consequences. Making pain a condition of employment tempts that fate and is tantamount to termination because leaving the job is a reasonably foreseeable consequence of the demand. The statute does not distinguish intolerable physical pain from intolerable psychological pain.

This case concerns psychological violence, which intimidates and is used as a weapon against some of the most vulnerable targets in the American workforce, Black women and the disabled. Workplace Mobbing is career sabotage that weaponizes the mechanisms of the professional environment against the intended target. Although both result in psychological harm, mobbing is distinguished from workplace bullying because it consists of ongoing overt and coverts acts that are sanctioned at the upper levels of an organization. The weight and power of organizational involvement in mobbing compounds the injury to the target, these campaigns result in a "significant and traumatic break in people's hopes, dreams, and plans for their work lives and their futures". M. Duffy et. al. *Overcoming Mobbing* 13 (2014) Mobbing is harassment with the purpose of removing the targeted individual from the organization. *Id.* at 65-66 "Abuses like mobbing are associated with worse outcomes than sexual harassment * * * PTSD was a common outcome." *Id.* at 80 At issue here is whether the inference of discrimination implicates such abusive yet seemingly "facially neutral" acts.

Before the Court is an opportunity to address whether disaggregation by categorical variable is permissible under the hostile work environment theory. At present, old concepts like implicit bias and microaggressions can feel new, the questions before the Court announce a pragmatic approach to

recognizing the nuances of a modern hostile work environment under the ADA and Title VII. "Hostile work environment claims have their legal basis in the phrase 'terms, conditions, and privileges of employment' present in the ADA and other employment discrimination statutes. 42 U.S.C. § 12112(a) ; see *Harris v. Forklift Sys., Inc* ., 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)." *Ford v. Marion Cnty. Sheriff's Office*, 942 F.3d 839, 851 (7th Cir. 2019) (Each circuit has either recognized, permitted or assumed without deciding hostile environment claims under the ADA).

On August 7, 2020, Puerto Rico became the first American jurisdiction to adopt law (House Bill 306) to prohibit workplace bullying. 30 states have already introduced a version of the "Healthy Workplace Bill" which protects employees against arbitrary cruelty. The language in the new law very closely mirrors this Court's hostile work environment precedents-which makes good sense because it is the abuse and not membership in a protected class that makes a sex-, race- or disability-based hostile work environment tangible. These new laws zero in on the dignity and respect all people deserve, which is a workplace free from harassment, period.

The only important question about the difference between bullying (mobbing in this case) and illegal harassment is the abuser's intention. When an employee is singled out based on federally protected characteristics, that protection makes the bullying actionable. In cases where the employee's protected status cannot be ruled out as a motivating factor, it follows that every instance of bullying or abuse (terms wholly interchangeable), should be counted. Mobbing by its very nature "quickly escalates into a hostile poisoned workplace" G. & R. Namie, *The Bully at Work* 6 (2009)

At summary judgment petitioner's evidence was "to be believed, and all justifiable inferences [were] to be drawn in [her] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

A. BACKGROUND

1. Petitioner McDaniel was a Rating Specialist (RVSR) assigned to the Cleveland VA Regional Office (VARO) until she involuntarily resigned in July 2015. As a certified journeyman RVSR, petitioner demonstrated the requisite "skill, experience, education" and expertise the position required. 29 C.F.R. 1630.2(m) The parties agree, and the record confirms that she was at all times rated "Fully Successful" or higher by VA. Petitioner was a subject matter expert (SME) with a long running error free track record at the National level. McDaniel is biracial, was regarded as Black by VA and she identifies as such. Pet. C.A. Br. 9-11, 33

Through her role as the Federal Women's Program Coordinator on the EEO Advisory Committee petitioner became increasingly aware of an abusive work environment created by her supervisor Charles L. Moore Jr. ("Moore") who identifies as a "light-skinned" Black man. The courts below chronicle interactions between petitioner and Moore that predate her committee role. App. *infra* 6a-7a, 18a-19a At all times relevant Moore was the Veterans Service Center Manager ("VSCM"), he retained sole authority to assign RVSRs work, petitioner included.

When Moore charged petitioner's fellow advisory committee member, also a non-white RVSR, with fraud; she claimed innocence, became distressed, and completed suicide. The AIB investigation that followed captures sworn testimony from female and

Black employees whose stories were known to petitioner. Pet. for Reh'g 15-16 There is no record of Moore being disciplined for the sex-, race- and disability-based harassing acts they described. Moore eventually brought similar charges of fraudulent misconduct against petitioner.

2. Beginning in 2013, petitioner volunteered to telework four days per week which was standard for her decisionmaker position. While working from her home, petitioner's output exceeded her productivity standard. Moore then deleted those outputs, driving down her averages, and proposed to suspend her without pay for "low productivity". Moore systematically removed every tool for success she had to remedy the harm, and she could not recover. He monitored her in real time and continued to suppress her productivity by removing her from screening and rating activity for the duration. He investigated her for months, changing where, when, and how she worked, then tacked on new charges stemming from those changes. Her workload was reduced to half the size of her white colleagues and she was given separate instructions for completing her work in front of her coworkers. Pet. C.A. Br. 22 Her phone was disconnected, her SME work ended abruptly, and her in-progress work was distributed to her white colleagues despite her written and verbal protestations. She was not credited for the time she spent on her assignments and watched as others took credit for finalizing her work. Pet. for Reh'g 12-14 She was often tearful at the office and feared going in. D. Ct. Doc. 40-2 at 233, 260, 285 She was subject to escalating character attacks and threats to her pay rate that insinuated she was lazy or performing poorly on purpose. D. Ct. Doc. 40-3 at 263 Petitioner believed this was done to pressure her into stealing work outside her jurisdiction or to

otherwise impermissibly inflate her productivity in a Catch 22, so that she could be caught in the act or otherwise fail. VA refused to investigate her "serial workplace bullying" complaint despite her office's "zero tolerance" workplace bullying policy and her statement that Moore's mobbing impacted her "personally and professionally". Pet. C.A. Reply 6 The courts below dropped these mobbing events from the recitation of facts. App. *infra* 5a

