No. _____

**IN THE SUPREME COURT OF THE UNITED STATES**

CHRISTINE D'ONOFRIO, PETITIONER

v.

COSTCO WHOLESALE CORPORATION, RESPONDENT

*ON PETITION FOR A WRIT OF CERTIORARI*
*FOR THE UNITED STATES ELEVENTH CIRCUIT COURT OF APPEALS*

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

A. Whether the majority opinion in affirming the grant of a Fed. R. Civ. P. 50(b) motion failed to apply the correct standard of review, and under the correct standard the evidence was legally sufficient to support the verdict in violation of the Seventh Amendment and United States Supreme Court precedent?

## PARTIES TO THE PROCEEDINGS

Petitioner is CHRISTINE D'ONOFRIO (or D'Onofrio") Respondent is COSTCO WHOLESALE CORPORATION (or "Costco").

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The undersigned Counsel Thomas J. Butler, on behalf of D'Onofrio, respectfully petitions for a writ of certiorari to review the judgment of the United States Eleventh Circuit Court of Appeals of Appeals in this case.

## OPINIONS BELOW

The opinion of the United States Eleventh Circuit Court of Appeals (App., *infra*, Appendix A) is reported at 964 F. 3d 1014 (11th Cir. 2020). The United States Eleventh Circuit Court of Appeals denial of a motion for rehearing (App., *infra*, Appendix B) is not reported. The order of the United States District Court (App., *infra*, Appendix C) is not reported.

## JURISDICTION

The disposition of the United States Eleventh Circuit Court of Appeals was entered on August 19, 2020. The jurisdiction of this Court is invoked under *28 U.S.C. § 1254(1).*

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*U.S. Const. amend. 7*, states in pertinent part:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

*Fed. R. Civ. P. 50*, states in pertinent part:

**(a) Judgment as a Matter of Law.**

(1) *In General.* If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

**(A)** resolve the issue against the party; and

**(B)** grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) *Motion.* A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) **Renewing the Motion After Trial; Alternative Motion for a New Trial.** If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

**(1)** allow judgment on the verdict, if the jury returned a verdict;

**(2)** order a new trial; or

**(3)** direct the entry of judgment as a matter of law.

## STATEMENT OF THE CASE

D'Onofrio, is a totally deaf individual who was terminated by Costco after twenty (20) plus years of employment. D'Onofrio filed an administrative charge of discrimination (Jnt. Exh. 30), and thereafter filed a lawsuit against Costco in Florida state court, alleging discrimination under the Florida Civil Rights Act of 1992, § 760.01–§ 760.11. (DE 1-1 at 4-9) (Complaint). Costco removed the case to federal court in the Southern District of Florida.

Costco had moved for summary judgment challenging D'Onofrio's ability to prove that Costco had not provided a reasonable accommodation. (DE 24). The motion was denied due to the existence of genuine issues of material facts. (DE 52-12-14). At the nine-day jury trial, the district court denied Costco's Rule 50(a) motions for directed verdict made at the close of D'Onofrio's case and at the close of the evidence. (DE 94) (June 6, 2018 Motion); (DE 122-5) (court reserves ruling); (*Id*. at 212-16) (motion at the end of the case); (DE 122-222) (oral ruling denying both motions).

On the only claim pertinent to this case, the "failure to accommodate" claim, the jury was instructed that the parties had agreed to all but two elements, and that the issues for their consideration on that claim were (1) whether D'Onofrio requested an accommodation, and (2) whether Costco failed to provide reasonable accommodations. (DE 124-91-95). The jury found in D'Onofrio's favor on both questions, awarding her $750,000 for emotional pain and mental anguish and $25,000 in punitive damages. The jury found in Costco's favor on the remaining claims. (DE 103) (Verdict); (DE 124-118-21).

After judgment was entered (DE 111), Costco renewed its motion for judgment as a matter of law under Rule 50(b), and alternatively sought a new trial or remittitur under Rule 59. (DE 126; DE 127). The district court granted Costco's renewed motion for judgment as a matter of law, and conditionally granted a new trial in the event that the judgment as a matter of law was reversed. (DE 140). Noting that disability discrimination claims under the Florida Civil Rights Act are analyzed under the same framework as the Americans with Disabilities Act (ADA) (*id.* at 5), the order (like the parties) relied exclusively on federal law. In stating the issue, the district court focused on the Video Remote Interpreter device that Costco had provided:

> [T]he question before the jury, with respect to the [failure to accommodate] claim at issue, and now, before the Court, is whether VRI, among other accommodations, is a reasonable accommodation by which Defendant could seek to fulfill its legal obligation to a disabled employee.

(DE 140-24) (Order). On that question, The district court found the evidence to be legally insufficient to sustain the jury's finding on reasonableness and determined, contrary to the verdict, that Costco had provided reasonable accommodations:

> [T]he Court here finds that *no reasonable jury could find that Defendant did not provide a reasonable accommodation to Plaintiff*. At least within the applicable time period, beginning in December of 2012 and continuing up to Plaintiff's termination, *Defendant provided accommodations which were reasonable.*

(DE 140-14) (Order).

The district court concluded that the availability of the VRI device, and a few hours of training on "deaf culture" that was provided to certain managers, and the occasional live interpreter for certain group meetings, satisfied Costco's obligation to provide a reasonable accommodation. *Id.* at 17. The district court did not address the

fact that Alan Holliday, a supervisor who began working at the store after the training was provided, who interacted with D'Onofrio every day, and who later wrote D'Onofrio up repeatedly for talking loudly and exhibiting what he believed were signs of inappropriate behavior, was provided no information from his superior or anyone else about the training and recommendations flowing from that training meeting. (*See* DE 122-19-21, 49-51, 87-88) (*See infra*, Statement of Facts). Instead, the district court came close to finding that a functioning VRI is *per se* a reasonable accommodation:

> [R]egardless of whether or not an on-site interpreter would have been a better accommodation [than the VRI], and there was no witness who was offered as an expert who so testified; indeed, there is no testimony from any witness which could meet the burden of establishing that this accommodation was not reasonable. *No reasonable jury could find that a reasonable accommodation was not offered*.

(DE 140-19) (Order). That conclusion was based in part upon the fact that no evidence suggested that the VRI did not function properly, and that D'Onofrio had not always wanted to use it. *Id.* at 24-25. In addition, the court found that Costco was entitled to remove the functioning three-manager communication team that had been put in place at the suggestion of Costco's consultant at the Center for Hearing and Communication, because Costco "was not required to provide this particular accommodation. Thus, Defendant cannot be said to fail to comply with the law when it removes an accommodation that is not legally mandated." *Id.* at 22. Throughout the order, the district court credited Costco's version of events, put the blame on D'Onofrio for her difficulties in communicating with the general manager and the front end manager, and found that her dissatisfaction with the VRI device as an effective solution to the

communication issues she was experiencing "was obstructing the reasonable accommodation which Defendant was providing." *Id.* at 26.