VA did not respond to her attorney's letter about Moore creating "a sexually hostile work environment for black females". App. *infra* 7a Petitioner elevated her complaint to the Under Secretary for Benefits, who routed her complaint back to HR Lead Jessica R. Minnich ("Minnich") at the Cleveland VARO. It was Minnich who initially received the complaint document and refused to investigate in the first instance, she was enlisted by Moore and heavily involved in inventing punishment for petitioner. Minnich routinely diminished or ignored petitioner's concerns while campaigning against her in the background as confirmed by internal emails. Petitioner was formally reprimanded for inquiring about reasonable accommodation. Pet. C.A. Reply 9 Petitioner's health declined, and she began seeing a counselor through the Employee Assistance Program (EAP) who recommended she see a therapist. During EEO proceedings, Moore attempted to sidestep inquiry into his mobbing by taking credit for her decision to visit EAP, "this was a young lady who needed some medical help * * * so we referred her to EAP". The implication being that petitioner was delusional and that her complaints about him and his management team were mere "ranting emails" unworthy of credence. D. Ct. Doc. 40-3 at 167-168 Petitioner's single signature authority paid out millions of taxpayer dollars, Moore never made a

move to revoke it despite the subsequent implication that she was unstable, instead he personally signed off on sizeable retroactive awards to Veterans based solely on her findings.

3. Moore invented different rules and standards for the small group of women of color who, like petitioner and her deceased coworker, ascended to autonomous decision maker roles at the GS-12 level and above. When petitioner and her cohort spoke up about inequities in workload, support, and tools for success preventing them from competing with their white peers, VA responded with criticisms and punishments instead. Moore was verbally abusive, "fucking bitch", "shut the fuck up", and considered Black women to be less talented "you will probably never get to my level ". D. Ct. Dkt. 59-Sealed (Exh. 19), 58-9 AIB Testimony He punished petitioner and other Black women *during* his investigations despite no evidence of wrongdoing. Petitioner's belief is that Moore fixated on her because she was "uppity" and did not conform to the "lazy negress" paradigm he preferred. D. Ct. Doc. 40-2 at 181-183 Petitioner was well-liked, respected, generous, intelligent, creative, empathetic, and advocated for doing what was right over what was easy. Pet. C.A. Br. 10-11 Research on the topic shows that she was exactly the kind of employee who is ripe for exploitation[1], but petitioner alleged that Moore was not an equal opportunity bully, he allowed white women to shine, and Black women were chastised for eclipsing them. Pet. for Reh'g 15-16

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[1] In the most bullying-prone industries, we've found that many employees share a prosocial orientation. They are the "do-gooders." They want to heal the sick, teach and develop the young, care for the elderly, work with the addicted and abused in society. They are ripe for exploitation. G. & R. Namie, *The Bully at Work* 23 (2009)

4. Both parties agree that petitioner's health care providers sent a letter and medical records which notified VA that petitioner suffered from Post-Traumatic Stress Disorder (PTSD) without psychotic features, Major Depressive Disorder (MDD),single episode severe and Generalized Anxiety Disorder (GAD) and opined "it is my professional opinion that due to her diagnoses it is necessary for her to work from home rather than the work environment". D. Ct. Dkt.59-Sealed (Exh. 13) At the outset, the work environment was identified as a significant trigger for exacerbation of her PTSD symptoms. Panic attacks and flashbacks reduced occupational functioning and increased leave usage. VA denied petitioner's request for an additional day of telework (an increase from four days per week to five) and removed her from telework altogether, citing the rescinded productivity standard it did not extend to other RVSRs. Petitioner resigned in response.

5. Moore outlined the business reasons behind his decision to hold the RVSR production/output standard in abeyance and articulated the requirements that must be met to achieve satisfactory performance. Petitioner met each of those requirements. Petitioner's monthly performance evaluations leading up to her removal explain why output averages below 3.0-points are still considered satisfactory. Each evaluation assigns a "Fully Successful" to the declining output averages. The appellate court incorrectly assumed she received "poor marks" because her output averages were under 3.0-points. App. *infra* 9a