Christine D'Onofrio loved her job. (DE 117-12, 19). She began working for Costco in 1989, at age 25 (DE 79-9), at the Davie, Florida store. (DE 117-18). Over the years, she was assigned to the bakery, the pharmacy, and stocking the sales floor, working among over six hundred other employees and forty managers. (*See e.g.,* DE 117-22; DE 118-99; DE 120-155-57). In 2003, she transferred to the Pompano Beach, Florida store (DE 117-18), and remained there until she was terminated by (DE 117-18), and remained there until she was terminated by the General Manager, Alan Pack, in October 2013, at age 49. (DE 116-202; Def. Exh. 11) The Davie store has approximately 225 employees; the Pompano Beach store has about 250 employees and 20-25 managers. The "over 600" number above reflects turnover over twenty-plus years. (DE 120-155-57).

D'Onofrio is profoundly deaf, since birth, and cannot hear any sounds. She can read lips "a little bit" if the individual speaker speaks slowly and with eye contact, but requires an on-site interpreter for multi-person meetings, where people tend to speak quickly. (DE 116-190-91). She communicates best using sign language, less well through lip reading, and although she can speak, she cannot hear her own voice and (like other deaf people) cannot control the volume of her voice. (DE 117-59; DE 121-91, 92, 99).

From the time she was transferred to the Pompano Beach location in 2003, until 2012, D'Onofrio made no complaints about any of the 15-20 managers. (DE 118-106, 109). Her employment records reveal only two incidents during that period. A 2007 Employment Counseling Notice ("ECN") described an argument with another employee.

(DE 117-26-32); (Def. Exh. 6). A week later, and not knowing that an ECN had been prepared, she wrote a letter of apology for her role in the incident. *Id.*; (s*ee* Def. Exh. 6, p. 3). And in 2011, she complained about a co-worker who repeatedly hit her with a floor scrubber, knowing she was deaf but refusing to steer clear of her with the scrubber. (DE 117-32-33). D'Onofrio was frustrated by the fact that Costco concluded she had not been hit by the scrubber, and therefore took no action against that employee. (DE 117-33; DE 120-168-71). Indeed, Costco's Regional Vice-President, Steven Powers, admitted at trial that Costco's response to the "scrubber incident," failing to take steps to ensure that it would not happen again, was wrong: "Hindsight being 20/20, we could have done something." (DE 120-180).

In general, for decades she was a loyal employee who reported no communication problems. (DE 118-106). Unmarried, with no children (DE 116-197), D'Onofrio told the jury that "My life was Costco":

> I was happy. I was able to do something. I was able to socialize with friends. I was able to go on vacations. . . .I mean, I would get to work at 5:00 in the morning. That was tough, you know. So imagine. I had to go to bed at 9:00. I was not a night owl. So I would go to sleep at 9:00 p.m. and get up.
>
> That was everything. That was my life. Everything I did was thinking about Costco. My life was Costco. That's it. That was what I did. I went to sleep early, woke up at the crack of dawn, and I went to Costco.

(DE 117-110-11).

Then, in the summer of 2012, Alan Pack arrived at the Pompano Beach store as General Manager. (DE 116-34). The "top man" at the store, he was an on-the-job trained manager, albeit with more than 30 years' experience with Costco, who had never before had a deaf employee or an employee who required accommodations under the ADA. Pack's training about the ADA had taken place twenty years earlier, with some

self-administered Costco on-line training modules after that. (DE 118-92-99). D'Onofrio, one of only five non-management employees with over twenty years with the company (*id*. at 101), found him to be "horrible." (DE 117-84).

He mumbled, making lip-reading impossible, refused to communicate with her in writing, ignored her when she tried to talk to him, ridiculed her for talking with her hands, "smirked" over her attempts to communicate, and was sarcastic. (DE116-34-38). Eventually, because she thought "it's vital for me to have access to communication about my workplace" (DE 117-38), and believing that she had "exhausted the chain of command" at the store with no resolution, she invoked the company's "open door policy" that allowed employees to lodge complaints with their managers' higher-ups. (*See* DE 119-200; DE 118-134; DE 120-162); (*see also* Jnt. Exh. 1, p. 11) (Costco Employee Agreement, § 2.1). D'Onofrio wrote to Costco's CEO, Craig Jelinek. (Jnt. Exh. 5) (Nov. 20, 2012 letter) (*see* DE 117-41).

She explained her difficulties with Alan Pack, and that his treatment of her was causing her great mental, physical, and emotional stress. *Id.* Asked at trial to explain the letter, she responded, "how am I supposed to solve a problem with someone who refuses to communicate with me? And he was the only one who refused to talk to me was Alan Pack." (DE 117-39-40).

The communication problem she experienced with her new manager was very different from her historical ability to communicate satisfactorily in the workplace. Indeed, her recent Performance Appraisals documented that, despite her deafness, her prior managers evaluated her favorably in the area of Interpersonal Skills & Communication. (*See* DE 118-67-79).

| | | |
|---|---|---|
| **2008** (Pl. Exh. 20) | "Meets Expectations" | "Christine has always accepted the coaching that is geared towards her, and works well with her peers." |
| **2009** (Pl. Exh. 21) | "Meets Expectations" or "Exceeds Expectations" | "Christine works and interacts well with other employees, she expresses ideas about her department well, and follows coaching." |
| **2010** (Pl. Exh. 22) | "Outstanding" or "Good" | "Christine is a good communicator and she makes sure to express an[y] issues or concerns that she may have"<br><br>"expresses disagreement in a way that can result in a positive outcome" |
| **2011** (Pl. Exh. 23) | "Outstanding" or "Good" | "Christine is a good communicator. . . ."<br><br>"Christine will always lend a helping hand where ever needed." |

Pack did not review those Performance Appraisals before preparing her October 2012 Performance Appraisal (DE 119-11) and was less complimentary, writing that she took offense to "constructive criticism" instead of viewing it as a "learning tool." (Pl. Exh. 24).

Steven Powers, Costco's Regional Vice-President based in Atlanta (DE 120-157-58), responded to D'Onofrio's letter to the CEO, and came to South Florida to meet with her, because he had a sense of urgency about the complaints, and wanted to be "supportive" of Pack. (DE 120-174, 188). On December 12, 2012, with an onsite interpreter present, Powers and Angela LiCastro, a Human Resources employee who happened to be in South Florida (DE 119-198; DE 120-185) had an informal meeting with D'Onofrio at a local hotel. Asked why he brought an interpreter, Powers said, "Well,

the whole issue was communication . . . . it seemed like the crux of the matter was that she was having a hard time communicating, I wanted to remove that barrier." (DE 186-87). What Powers *didn't* want was a "paper trail." After reviewing a response that Pack had drafted, Powers told him "You clearly have put a lot of effort into a response to Christine however I am trying to figure out a way to convey your message verbally *without the paper trail*." (Pl. Exh. 25) (emphasis supplied); (*see also* DE 118-146-48; DE 120-177-78).

Powers' two "takeaways" from the meeting were (1) that there was "definitely a communication issue" between D'Onofrio and Pack, because he mumbled and she could not read his lips ("that's a big problem if she can't understand the general manager"), and (2) that she felt "very strongly" that Costco did not understand the deaf culture. (DE 120-191).

D'Onofrio explained that the term "deaf culture" encompasses deaf persons' various ways of communicating, their unique needs and skills, and related information. (DE 117-42-43). She suggested to Powers that Costco provide training in deaf culture for its managers and employees, but Powers initially rejected the idea. *Id.* at 42-43. Instead, a month later, both he and LiCastro advised D'Onofrio that two VRI (Video Remote Interpreter) devices were to be installed in the store. (Def. Exhs. 7 and 8).

At the end of January, two immobile VRI devices were installed, one in the office, and one in a pharmacy conference room. (DE 117-52; DE 118-139). A VRI, with a screen the size of a laptop computer screen (DE 120-219), operates by connecting to a live person at a remote location, who listens to one person and uses sign language to communicate those words to the deaf person. (DE 117-152; DE121-110). It is "very

much a one-on-one situation." (DE 121-89). Melissa Mocilac, from Human Resources, asked D'Onofrio to call her from the pharmacy conference room VRI on February 4. (DE 118-14-16). She went there to make the call, but was interrupted by Pack, who immediately scolded her for being in the room, for having her lunch with her, and for being on the VRI, demanding to know who she was calling. (DE 117-53-54).

Then began a period of time where D'Onofrio believed Pack was "stalking" her at the store, following her around and acting distrustful of her, a concern that she voiced repeatedly (Jnt. Exhs. 7, 15), but that Costco found to be unfounded. (DE117-54-55, 70; DE 120-109-10, 199-206); (Def. Exh. 14). That determination was made and reported to Powers within twenty minutes of D'Onofrio's complaint, based on Personnel Specialist Angela LiCastro discussing the complaint with Pack *before* she discussed it with D'Onofrio, contrary to company policy to keep such complaints confidential. (DE 119-245-52); (DE 99-13; Jnt. Exh. 1, § 2.5). The pro-Pack determination was memorialized in a March 5, 2013 letter from a different Personnel Specialist (Jnt. Exh. 32) ("we found that Alan treated you appropriately and conclude that the facts do not support your complaint of a violation of Company policy").

Nonetheless, Powers changed his mind, and arranged for selected managers to attend a training session at the Center for Hearing and Communication, in Fort Lauderdale. Dr. Shana Williams, a psychologist who is the Center's Director of Mental Health, described the facility as a "deaf service center" providing services for people with hearing loss, including an audiology department, mental health, and education, and also providing training to major companies about the special needs of the deaf. (DE 121-75-80). Before the training meeting, Dr. Williams visited the Pompano Beach Costco store to

learn about D'Onofrio's work environment, noting that the way in which the VRIs had been installed in two locations was "very effective." *Id.* at 80-83. The district court noted this testimony, but overstated it by writing that Dr. Williams "thought the VRI was effective." (DE 140-18). Her remark pertained only to the availability and location of the devices.

Dr. Williams and a colleague conducted meetings at the Center on March 1, 2013. Present were D'Onofrio, Alan Pack, Steven Powers, four other managers, Ainsley Brown, Carol Sivon, Jeff Weissler, and Jorge Vallejo, and a networking person involved with operation of the VRIs. An on-site sign language interpreter was also present. (DE 121-80-86, 108; Jnt. Exh. 9). Afterwards, everyone agreed the meeting was informative. (*See e.g.*, DE 117-60-61; DE 118-163-68). Pack prepared a summary of the meeting, which Dr. Williams found to be an accurate recap. (Jnt.Exh. 9); (DE 80-86, 108).

The majority of the meeting was Dr. Williams explaining "deaf culture," and that deaf people "have their own specific norms, values, language, and customs." (DE 121-82, 118).

> [DR. WILLIAMS]: Deaf people tend to point, where hearing people don't. So in deaf culture, that's very appropriate. A deaf person might tap on your arm to get your attention or flip the lights on and off which to most hearing people would be quite disruptive, but it gets the attention of other deaf people.
>
> They will use another person to relay information so they will pass information by tapping somebody closer or getting their attention to relay back to the back of the room.

(DE 121-119).

She also explained that a deaf person may attempt to make noise or pound a table to get someone's attention: "[i]f a deaf person wants to get your attention, they will use

the sound vibration to the end of the table to get somebody to look." *Id.* Dr. Williams explained that deaf people sometimes speak louder than other people, especially when excited or upset, because they cannot hear and they have no ability to modulate their voice and are unaware of the volume. *Id.* at 120. She further explained that in the deaf culture, "it is very appropriate to be direct and quite blunt and also to elaborate. So they will speak for a very long time," a practice that a hearing person may perceive as rude. *Id.* at 121. Dr. Williams provided a copy of a PowerPoint presentation, so that Costco could share this information with employees who did not attend the training session. (DE 121-122-23). She was later surprised to learn that Costco had not done so. *Id.* at 124.

Several ideas and recommendations grew out of that March 1, 2013 meeting, including understanding challenges deaf employees face; understanding that D'Onofrio's conduct was similar to other deaf persons; the selection of a three manager communication team to have direct communication with her, in order to limit her need to interact with Pack; the use of an on-site interpreter for group meetings and performance evaluations; the use of the VRI for one-on-one conversations; and a commitment by all parties to work toward achieving better communication. (Jnt. Exh. 9); (*see also* DE 117-56-62; DE 121-89, 112-15). Thus, the VRI was discussed as one tool to assist in communication, but it was not represented to be the solution to the communication problems D'Onofrio was experiencing.

D'Onofrio had not requested the VRI, having communicated with other managers for over twenty years without one. She wanted training in "deaf culture" for her new managers, and an on-site interpreter. (DE 117-68, 76); (Jnt. Exh. 13, p. 2) (in July 2013,

LiCastro had a "concern" because "we had not had an interpreter sit in on reviews or employee meetings").

But even when D'Onofrio used the VRI, Pack caused her to give up. On their first attempt, she agreed to use it, but Pack became "combative," so she hung up. *Id.* at 81. They reached a second remote interpreter, but Pack "was trying to control the interpreter and tell them what to do." (DE 117-81). That interpreter then refused to work with them, and D'Onofrio hung up the VRI again. *Id.*

Even Pack acknowledged that the VRI alone was not the solution to their communication problems:

> Q. And the reason [Costco] did several things to help her in her accommodations was because the VRI machine alone was not enough without training for the deaf culture, correct? You couldn't do one without the other; you needed both?
>
> A. [PACK]: Yes.
>
> * * *
>
> Q. [T]he [three-manager communication] team was also designed to accommodate her hearing impairment?
>
> A. Yes.

(DE 118-182).

> Powers, too, admitted that the VRI was just a tool:
>
> Q. You were not expecting at that point in time when you set up that meeting at the center for the deaf culture that the VRI machine was the sole exclusive answer to the communication problems that Christine was experiencing at Costco, correct?
>
> Q. [POWERS]: No, It was just an assistance, a tool.
>
> Q. Just an assistance?
>
> A. Yes, sir.

(DE 120-196).