VA management reassured petitioner that the way she was completing her assignments (i.e. productive time spent mentoring trainees, minimal opportunity for rating activity) was in line with VSCM Moore's guidance on performance

expectations. Pet. C.A. Reply 16 VSCM Moore rewarded teleworking employees with full time telework based on achieving the new collective output goals each month. The Cleveland VARO Work-at home (WAH) study confirms that 74 out of 91 RVSRs teleworked, 25 percent of them were not achieving or expected to achieve the rescinded 3.0-point standard during the relevant time period. 35 percent of non-teleworking RVSRs were also below 3.0-points. Moore testified, "We did not hold them accountable for their production element of their work * * * we mitigated that particular element * * * there was no question at the end of the year about whether she was going to be fully successful. That question was taken off the table by myself: No matter how little or how much did, she - - there was no question about that." D. Ct. Doc. 40-3 at 161 Moore's testimony links the tangible decline in her productivity to his decision to assign her less rating activity. Employee performance data shows that despite Moore's suppression, petitioner outperformed similarly situated white women who were not disabled and were not removed from routine RVSR telework. Pet. Opp. Br. 6

6. The record shows that Minnich in her capacity as the Local Reasonable Accommodation Coordinator (LRAC) refused to consider telework *as an accommodation*. Minnich worked with Moore and various other managers, to create and issue a memorandum comparing petitioner's output data to the standard Moore rescinded. D. Ct. Dkt.58-98, 58-99 Petitioner was threatened with removal from telework if she failed to achieve an average of 3.0-points. The memo conflicts entirely with petitioner's actual performance reviews and the performance expectations set for the other RVSRs fiscal year. Internal VA emails memorialize the Agency's

prediction that her disability would prevent working from the office environment "It was crystal clear to me that she was experiencing a very difficult mental event * * * I forsee * * * whenever * * * [she is required] to be in the office * * * she will not come in" and LRAC Minnich preferred her exit from the Agency to accommodating her, "We do not need/want to exacerbate this by engaging, holding her hand or talking her into staying." Pet. for Reh'g 17 Petitioner's providers responded to every reasonable request for functional limitations and petitioner spent her final weeks at VA pleading with Minnich to grant her request so that she could continue to serve Veterans in the same manner as the other RVSRs (free from pain and from home). D. Ct. Dkt. 59-Sealed (Exh. 15, 15.1, 17) VSCM Moore testified that to his knowledge petitioner was the first employee to be denied telework as an accommodation, all others were white "none were Black". D. Ct. Doc. 40-3 at 167

B. PROCEEDINGS BELOW

1. Petitioner McDaniel commenced this action in the Northern District of Ohio, alleging that she was the victim of disability-race-sex discrimination in violation of Title VII and the Rehab Act. Petitioner further alleged retaliation because of her protected activity and a discriminatory and retaliatory hostile work environment, in violation of the same statutory laws.

2. The VA moved to dismiss all of her claims. The district court granted the motion in part and denied the motion in part, permitting her hostile work environment, disability discrimination, and constructive discharge claims to proceed. App. *infra* 25a-41a After a period of discovery, the district court granted the VA's motion for summary judgment on

all of petitioner's remaining claims. No decision was made on petitioner's motion to compel documentary evidence to include *inter alia* her electronically stored performance data with time record, and complete records for the employees who were granted telework as an accommodation. *See* FED. R. CIV. P. 37; D. Ct. Dkt. 45-Mtn. to Compel and 53-Reply to Opp.

3. On appeal, petitioner argued that the district court erred in granting summary judgment in several respects. First, the district court erred deciding that no prima facie case for disability discrimination could be made by assuming the references to performance issues in *EEOC v. Ford* at all pertained to the failure to accommodate portion of that case. This misapprehension lead to the incorrect conclusion that it was "not unreasonable" for VA to deny telework as a reasonable accommodation. App. *infra* 19a. The fact that VA already granted 4 day telework that was routine, and 5 day telework as an accommodation to other RVSRs makes it unreasonable as a matter of law to deny petitioner's request. Second, the district court failed to apply the per se rules established in *U.S. Airways v. Barnett*, even though the en banc court's decision in *EEOC v. Ford* contemplated how the job was ordinarily done and the dissent considered circumstances that may have made reasonable a removal of essential function exception. The district court did not require VA to identify an essential function of the RVSR position that telework removed. Teleworking four days per week was not a special dispensation or an essential function test, but rather how the job was normally done. Petitioner argued in both courts that VA's discussion of her productivity was nothing more than an improper assertion calculated to mislead. Third, the content and scope of the hostile work

environment claim includes discrimination because of sex, race, and disability perpetrated against petitioner as well as member class harassment of which petitioner was aware, the "totality of the circumstances" test established by this Court in *Meritor Sav. Bank v. Vinson,* 477 U.S. 57 (1986) 477 U.S. 57 (interpreting 29 C.F.R. 1604.11) was not used and admissible member class testimony was not considered[2]. Fourth, the district court erred because the interpretation of the record ignored pertinent context and did not evaluate the facts that elucidated the material fact issues in dispute, which under controlling precedent would prevent a grant of summary judgment to VA. This evidence was at minimum, sufficient to raise a jury question of whether telework was a reasonable accommodation and whether discrimination, retaliation, or both were motivating factors for the series of sabotaging acts that caused psychological injury, unreasonably interfered with petitioner's ability to do her job, and the final act that prompted her discharge.

4. The court of appeals affirmed the judgment of the district court in its entirety. App. *infra* 1a-10a The court of appeals concluded petitioner was a qualified individual with a disability after the district court used superseded law (pre-ADAAA) to conclude otherwise. The court of appeals assumed without deciding that petitioner was qualified

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[2] "Employees who talk to investigators are either speaking on matters within the scope of their duties under Fed. R. Evid. 801(d)(2)(D) or are in effect 'authorized' to cooperate with investigators, so their statements fit Fed. R. Evid. 801(d)(2)(C)." Weinstein v. Siemens, 756 F. Supp. 2d 839, 852 (E.D. Mich. 2010) (quoting 30B Graham, Federal Practice & Procedure,§ 7021).

because there was no dispute between the parties concerning whether petitioner was qualified to perform the essential functions of the RVSR position under ADA law.