> That was consistent with Dr. Shana Williams' testimony:
>
> Q. Did you believe that the installation of the VRI phone by itself would solve the communication issues that were existing between Christine and Mr. Pack?
>
> Q. [DR. WILLIAMS]: I made a recommendation that they both come in to work on some of their communication challenges, so I don't think that was the only intervention that we suggested.
>
> * * *
>
> Q. But *the installation of the VRI phone by itself would not have solved all the communication problems, correct*?
>
> A. *No*.

(DE 121-128)

Thus, *three witnesses* acknowledged that the VRI alone was not enough to fully accommodate D'Onofrio's special needs.

The three-manager communication team, put in place after the training session, functioned well. (DE 117-60-64; DE 118-182; DE 120-43-50). But after only ten weeks, Costco discontinued that accommodation, for no articulated reason, other than stating that it had been "temporary." (Def. Exh. 14)(Personnel Specialist Angela LiCastro's letter to D'Onofrio)("This solution cannot realistically continue."). Instead, D'Onofrio was directed to communicate with Pack in the future. *Id.*; (*see also* DE 117-61-64).

LiCastro admitted she had *no basis* for her statement that the three-manager communication team had been a temporary solution, although it might have come from Powers. (DE 120-50-54). Powers, however, denied making the decision or knowing why the letter was written. *Id.* at 231. Wherever the directive originated, LiCastro said

that the problem was that D'Onofrio was not communicating with Pack (not saying "good morning" to him on a daily basis) and the three-manager communication team was therefore discontinued, with no alternative accommodation offered. *Id.* at 48, 50, 55, 57.

Around that time, in April 2013, a new front end manager arrived at the Pompano Beach store, Alan Holliday. (DE 122-20). He interacted with D'Onofrio *every day* (*id*. at 21, 51), but his superior, Pack, *never told him* that she had complained to Human Resources and to the corporate office about the need to accommodate her disability and her communication problems with Pack. *Id*. at 44. Holliday received no training on deaf culture or on how to accommodate a deaf employee (*id*. at 48-49), and was not shown the PowerPoint that the Center for Hearing and Communication had provided to Costco for training purposes. *Id.* at 49. Indeed, no evidence suggests that Holliday even knew that there had been a training meeting at the Center for Hearing and Communication to train other managers on deaf culture and to address D'Onofrio's communication problems. As a result, Holliday was *not informed* of the three-manager communication team that was an accommodation in place when he arrived. (DE 122-52).

In the ensuing months, Holliday repeatedly accused D'Onofrio of being loud, angry, and insubordinate. After years with no ECNs, a flurry of them began a few months after Holliday's arrival, ultimately leading to D'Onofrio's termination. (*See* Jnt. Exhs. 18; 20; 21; 22); (DE 121-11-12, 34). The common theme in those ECNs is that D'Onofrio was talking loudly, screaming, yelling, being aggressive, demanding eye contact, and making dramatic and emphatic gestures, on the floor of the store and in the ECN meetings themselves. The ECNs portrayed her as unreasonably angry and defensive with her managers and others. Indeed, at ECN meetings (conducted without an

on-site interpreter present), she was twice suspended for insubordination and unbecoming conduct, first on September 6, 2013 (DE 117-82-83; Jnt. Exh. 20), and again on October 18, 2013. (DE 117-93; Jnt. Exh. 27).

Christine described the events leading to the atypical cluster of ECNs and the suspensions differently. She felt strongly that she had done nothing wrong, and, after over twenty years with Costco, was "completely perplexed" about the situation under the new management (DE 117-83-84). For example, with regard to the ECN on September 23, 2013 (Jnt. Exh. 22), the jury heard this:

> Q. Did you know that you were yelling and screaming at [Assistant General Manager] Ainsley Brown?
>
> A. [D'ONOFRIO]: No.
>
> * * *
>
> A. When I asked to not have a confrontation, why would I be yelling? If I'm asking, saying I don't want a confrontation, why would I yell at them? I mean, I'm obviously saying I don't want to argue, so I'm saying I don't want a confrontation. I wouldn't be yelling. And how does he know what I said? Obviously that means they understood what I said?
>
> Q. If you yelled, was it your intention to yell at Ainsley Brown?
>
> A. No, no, no. I would never do that on purpose.

(DE 117-86).

And on October 10, 2013, at 5:30 a.m., when D'Onofrio was on the floor of the store discussing work to be done with another supervisor, Carol Sivon, Holliday appeared and accused D'Onofrio of screaming. He was "very aggressive," and she testified that "he was screaming, I wasn't screaming . . . he was so angry that he was kicking the stuffed animals." (DE 117-89-91). But on October 18, because of that incident, she was suspended again. (Jnt. Exh. 27).

Ultimately, D'Onofrio never worked again, because when she returned from the October 18 suspension on October 23, 2013, General Manager Alan Pack terminated her employment. (Def. Exh. 11). For that ECN meeting, Costco provided an on-site interpreter, because, as Regional Vice President Steven Powers explained, Costco "needed to make sure that she understood what was happening, that there wasn't any confusion, because apparently there was some confusion in the past . . . . We wanted to make sure that this was very clear." (DE 121-50).

On July 6, 2020, a panel of the United States Eleventh Circuit Court of Appeals in a 2-1 decision entered an Opinion affirming the district court's grant of judgment as a matter of law to Costco pursuant to Federal Rule of Civil Procedure 50(b). On July 29, 2020, D'Onofrio filed a petition for panel rehearing, which was denied on August 19, 2020.

## REASONS FOR GRANTING THE PETITION

B. The majority opinion in affirming the grant of a Fed. R. Civ. P. 50(b) motion failed to apply the correct standard of review, and under the correct standard the evidence was legally sufficient to support the verdict in violation of the Seventh Amendment.

### A. The guiding legal principles on the issue of "accommodation."

To establish a prima facie case of disability-discrimination under the Americans with Disabilities Act, a plaintiff must show that: (1) she is disabled, (2) she is a "qualified" individual, and (3) that she was subjected to unlawful discrimination because of her disability. *See Samson*, 746 F.3d at 1200 (*see also* DE 140-6) (Order). D'Onofrio sued under the Florida Civil Rights Act, but the parties and the district court looked to federal cases, because "disability-discrimination claims under the FCRA are analyzed using the same framework as ADA claims." *Samson*, 746 F.3d at 1200 n. 2 (quoting

*Holly v. Clairson Indus., LLC,* 492 F.3d at 1255. Here, it is undisputed that D'Onofrio has a disability, that she is a qualified individual, that Costco knew of her disability, and that one or more reasonable accommodations existed that would have allowed Plaintiff to perform the essential functions of her job. (DE 101-10-11) (Jury Instructions).

The analysis here focuses on the third element, whether D'Onofrio was subjected to unlawful discrimination because of her disability. Under the ADA, the definition of the term "discriminate against a qualified individual on the basis of disability" includes "not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability." *See 42 U.S.C. § 12112(b)(5)(A).* In other words, "[u]nder the plain language of the ADA and the FCRA, an employer's failure to reasonably accommodate an 'otherwise qualified' disabled employee itself constitutes unlawful discrimination, unless the employer can show 'undue hardship.'" *See Holly,* 492 F.3d at 1249. Costco did not assert that any particular accommodation would cause it an undue hardship. That defense is not an issue in this case.

Because of the stipulations, the jury was instructed that it only had to determine two elements on the failure to accommodate claim: (1) did Plaintiff request an accommodation?, and (2) did Costco fail to provide a reasonable accommodation? (DE 101-11). The jury answered "yes" to both questions. (DE 103-2-3)(Verdict). In the order on appeal, the district court agreed that D'Onofrio had requested an accommodation, but on the second point concluded that "no reasonable jury could find that Defendant did not provide a reasonable accommodation to Plaintiff." (DE 140-14). That, we submit, was reversible error and a clear violation of the Seventh Amendment.

The ADA offers examples of reasonable accommodations, depending on the circumstances:

> **(9) Reasonable accommodation**
>
> The term "reasonable accommodation" may include—
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities

*See* 42 U.S.C. § 12111(9).

Notably, an employer's "duty to provide reasonable accommodation is an ongoing one," and some "individuals require only one reasonable accommodation, Notably, an employer's "duty to provide reasonable accommodation is an ongoing one," and some "individuals require only one reasonable accommodation, while others may need more than one." *See EEOC, ENFORCEMENT GUIDANCE: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 32, available at:*

https://www.eeoc.gov/policy/docs/accommodation.html#workplace (last modified on May 9, 2019). However, if "a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship." *See Id.* While the employer

makes the ultimate decision on which effective reasonable accommodation it offers, "the preference of the individual with a disability should be given primary consideration," if more than one reasonable accommodation is being considered. *See 29 C.F.R. § Pt. 1630, App. 29 C.F.R. § Pt. 1630, App*. When an employer seeks to accommodate a disabled employee, "what is reasonable for each individual employer is a highly fact-specific inquiry that will vary depending on the circumstances and necessities of each employment situation." *See Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1527 (11th Cir. 1997).

The inquiry concerning whether an accommodation is "reasonable" and whether an accommodation is "effective" are two separate concerns. *See U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002). In other words, an "*ineffective* 'modification' or 'adjustment' will not *accommodate* a disabled individual's limitations." *See Id.* ("It is the word 'accommodation,' not the word 'reasonable,' that conveys the need for effectiveness.").

### C. Applying the legal principles on this record is a violation of the Seventh Amendment and United States Supreme Court precedent and requires reversal.

Every disability has its own special needs. For example, accommodating an employee in a wheelchair may be achieved by a few modifications to the work environment such as the installation of a ramp, or lowering the height of a desk. These are one-time modifications that do not require the ongoing cooperation and understanding of coworkers and managers on a day-to-day basis. Accommodating a deaf employee is an entirely different matter that requires the ongoing cooperation and understanding of each person that interacts with the disabled employee.

During the jury trial, Dr. Shana Williams at the Center for Hearing and Communication explained that deaf people communicate in ways that may seem offensive to a hearing person, although no offense is intended: being blunt, loud, with dramatic, expressive body language. *See supra*, pp. 13-14. A manager who doesn't know that such as Mr. Holliday, or who doesn't remember that, or care (Mr. Pack), could easily mistake normal attempts at communication (by a previously-described "good communicator") for insubordination. In such a situation, training (and learning) are a more important accommodation than an immobile VRI turned on only when criticism and discipline are about to be dished out. However, Costco failed to provide *any* training to Mr. Holliday, which the jury could reasonably have believed was an inadequate response to her known disability and the acknowledged communication issues. *See U.S. Airways, Inc.*, 535 U.S. at 401 (explaining that the ADA's objectives "demand unprejudiced thought and reasonable responsive reaction on the part of employers and fellow workers alike.").

The district court and a 2-1 panel opinion in the Eleventh Circuit did not view it that way. The lower courts improperly weighed the evidence from Costco's perspective, finding "that no reasonable jury could find that Defendant did not provide a reasonable accommodation to Plaintiff." (DE 140-14, Appendix A, pp. 16-44).

The district court and a 2-1 Eleventh Circuit panel opinion thought that Costco's efforts were sufficient, despite their evident lack of effectiveness. The district court order noted that Costco primarily provided "the VRI and training on the deaf culture," and at times "provided an on-site interpreter." *Id.* at 17. Focusing on the VRI (DE 140-24), the order concluded: "there is no testimony from any witness which could meet the burden of

establishing that this accommodation was not reasonable." *Id.* at 19. The district court then concluded that Costco had checked the box on its ADA obligation, and that the record in this case is utterly devoid of any testimony that the VRI did not function adequately." (DE140-26). The 2-1 Eleventh Circuit Opinion agreed with the district court. (*See* Appendix A, pp. 16-44) That misses the point, where three witnesses acknowledged that the VRI was never intended to be sufficient on its own to solve the communication problems at issue. *See supra*, pp. 15-16.

In addition, the order granting judgment as a matter of law as well as the 2-1 Eleventh Circuit opinion (*See* Appendix A, pp. 16-44) featured evidence of D'Onofrio's frustration with the limitations of the VRI and her frustration with her manager's unwillingness to understand her disability, and interpreted them, much like Costco, as her obstructing the process. (DE 140-23-25)("It is also apparent that breakdowns in the use of both of the primary accommodations were due, at least in part, to Plaintiff's unwillingness to engage."). When the record is viewed in her favor, one sees that D'Onofrio had a track record with Costco of more than twenty years, with her ability to communicate well documented in her recent performance reviews. *See supra*, at 9.

A reasonable jury could conclude that—VRI or not—Pack's and Holliday's lack of understanding of the challenges that are unique to deaf persons, and their repeated zeal to find fault with her without hearing her side of the story, was a failure to provide an ongoing reasonable accommodation. D'Onofrio's experience of Pack's hostile demeanor, and his making fun of her attempts to communicate, are the exact experiences that the ADA is in place to eliminate, or at least to reduce. Those experiences were not relieved by the VRI. For example, because the jury was told that it could believe or

disbelieve any witness (DE 124-86), the jury was entitled to believe the testimony of Alan Pack's former employee, Todd Amundson, who while in the Pompano Beach store recognized Pack's voice and overheard him tell someone, "get that F'ing deaf mute away" from him. (DE 119-185-86). The jury was allowed to reasonably infer that Pack's animus permeated his relationship with D'Onofrio, making effective communication impossible. And in view of Dr. Williams' recommendation that an on-site interpreter be used for meetings of three people or more (DE 121-89, 109), a reasonable jury could find that Costco's failure to provide an on-site interpreter for any ECN meeting before the termination meeting was a failure to provide a reasonable accommodation.

The ADA "seeks to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life, including the workplace." *See U.S. Airways, Inc.*, 535 U.S. at 401. The ADA's objectives "demand unprejudiced thought and reasonable responsive reaction on the part of employers and fellow workers alike," and sometime they will "require affirmative conduct to promote entry of disabled people into the work force." *See Id.* It was this understanding of the deaf culture that D'Onofrio sought, and that Costco failed to provide.

Although Costco did provide training about "deaf culture" to some of its managers, it removed the three-person communication team, an accommodation that had been recommended by the Center for Hearing and Communication, and which was working well. Instead, Costco insisted that D'Onofrio communicate with Pack, and offered no training whatsoever to Holliday, the manager who worked with her daily.