The court of appeals ultimately decided that there could be no failure to accommodate because telework was not a reasonable accommodation. App. *infra* 8a Like the district court, the appellate court's theory relied entirely on the en banc court's factbound conclusions in *EEOC v. Ford.* Neither the majority opinion nor the dissent in that case addressed the difference between a federal employer that already has a voluntary, time-tested remote work policy implemented under the Telework Act for the position in question, and a non-federal employer that identifies regular in-person attendance as an essential function of that particular job.

The panel held that telework was unreasonable by impermissibly relying on a VA performance standard that was held in abeyance for all teleworking and non-teleworking employees in petitioner's position. Removing petitioner from routine telework required a rating below "Fully Successful," both parties agree that she was at or above that level at all times. The Telework Act prohibits treating petitioner differently than non-teleworking employees for the purposes of deciding what constitutes diminished performance.

5. As for the additional issues raised here, the appellate court used a framework for addressing constructive discharge that ignored VA's demand that pain become a condition of her employment. The appellate court also failed to view that demand as a harassing act that forced her to work in excess of her medical restrictions.

Instead of viewing each instance of "bullying" as a pattern of actionable targeted harassment, the court

disaggregated the hostile work environment claim and found that a restrictive sampling of sexually and racially harassing acts were not so objectively intimidating, hostile, or offensive as to interfere with her work. App. *infra* 6a The appellate court noted that petitioner proved with evidence that she complained, "McDaniel also asserts that the district court erred in finding that the VA did not know about the allegedly hostile work environment, pointing to a letter that her attorney wrote to VA management in 2014. She is correct" *Id.* 7a However, the appellate court did not require VA to articulate a legitimate non-discriminatory reasons for the series of well documented and undisputed "facially neutral" acts that followed, which petitioner alleged were purely sabotaging acts based on her race, sex, and disability and reasonably designed to intimidate, set her up for failure and/or force her to quit.

6. The court of appeals denied petitioner's timely petition for rehearing or rehearing en banc, which argued *inter alia* that the court should apply its interpretation of *EEOC v. Ford* found in *Hostettler v. Coll. of Wooster,* 895 F.3d 844 (6th Cir. 2018), and *Mosby-Meachem v. Memphis Light, Gas & Water Div.,* 883 F.3d 595 (6th Cir. 2018) to her failure to accommodate claim, and to apply *Talley v. Fa. Dollar St.*, 542 F.3d 1099 (6th Cir. 2008) and its progeny *Morrissey v. Laurel Health Care Co.,* 946 F.3d 292 (6th Cir. 2019) to her constructive discharge claim, and the measure of "pervasiveness" found in *Harper v. Elder*, No. 19-5475, at *1 (6th Cir. Mar. 4, 2020) to her hostile work environment claim as well as this Court's precedents in *Barnett, Meritor, Harris, Faragher v. City of Boca Raton, and Pa. State Police v. Suders,* 542 U.S. 129 (2004) to her facts in her

failure to accommodate and hostile work environment claims. App., *infra* 42a-43a

REASONS FOR GRANTING THE PETITION

1. The decision of the Sixth Circuit conflicts with *Barnett* and the regulatory factors used by every other Circuit on the issue of what type of evidence is needed to prove an accommodation is unreasonable.

a. The courts below did not apply the correct legal standard. "[A] plaintiff/employee (to defeat a defendant/employers motion for summary judgment) need only show that an accommodation seems reasonable on its face, i.e., ordinarily or in the run of cases." *Barnett,* 535 U.S. 391 (2002) For a grant of summary judgment, the VA "must explain *why* [McDaniel] could not complete the essential functions of her job unless she was [physically] present [in office] 40 hours a week." *Hostettler v. Coll. of Wooster,* No. 17-3406, at *14 (6th Cir. July 17, 2018)

The district court decision parroted the movant's facts at summary judgment and inexplicably ignored petitioner's uncontroverted evidence rebutting movant's facts. The district court assumed declining outputs indicated failure to meet performance standards while teleworking. App. *infra* 19a This is incorrect, but even if this were true it would not be dispositive of a failure to accommodate claim. Pursuant to the ADA as amended, the EEOC is expressly granted the authority and is expected to amend the controlling regulations. 42 U.S.C. 12205a EEOC distinguishes performance standards from essential functions. 29 C.F.R. 1630.2(n); 29 CFR pt. 1630 app. § 1630.2(n) 395. EEOC has addressed near identical allegations of productivity decline:

> "the Agency has not provided any specific evidence that teleworking negatively impacted [her] productivity in comparison to working in the office. Moreover, [she] received a "Fully Successful" performance evaluation while teleworking two days per week. As such, the Agency's assertion that she could not telework additional days because of productivity concerns is unsubstantiated and unworthy of belief." *Doria R. v. National Science Foundation,* Appeal No. 0120121886 (EEOC November 9, 2017)