Holliday was not shown the PowerPoint and was not even informed that a meeting designed to improve communication with D'Onofrio had taken place. A jury could reasonably conclude that the series of ECN's initiated by Holliday could have been avoided, had Pack or anyone at Costco made the effort to give Holliday some insight into deaf culture, through the information that had been provided by the Center for Hearing and Communication.

Holliday's fundamental lack of understanding of his obligations under the ADA was attributable to Costco, which had an ongoing obligation to let him know that D'Onofrio needed to be treated somewhat differently than other employees. *See Holly v. Clairson Indus., LLC.*, 492 F.3d at 1262–63 ("the very purpose of reasonable accommodation laws is to *require* employers to treat disabled individuals differently in some circumstances—namely, when different treatment would allow a disabled individual to perform the essential functions of his position by accommodating his disability"). Collectively, if the jury's credibility findings were in her favor, the above record facts are legally sufficient to support a jury verdict, notwithstanding Costco's evidence and arguments that D'Onofrio was the cause of her problems at the workplace.

The cases cited by the lower courts concerning reasonable accommodation claims, unlike this case, turn on other issues, such as whether the employee was disabled, but also discuss the employees' requests being unreasonable as a matter of law, so that the employee does not get to pick-and-choose the employee's preferred accommodation. That is not the situation here, where D'Onofrio's request for training in deaf culture and an on-site interpreter was not unreasonable.

As an additional basis for granting and affirming the motion for judgment as a matter of law, the district court and the Eleventh Circuit determined that D'Onofrio caused the interactive process to identify a reasonable accommodation to break down. (DE 140-25-26; Appendix A, pp. 16-44)(the evidence supports the conclusion that Plaintiff was obstructing the reasonable accommodation which Costco was providing.). The lower courts mistakenly relied on *Stewart v. Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278 (11th Cir. 1997) in violation of the Seventh Amendment, and concluded that D'Onofrio had caused the interactive process to break down and thus Costco was relieved of liability. (DE 140-22). But *Stewart* is inapposite, because the employee's request was unreasonable as a matter of law. ("The court in Stewart was at pains to make clear that the concept of a reasonable accommodation does not mean that a disabled individual is entitled to choose how an employer accommodates her disability."). However, in *Stewart*, the court affirmed a summary judgment where the district court had determined that the employee was not disabled. *See Id.* at 1286-87. There, the employer had offered *five different reasonable accommodations* but the employee refused them all without explanation, and instead demanded 30-minutes paid breaks for herself and all her able-bodied coworkers. *See Id.* ("In this case, Stewart clearly crossed the line from seeking an accommodation on her own behalf to becoming an advocate on behalf of a policy goal—thirty minutes of paid break time for all Happy Herman's employees.").

But, "where the evidence can be interpreted in various ways, whether or not an employer or employee engaged in an interactive process is for the jury." *See Tate v. Potter*, No. 04-61509-CIV, 2008 WL 11400757, at *5 (S.D. Fla. Mar. 25, 2008) (citing *Canny v. Dr. Pepper*, 439 F.3d 894, 902-03 (8th Cir. 2006)). Sufficient record evidence

exists to support a reasonable jury's determination that D'Onofrio's conduct was merely an expression of her frustration over her managers' lack of understanding of the deaf culture, as opposed to an obstruction akin to the facts in *Stewart*. D'Onofrio's record of working for Costco for more than twenty (20) years supports a reasonable jury's determination that she was willing and able to work with Costco's management to accommodate her disability, when Costco's management was willing to work with her.

An employer is not relieved from its duties under the ADA simply because an employee is frustrated with an ineffective accommodation. If that were so, then an employer could simply insist on an ineffective accommodation that appeared reasonable, and thereby force an employee, frustrated by the hardship of her disability and by her uncooperative managers, to become "insubordinate" enough to get fired. That is not the law. By determining that D'Onofrio's frustration was an obstruction, the lower courts created an escape hatch for Costco and violated the Seventh Amendment on a question that was uniquely within the province of the jury.

The majority opinion sets out a standard of review that is correct, but incomplete:

> This Court reviews *de novo* the district court's grant of Costco's motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50. *Abel v. Dubberly*, 210 F.3d 1334, 1337 (11th Cir. 2000) (per curiam). A court should enter a JMOL only when there is "no legally sufficient evidentiary basis for a reasonable jury to find for [the nonmoving] party." *Home Design Servs., Inc. v. Turner Heritage Homes Inc.*, 825 F.3d 1314, 1320 (11th Cir. 2016) (alteration in original) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)).

*See* Appendix A, at p. 15. The majority opinion statement of the standard of review *omitted* a critical component: the verdict-friendly perspective from which a court must view the evidence when reaching its conclusion about its legal sufficiency. (*See* Appellant's Initial Br., pp. 20-21). That requirement places boundaries around "*de novo*"

review, respects the institutional role of the jury that is of constitutional importance, and precludes a reviewing court from taking on the role of a second jury.

This Court's decision in *Reeves*, 530 U.S. at 133, is highly instructive, because it solidified the standard that governs review of an order under Rule 50, Federal Rules of Civil Procedure. *Reeves* was an age discrimination case. Like here, the *Reeves* case went to the jury, and the jury returned a verdict in favor of the plaintiff, awarding damages. *See Id.* at 138. In *Reeves*, the district court denied the employer's motion for judgment as a matter of law, but the Fifth Circuit reversed, finding the plaintiff employee's evidence legally insufficient. *See Id*. at 139. On further review, this Court reversed, holding that "the Court of Appeals erred in overturning [the] verdict." *See Id*. at 154.

In *Reeves*, this Court clarified that a court must view *all* the evidence, and described the prism through which a court must view the trial evidence. It is apparent that a reviewing court, while applying *de novo* review, has certain constraints. *Reeves* emphasized that a court should not intrude into the jury's role in resolving disputes and drawing reasonable inferences from the evidence:

> [I]n entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record.
>
> In doing so, however, ***the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence***. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554–555, 110 S. Ct. 1331, 108 L.Ed.2d 504 (1990); *Liberty Lobby, Inc., supra,* at 254, 106 S. Ct. 2505; *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, n. 6, 82 S. Ct. 1404, 8 L.Ed.2d 777 (1962). "***Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge***." *Liberty Lobby, supra*, at 255, 106 S. Ct. 2505. Thus, although the court should review the record as a whole, ***it must disregard all evidence favorable to the moving party that the jury is not required to believe***. See Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving

> party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.*, at 300.

*See Reeves.*, 530 U.S. at pp. 150–51.

Because the panel majority opinion *failed to acknowledge that critical portion of the standard of review*, the majority's discussion of the evidence improperly mirrored Costco's and the district court's perspective, and did not draw all reasonable inferences in D'Onofrio's favor, disregarding Costco's evidence that the jury was not required to believe, as required by *Reeves* and its progeny. *See id*. The majority conclusion that "none of the proof that D'Onofrio cites is sufficient to support a jury finding of Costco's failure to accommodate" (*See* Appendix A, at p. 20) was the product of an erroneous standard of review and is a violation of the Seventh Amendment. *See Batson v. Salvation Army*, 87 F.3d 1320 (11th Cir. 2018)(*See* Appendix at p. 39), is inapposite, because there the plaintiff "concede[d] that she was never denied a specific accommodation she requested," and summary judgment was granted. D'Onofrio made no similar concession. D'Onofrio consistently sought to communicate with her managers, and although her managers found her insubordinate, a reasonable jury could have found that the managers misunderstood both her behavior and their obligations under the law.

A reasonable jury could have believed D'Onofrio, when she said "If the VRI was set up to enable me to have effective communication, it wasn't happening." (*See* Appellant's Initial Br. at 4) (citing DE 118-12-13). The VRI was installed in January and used for the first time in August. (DE 117-52, 74). A reasonable jury could have found it unreasonable for Costco to have let the VRI devices collect dust for six (6) months after they were installed (*See* Appellant's Initial Br., at p. 48), while Costco rebuffed D'Onofrio's reports that her supervisor was "stalking" her and making her uncomfortable

(Appellant's Initial Br., at pp. 11-12)(citing Jnt. Exhs. 7, 15; Def. Exh. 14), and for Costco to bring the VRI out only when calling D'Onofrio on the carpet for an ECN "counseling" session. Her need for and request for an accommodation had nothing to do with ECN counseling sessions; she wanted an accommodation in the workplace, to improve communications with her manager, who was intolerant of her disability.

A reasonable jury could have believed D'Onofrio when she described Alan Pack's "combative" approach to using the VRI on their first attempt. (DE 117-81). A reasonable jury could have found it unreasonable for Costco to have failed to apprise a new manager, Alan Holliday, of the recent training session at the Center for Hearing and Communication, and a reasonable jury could easily have rejected the notion that he was equipped to supervise a deaf employee because he spent time with a deaf aunt when he was growing up. Indeed, Holliday thought that exaggerated gestures means that a deaf person is angry (DE 122-49-50), a misconception that the training session by Dr. Shana Williams put to rest for those in attendance. (Appellant's Initial Br., at pp. 13-14).

A reasonable jury could have found that Holliday's lack of training continued or exacerbated the problems with management that D'Onofrio had originally brought to Costco's attention. Holliday admitted having no training in how to supervise a deaf employee, and believed—contrary to an employer's responsibilities under the Florida Civil Rights Act and the Americans With Disabilities Act—that he had no need "to treat them any differently than any other employee as far as giving directions." (DE 122-48). But an accommodation under those anti-discrimination laws is a *legal obligation* to treat disabled people differently in order to ensure that they can do their job, as long as doing so is not an undue burden on the employer. Costco never argued that any

accommodation in D'Onofrio's case would have been an undue burden. Thus, a reasonable jury, having been told that before Pack and Holliday came on the scene D'Onofrio was described as "outstanding" and a "good communicator" (Appellant's Br. 9)(summarizing her performance reviews), could have concluded that the communication problems originated with the supervisors, not the 24-year employee, and that Costco did not take reasonable steps to alleviate their communication problems. That is especially so where the behaviors described as "insubordinate" in the ECNs generated by Holliday and Pack were described by Dr. Shana Williams as typical of deaf culture. (Appellant's Br. 13-14).

On that record, and even noting that in addition to D'Onofrio's testimony, three Costco witnesses testified that the VRI alone was not enough to accommodate the communication problems (Appendix A at 26), the Eleventh Circuit majority opinion summarily concluded that "These statements are insufficient to support a jury finding that Costco failed to provide a reasonable accommodation." *Se Id*. at 27. D'Onofrio respectfully asks, why not? Those three, plus D'Onofrio, make *four witnesses* who acknowledged the limitations of the VRIs and that testimony cannot be viewed in isolation, but rather in the larger context of an employee who for over two (2) decades worked happily and effectively despite her disability, and reached out for her employer's help only when her new manager was both impossible to understand and disrespectful to her. (Appellant's Br. 8)(citing DE 116-34-38). It is evident that the VRIs alone were ineffective in this case, and that the training, while a good attempt, was of no use to Holliday, who never learned of it. Ironically, the most effective accommodation—the

three-person management team recommended by Dr. Williams—was inexplicably discontinued, for reasons that no one could articulate. *See* Def. Exh. 14.

Personnel Specialist, Angela LiCastro, admitted that she had no basis for deeming the three-manager team "temporary" (DE 120-50-54), suggesting that Regional Vice-President, Steven Powers, was behind it. But nothing supported that assumption, and Powers could not recall. *See Id*. at 231-32. The majority's statement that LiCastro had a good reason for discontinuing the team (slip op. at 10) is unsupported by the record, and the statement that the effect of that was "null" because the three-manager team continued (*id*.)(citing Doc. 117, p. 87) is not supported by the record citation and is plainly contrary to LiCastro's letter. (Def. Exh. 14).

The nine-day trial, where the ultimate issue on the failure to accommodate claim was whether the defendant acted "reasonably," was replete with disputed, impeached, and inconsistent testimony, requiring a jury to sort it out. The jury instructions on the failure to accommodate claim are illustrative of the complexity of the factual question. *See* DE 101-10-15; DE 124-93-96. The instructions were thorough, advising what Costco did, and saying "You must determine whether the measures Defendant implemented constituted reasonable accommodations." (DE 101-12). Each of Costco's defensive positions was included in the instructions. *See Id*. at 12-15. The jury was to keep the claims, defenses, and applicable principles in mind when considering the extensive testimony, and render a decision on the reasonableness of Costco's response to D'Onofrio's request for an accommodation.

On the record presented, a reasonable jury could have found in D'Onofrio's favor, and the majority's failure to apply the correct standard of review and the violation of the

Seventh Amendment led to a decision that cannot be squared with decades of precedent—both before and after *Reeves*—holding that issues of credibility are for the jury, and that reasonable inferences from trial evidence must be viewed in favor of the party that prevailed before the jury. *See Reeves*, 530 U.S. at 133, *Lavender v. Kurn*, 327 U.S. 645, 653 (1946), in which the Court stated, "Only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear;" *See Basham v. Pennsylavania R. Co.*, 372 U.S. 699 (1963)(holding that should either party to a cause its Seventh Amendment right, the jury becomes the principal factfinder, charged with weighing the evidence, judging the credibility of witnesses, and reaching a verdict).

In this case, Judge Wilson, dissenting, noted that the majority "sets forth trial testimony supporting Costco's defenses and affirms the district court," whereas he found that "the jury was well within its prerogative to accept D'Onofrio's evidence over Costco's and make credibility determinations," and "a reasonable jury could have concluded that Costco failed to provide a reasonable accommodation for D'Onofrio's disability." (Appendix A, Wilson, J., dissenting, at pp. 40-41). And, as shown above, "It is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine credibility of witnesses." (Appendix A, Wilson, J., dissenting, at p. 41)(quoting *Watts v. Great Atl. & Pac. Tea Co.*, 842 F.2d 307, 310 (11th Cir. 1988).