The inquiry should focus on whether the impact of removing an essential function drives down productivity. If the accommodation itself can be blamed because it prevents certain integral tasks from being completed, then the accommodation is unreasonable because it removes an essential function. If the accommodation does not remove an essential function, then productivity may be impacted for any number of reasons. In this case the petitioner testified to extreme restrictions being placed on her rating activity. The assumption that the accommodation put in place to help the disabled employee is to blame and not decisions like the ones made here (i.e. providing her less work whilst conditioning telework on achieving a higher standard than her peers) strains credibility. Even in instances where there is no genuine dispute between the parties about performance and an "unsatisfactory" rating is issued to the disabled employee, the EEOC specifically cautions against assuming telework is to blame:

> "An employer may not withdraw a reasonable accommodation as punishment for the unsatisfactory performance rating. Simply withdrawing the telework arrangement or a modified schedule is no different than discontinuing an employee's use of a sign language interpreter or assistive technology as reasonable accommodations. Nor should an employer assume that an unsatisfactory rating means that the reasonable accommodation is not working." EEOC: *Applying Performance and Conduct Standards to Employees with Disabilities,* Question 7 dated September 3, 2008 https://tinyurl.com/y4hsczxy (as last visited Sept. 9, 2020).

Instead of distinguishing performance from essential functions the courts below incorrectly concluded, "it was not unreasonable for the [VA] to refuse increasing her telework to five days per week, because there was evidence that [she] was not 'able to satisfactorily perform her duties within that accommodation' request." (citing *EEOC v. Ford* Motor Co., 782 F.3d 753, 763 (6th Cir. 2015) (en banc)" App. *infra* 8a, 19a This section is particularly problematic. First, neither the words quoted, nor the sentiment appear in *EEOC v. Ford.* Second, VA did not allege or prove with evidence that an essential function was removed by telework, as was the case in *EEOC v. Ford.* Third, the *EEOC v. Ford* case does not address productivity or performance when determining whether telework was a reasonable accommodation. Fourth, the court's conclusion ignores the fact that VA didn't just refuse to increase telework to five days but removed her from telework entirely based on an allegation that is irrelevant to the essential function inquiry. Fifth, no

essential function inquiry was completed, the regulatory requirements were not applied, and thus the words "essential function" do not appear in the decisions of the courts below.

The courts below did not require VA to identify an essential function that was removed by the accommodation. However, it stands to reason that VA, a federal employer subject to the Telework Act would be hard pressed to explain how petitioner's voluntary and routine participation in the Agency's RVSR telework program removes an essential function of the RVSR position. The courts below failed to consider how removing her from telework altogether denied her a "benefit and privilege of employment" enjoyed by 74 out of 91 RVSRs working for the Cleveland VARO. 42 U.S.C. 2000e-2(a), 29 C.F.R. 1630.2(o)(1)(iii) Five day per week telework largely parallels the telework agreements of most other RVSRs because routine in person attendance is not required. Retroactively applying the rescinded standard to petitioner and not the others violates not only the ADA but the Telework Act along the way.

b. Telework is a Reasonable Accommodation. The courts below decided there was "no genuine dispute that telework was unreasonable." App. *infra* 8a Providing disabled employees with the reasonable accommodation of telework is consistent with the Rehab Act's goal of assuring "equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities. 42 U.S.C. § 12101(a)(7) "It is the word accommodation, not the word reasonable, that conveys the need for effectiveness. * * * Neither has Congress indicated in the statute, or elsewhere, that the word reasonable means no more than effective." *Barnett,* 535 U.S. 391, 400 (2002)

Government resources confirm that telework is an effective reasonable accommodation for employees suffering from PTSD. Outside of these proceedings, VA advocates for its use because "workplace conditions exacerbate PTSD". Maxanne R. Witkin, *Compliance Corner, Telework and Reasonable Accommodation,* July 2015. https://tinyurl.com/yxbbbml4 (as last visited Sept. 9, 2020) According to the Job Accommodation Network (JAN), a service of the President's Committee on Employment of People with Disabilities, telework is an effective accommodation for petitioner's functional limitations related to PTSD to include attention/concentration, and stress. https://tinyurl.com/y4rvnnlf (as last visited Sept. 9, 2020) Similarly, the Department of Labor lists "Flexible Workplace - Telecommuting and/or working from home" at the top of the list for the "most effective and frequently used workplace accommodations" for psychiatric conditions. https://tinyurl.com/y6cuxxdj (as last visited Sept. 9, 2020).

Review of EEOC Federal Sector Appeal decisions confirms that VA accommodates disabled adjudicators with full time telework when they experience functional limitations due to PTSD. *See Keturah F. v. Dep't. of Veterans Affairs,* Appeal No. 2019001711 (EEOC June 4, 2019); *Natalie S. v. Dep't. of Veterans Affairs,* Appeals Nos. 0120140815 and 0120142049 (EEOC January 26, 2018); *see also Iliana S. v. Dep't of Justice,* Appeal No. 0120181195 (EEOC June 12, 2019) (DOJ Analyst accommodated with full-time telework, revoked despite medical evidence of significant distress brought on by work environment; DOJ found liable for failure to accommodate.)

c. The regulatory requirements were not applied by the courts below because VA failed to identify an essential function, even on appeal. VA offered nothing more than a mischaracterization of her performance that remains untethered to *where* she performed the essential functions of the job. VA failed to articulate a legitimate non-discriminatory reason for denying telework *as an accommodation.* Petitioner proved with evidence that VA knew telework was a medically necessary reasonable accommodation when she was denied her request. There is no provision under ADA that permits delay or endless exploration of every possible accommodation an employer may prefer to the one that is medically necessary, facially reasonable, does not remove an essential function, and does not present an undue hardship to the employer.

The appellate court made short shrift of the case. Considering allegations of performance decline without evidence of a poor performance rating or performance improvement plan (PIP) pulls focus from the elements of the ADA. "[I]f an employer does require [a 3.0 point productivity standard], it will have to show that it actually imposes such requirements on its employees in fact, and not simply on paper." 29 C.F.R. §1630.2(n) app. 395 VA cannot make such a showing. Petitioner proved with evidence that her employer retained the right to change the productivity standard unilaterally and exercised that right fairly frequently by holding it in abeyance for entire fiscal years. *Barnett,* 535 U.S. 391, 392 (2002) This move on the part of VA eviscerates any argument that productivity, under these "special circumstances", was a fundamental requirement of the RVSR job. *Id.* at 392 VA did not allege undue hardship. The cost to accommodate

McDaniel would have been $0.00 without impact to the 90 other RVSRs assigned to the VARO.

The district court's role was to determine whether McDaniel's "[request to telework] would be reasonable within the meaning of the statute". *Barnett,* 535 U.S. 391, 403 (2002) At summary judgment the courts below should have required a valid reason under the applicable standard of law. Routine in-person attendance was not part of the RVSR job, and VA did not dispute that the essential functions could be completed entirely remotely. The appellate court inexplicably disregarded how common telework is amongst VA employees, a fact with which at least one panel member is familiar. *Cf. Watkins v. Wilkie,* No. 19-4045, at *1 (6th Cir. Aug. 4, 2020) (unpublished) ("Watkins usually works remotely from his home in Ohio.") The appellate court's holding conflicts entirely with the rules established in *Barnett. See* S. Ct. Rule 10(c) Evidence regarding VA's refusal to provide further telework as an accommodation could support a jury verdict in petitioner's favor. Evidence showing that VA already granted telework as an accommodation to other employees makes the denial of petitioner's request unreasonable as a matter of law. Summary judgment could have been granted in favor of petitioner based on this fact alone. Instead of applying the correct summary judgment standard, the courts below invented a new standard of extreme agency employer deference creating an impossible burden that permits disregarding the legal requirements for reasonable accommodation.

2. The Sixth Circuit's decision conflicts with this Court's decisions related to Title VII and ADA hostile work environment. The prohibitions in Title VII protect against a hostile work environment "because of sex" and "because of race". 42 U.S.C. 2000e-2(a)(1)

In *Harris* this Court established a paradigm for sex-based harassment distinguished from the "appalling" and "especially egregious examples of sexual harassment" alleged in *Meritor* seven years earlier. *Harris,* 510 U.S. 17, 22 (1993) Also pertinent here, the *Harris* court reiterated that "the phrase "terms, conditions, or privileges of employment" evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women" in employment," which includes requiring people to work in a discriminatorily hostile or abusive environment." *Id. at 21 citing Meritor.* Since this case also concerns protection against a hostile work environment "because of disability", the ADA was invoked by petitioner under the same theory.

In ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [her] favor." *Anderson v. Liberty Lobby, Inc.,* 477 U. S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In order to survive summary judgment, petitioner had to show the existence of a genuine factual dispute as to 1) whether a reasonable Black woman with PTSD would find the workplace so objectively and subjectively abusive as to create an abusive working environment; and 2) whether VA failed to take adequate remedial and disciplinary action. *Faragher v. City of Boca Raton,* 524 U.S. 775, 787, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998)

a. The cumulative effect of mobbing has always been covered under the hostile work environment standard. A hostile work environment claim is comprised of a series of separate acts that collectively constitute one unlawful employment practice. *National Railroad Passenger Corp. v. Morgan,* 536 U.S. 101, at 117 (2002). Unlike a claim based on discrete acts of discrimination, a hostile work

environment claim is based upon the cumulative effect of individual acts that may not themselves be actionable. *Id.* at 115. Title VII forbids, "behavior so objectively offensive as to alter the conditions of the victim's employment." *Oncale v. Sundowner Offshore Serv., Inc.*,523 U.S. 75, 81 (1998). The requirement that the specific acts offended the senses of a reasonable person is a less reliable test than whether 1.) the conditions of employment were altered by making the job more difficult or 2.) whether the conduct unreasonably interferes with work performance. *See Harris,* 510 U.S. 17, 24-25 (1993) (Scalia, J., concurring and Ginsberg, J., concurring) Psychological harm is relevant to this inquiry, but the petitioner was not required to demonstrate medical injury to succeed on her claim. "Although the presence of physical threats or impact on job performance are relevant to finding a hostile work environment, their absence is by no means dispositive. Rather, the overall severity and pervasiveness of discriminatory conduct must be considered. By its very nature that determination is bound to raise factual disputes that likely will not be proper for resolution at the summary judgment stage." *Rasmy v Marriott Intl.,* No.*18-3260*-cv, at *20-21 (2d Cir. Mar. 6, 2020)

Once membership in a protected class(es) is established, all testimony and circumstantial evidence concerning severity, and frequency of the "mobbing events" must be considered to fully comprehend the claim. *See Robinson v. Perales,* 894 F.3d 818, 829-30 (7th Cir. 2018) (Considering supervisor's unusually close surveillance, directives to others to "get shit" on employee in order to write him up and deny him benefits that he wanted.) When these mobbing events whether directed at a protected individual or group are disaggregated and

viewed as separate from "classic" sexual harassment, "it precludes the application of the hostile work environment theory in bullying situations motivated by discriminatory animus * * * " D. Yamada *Workplace Bullying and the Law: A Report from the United States,* 172-173 (2013) "Incidents of nonsexual conduct — such as work sabotage, exclusion, denial of support, and humiliation — can in context contribute to a hostile work environment," *O'Rourke v. City of Providence,* 235 F.3d 713, 730 (1st Cir. 2001) (("See V. Schultz, *Reconceptualizing Sexual Harassment,* 107 Yale L.J. 1683, 1719-20 (1998)(isolating nonsexual conduct from hostile work environment claims "weakens the plaintiff's case and distorts the law's understanding of the hostile work environment by obscuring a full view of the culture and conditions of the workplace" and "drain[s] harassment law of its ability to address the full range of gender-based hostility at work")). These appellate court precedents describe mobbing because that is often how discriminatory abuse manifests. While solid evidence of equal opportunity bullying is a shield against liability, the fact remains that mobbing by its very nature is severe, pervasive and objectively intimidating; mobbing is career destroying trauma and documented ridicule.

b. Disaggregation of the hostile work environment claim compelled the finding that the conduct was not objectively intimidating and did not interfere with work. Historically, the Sixth Circuit considers evidence of other acts of harassment, "directed at others and occur[ing] outside of the plaintiff's presence...[assigning] more weight...to acts committed by a serial harasser if the plaintiff knows that the same individual committed offending acts in the past." *Hawkins v. Anheuser-Busc, 517 F.3d 321, 337 (6th Cir. 2008), see also Moore v. KUKA Welding*

Sys., 171 F.3d 1073, 1077-79 (6th Cir. 1999) (considering evidence of harassment that the plaintiff later learned about through a coworker). Considering "evidence of a discriminatory atmosphere add[s] "color" to the employer's decisionmaking processes and to the influences behind the actions taken with respect to the individual plaintiff." *Risch v. Royal Oak Police Dept,* 581 F.3d 383, 393 (6th Cir. 2009), *see also Jackson v. Quanex Corporation,* 191 F.3d 647, 661 (6th Cir. 1999) ("As *Meritor* demonstrates, an employer may create a hostile environment for an employee even where it directs its discriminatory acts or practices at the protected group of which the plaintiff is a member, and not just at the plaintiff herself.") Petitioner's evidence and testimony concerning how women of color were targeted for disparate treatment is part of this mosaic. A reasonable person in petitioner's shoes would feel their work environment was poisoned by abuse after weathering the death of someone with whom they identify. A reasonable person would reasonably feel threatened and intimidated if nothing changed and they were targeted by the same boss next.

VA did not meaningfully address the hostile work environment claim in its motion for summary judgment. Petitioner's lengthy opposition brief cited evidence; workplace sabotage and member class harassment went unconsidered by the district court. *Cf. Williams v. Gen. Motors Corp.*, 187 F.3d 553, 563 (6th Cir. 1999) ("courts must be mindful of the need to review the work environment as a whole, rather than focusing single-mindedly on individual acts of alleged hostility.") Instead of viewing each instance of "bullying" as actionable targeted harassment; as part of the mobbing that segregated petitioner and set her up for failure, the courts below focused

narrowly on the overtly discriminatory acts from petitioner's testimony. This sampling error was compounded because "the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion". *Tolan v. Cotton,* 572 U.S. 650, 659 (2014) *See Cooter Gell v. Hartmarx Corp.,* 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.")

In her testimony, petitioner described background information to create context for her experience in the work environment. At the outset she was targeted for her appearance which includes her race and sex. As she became increasingly successful the unwelcomed compliments turned sour. These lesser incidents that on their own may not be considered actionable do not comprise her hostile work environment claim, they merely set the stage. The incident when a front line supervisor grabbed and felt her long braided hair and commented about her being "biracial" or "pretty", or when her new supervisor Moore introduced himself by silently looking her up and down and then asking if she was having a sexual relationship with the attractive Black female coworker who stood beside her. Or when he told her, "You're not going to get a job because you are pretty." in front of other employees or visited her desk, leering at her body and remarking "you know you were bad when you were younger". The district court disaggregated her claim in a way that stereotypes sex-based harassment. While there was a sexual component, sex-based harassment of women encompasses a larger anti-woman animus that the courts below failed to grasp. The appellate court found that these discrete

"events" *on their own* did not create an abusive work environment because they were not objectively intimidating and *they themselves* did not interfere with petitioner's work. App. *infra* 6a These unreported events that precede the mobbing were proffered as evidence linking subsequent abuse to her race and sex, an inference of discrimination that in the aggregate was pervasive because the mobbing occurred daily and interfered with her work. Pet. for Reh'g 13 "The inference remains — unless it is conclusively demonstrated, by evidence the district court is required to credit on a motion for judgment as a matter of law, that discrimination could not have been the defendant's true motivation." *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 154-55 (2000)

There could be no mistake that petitioner attacked the VA's decisions as illegitimate by pointing to evidence that similarly situated white employees were treated favorably by comparison and women of color were singled out for abuse that made equal opportunity impossible. As far as removing petitioner from telework, pretext was not considered. *See Collazo v. Bristol-Myers Squibb Mfg., Inc.,* 617 F.3d 39, 52-53 (1st Cir. 2010) (considering evidence of employee's positive work evaluations and concluding that a genuine issue of material fact existed as to whether the performance-related justification was pretextual) VA's proffered rationale for requiring her to come in was not extended to similarly situated white employees who were not disabled and predicated on retroactive goal setting which can be viewed as discriminatory. This kind of dispute cannot be resolved on summary judgment.

c. The appellate court did not apply the correct constructive discharge theory. Instead of addressing the objective intolerability of working in excess of

medical restrictions, which is the crux of constructive discharge, the appellate court used its own erroneous findings on reasonable accommodation and hostile work environment under ADA and Title VII to affirm the disposition of the constructive discharge claim. App. *infra* 8a-9a

"A claim of constructive discharge requires proof of a causal link between the allegedly intolerable conditions and the resignation. See 1 Lindemann 21–45, and n. 106." *Green v. Brennan,* 136 S. Ct. 1769, 1781 (2016) "The whole point of allowing an employee to claim "constructive" discharge is that in circumstances of discrimination so intolerable that a reasonable person would resign, we treat the employee's resignation as though the employer actually fired him. Id at 1779 citing *Suders,* 542 U.S., at 141–143, 124 S.Ct. 2342."

Petitioner's condition was already linked to the work environment by her providers. She complained about her abusive discriminatory working conditions and was ignored. She developed disabling psychiatric conditions as a result. Because her providers introduced medical restrictions in addition to identifying a reasonable accommodation, the appellate court's review should have centered on whether denying the accommodation she needed for symptom reduction in addition to addressing her functional limitations made pain due to an ADA disability a condition of employment and whether the alleged harassment included enduring conditions that "exacerbate her symptoms". Pet. Opp. Br. 25. VA demanded that petitioner work in excess of her medical restrictions 40 hours per week, plus a minimum of 20 hours of mandatary overtime each month. The *Harris* court took, "a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a

tangible psychological injury." When considered against the backdrop of intentional mobbing, evidence of psychological injury can clear the higher bar for constructive discharge. Petitioner's formal diagnosis from two separate providers, combined with medical necessity is that "something more" referenced in *Suders,* 542 U.S. 129, 147 (2004).

Petitioner "would have to acquiesce in and affirmatively adopt a workplace role in which, because of her sex, [race, and disability] she would be the butt of certain forms of ridicule, bullying, and diminished professional responsibilities" *Gregory v. Daly,* 243 F.3d 687, 698 (2d Cir. 2001) What's more, petitioner's suffering was apparent, and her exit, as opposed to her compliance with coming into the office full-time, was desirable to the agency. Evidence that VA acknowledged her distress behind the scenes and withheld accommodation is unusually harsh and constitutes expulsion through emotional abuse. Pet. C.A. Br. 42-45 When petitioner resigned, hostile conditions had not abated She was forced to choose between her health and her livelihood. In these instances, "a jury may conclude that the employee's resignation was both intended and foreseeable." *Talley,* 542 F.3d at 1109. ("Assuming that [the plaintiff] was denied a reasonable accommodation that forced her to work in excess of her medical restrictions, a reasonable jury could infer that the defendants knew that [the plaintiff's] working conditions would become intolerable to a reasonable person suffering from her particular disability."), see also *Morrissey v. Laurel Health Care Co.,* 946 F.3d 292, 304 (6th Cir. 2019) (Reversing a grant of summary judgment to employer that offered no legitimate, undisputed evidence explaining why plaintiff was mandated to work a schedule of 13.5 hours on a single day when her medical restriction

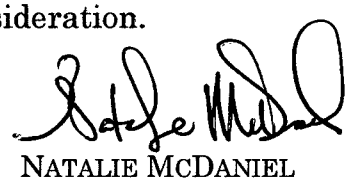
mandated a shift no longer than 12. Instead of completing the shift, plaintiff walked off the job and never returned.). *See also Wallace v. City of San Diego*, 460 F.3d 1181, 1191 (9th Cir. 2006) (plaintiff presented evidence of a continuing pattern of hostile and discriminatory conduct that went largely unaddressed. This evidence was sufficient to permit the jury to conclude that the intolerable situation had not abated at the time of his resignation, and therefore, that a reasonable person in his position would have felt compelled to quit.) The appellate court citied precedent that is materially different, ruling that denial of an accommodation "by itself is not sufficient to prove constructive discharge." App. *infra* 8a The question of objective intolerability was not addressed in light of the non-movants facts despite a run of cases with a high degree of factual similarity. These cases reverse summary judgment based on the inference that the employer knew the employee was required to work in excess of medical restrictions or the employer failed to address the continuing pattern of workplace sabotage.

The statute does not distinguish psychological pain from physical pain. 42 U.S.C. 12102(2)(B). PTSD and MDD are specifically included in the definitions of the implementing regulations to the ADA as substantially limiting brain function. 29 C.F.R. 1630.2(j)(3)(iii). Documenting abuse that harms and then continuing to abuse with that knowledge means the consequence of injury to the target is an acceptable outcome. A work environment where psychological injury is acceptable, especially following a collective experience with employee suicide communicates deep disrespect for the target, speaks to intention and makes intolerable pain a condition of continued employment.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted. The court should vacate the judgment of the court of appeals and remand the case for further consideration.

Respectfully submitted.



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