## CONCLUSION

The petition for writ of certiorari should be granted in this case to reverse and remand with directions to reinstate the judgment on the verdict, in favor of D'Onofrio.

Dated: December 18, 2020.

Respectfully submitted,

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# APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 19-10663

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D.C. Docket No. 0:15-cv-62065-WJZ

CHRISTINE D'ONOFRIO,

Plaintiff-Appellant,

versus

COSTCO WHOLESALE CORPORATION,

Defendant-Appellee.

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Appeal from the United States District Court
for the Southern District of Florida

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(July 6, 2020)

Before WILSON, MARCUS, and BUSH,[*] Circuit Judges.

BUSH, Circuit Judge:

[*] Honorable John K. Bush, United States Circuit Judge for the Sixth Circuit, sitting by designation.

This case concerns the obligations of an employer to accommodate a deaf employee under the Florida Civil Rights Act of 1992 (FCRA), § 760.01 - § 760.11. The dispute arose after Costco Wholesale Corporation terminated the employment of Christine D'Onofrio, who has been deaf since birth. She sued Costco in Florida state court for violations of the FCRA, and Costco removed the case to federal court. The trial ended with a jury verdict in Costco's favor on one count of wrongful termination, but against the company on D'Onofrio's failure-to-accommodate claim, which is the subject of this appeal. As to this latter claim, the district court granted Costco's motion for judgment as a matter of law and, in the event that this judgment were to be reversed on appeal, conditionally granted Costco's motion for a new trial based on the verdict being against the great weight of the evidence.

For the reasons explained below, we agree with the district court that there was insufficient evidence to support the failure-to-accommodate claim. Therefore, we **AFFIRM** the district court's grant of judgment as a matter of law to Costco pursuant to Federal Rule of Civil Procedure 50(b). In light of this holding, we need not address D'Onofrio's second appeal related to the court's conditional grant of Costco's new-trial motion.

## I.

### A. D'Onofrio's Employment at Costco: 1989 to 2011

In 1989 D'Onofrio started her employment at Costco's Davie, Florida warehouse. (Doc. 79, p. 9; Doc. 116, p. 190). There, she worked for approximately 14 years, during which about 15 to 20 people at different times served as her manager. (Doc. 117, pp. 10-11, 18). None of these supervisors had any difficulty communicating with her, and she never filed any complaint with Human Resources about any of them. (*Id.*, pp. 11-12).

In 2003, D'Onofrio transferred to another Florida-based Costco warehouse, in Pompano Beach. She acknowledged that, for many years in this job, she had no "issues with managers involving communication," and "was able to communicate with managers and coworkers effectively" and "successfully." (Doc. 117, pp. 22, 24-25). D'Onofrio's performance evaluations prior to 2012 attest to these facts. (Doc. 118, pp. 67-79; Doc. 112-4-7). She testified that as of "June 2011," she "was very happy" with her employment at Costco. (Doc. 117 p. 25). In addition, during this period, there were relatively few behavioral incidents involving D'Onofrio.

In fact, there were only two such incidents reported. The first, in 2007, involved an argument between D'Onofrio and another employee. (Doc. 117, pp. 26-32). For this encounter, D'Onofrio received an "Employment Counseling Notice"—Costco's version of an employee warning. (*Id.*). The second incident, in 2011, involved D'Onofrio's allegation that another Costco employee had hit her with a scrubber. When D'Onofrio complained to Costco, she was told to steer clear of the

employee in question. Upon investigation of the matter, however, Costco ultimately concluded that D'Onofrio had not been struck; therefore, the company took no action against the other employee. (Doc. 117, p. 33; Doc. 120, pp. 168-71).

**B. D'Onofrio's Employment Concerns Related to Her Deafness: 2012**

During the summer of 2012, the work situation changed for D'Onofrio. She began to experience "difficulties with Alan Pack," (Appellant Br. at 8), the new general manager. (Doc. 116, p. 34). According to D'Onofrio, Pack "mumbled, ma[de] lip-reading impossible, refused to communicate with her in writing, ignored her when she tried to talk to him, ridiculed her for talking with her hands, 'smirked' over her attempts to communicate, and was sarcastic." (*Id.* (citing Doc. 117, pp. 34-38)). This conduct led D'Onofrio to "invoke[] the company's 'open door policy' that allowed employees to lodge complaints with their managers' higher-ups." (*Id.* (quoting Doc. 119, p. 200)); (*see* Doc. 119, p. 200; Doc. 118, p. 134; Doc. 120, p. 162); (see also Jnt. Exh. 1, p. 11) (Costco Employee Agreement, § 2.1.)). D'Onofrio "thought 'it [was] vital [] to have access to communication about my workplace,' and believ[ed] that" accessing the open-door policy was necessary because "she had 'exhausted the chain of command' at the store with no resolution." (*Id.*).

Accordingly, on November 20, 2012, D'Onofrio wrote a letter to Costco's Chief Executive Officer (CEO), Craig Jelinek, informing him of her communication issues with Pack. (Doc. 117, p. 38; Doc. 99-43). Pack's treatment of her was

"causing her great mental, physical, and emotional stress." (Appellant Br. at 8); ((*See* Jnt. Exh. 5) (Nov. 20, 2012 letter) (*see also* Doc. 117, p. 41).[1] D'Onofrio explained to Jelinek that "[a]s a born deaf person, I have always been able to communicate with my managers. I am a lip reader and can speak well." (*Id*.). She appeared to be suggesting that the types of problems she was experiencing with Pack were new.[2]

The day after Jelinek received D'Onofrio's letter, he and Steve Powers, Costco's Vice President and Regional Operations Manager, reached out to schedule a meeting so D'Onofrio could voice her concerns related to Pack. (Doc. 117, p. 147). Shortly thereafter, in December 2012, Powers and Angela LiCastro, a member of Costco's Human Resources Team, traveled to Fort Lauderdale, Florida to meet personally with D'Onofrio and investigate her complaint. (*Id*. pp. 147-48). During the meeting, D'Onofrio described her communications issues with Pack. To help resolve these concerns, she made two requests of Powers and LiCastro: (1) that Pack be transferred to a different Costco warehouse, and (2) that all Costco managers be trained on deaf culture. (*Id.* pp. 40, 42-43, 149). D'Onofrio did not ask Powers or

[1] When asked at trial to explain the letter, D'Onofrio responded: "how am I supposed to solve a problem with someone who refuses to communicate with me? And he was the only one who refused to talk to me was Alan Pack." (Doc. 117, pp. 39-40).

[2] D'Onofrio testified that she had "always been able to communicate with all of [her] managers" before Pack. (Doc. 117, p. 38).

LiCastro for any other specific accommodation that might help her improve her communications with Pack. (Doc. 117, pp. 40, 149-150).

### C. Costco's Response to D'Onofrio's Concerns

#### 1. Installation of Video Remote Interpreting Equipment

Immediately after the meeting, Costco implemented several new measures, including: (1) installing Video Remote Interpreting (VRI) equipment in two locations at the Pompano Beach warehouse; and (2) subscribing to a VRI service. (*Id.* pp. 151-53). A VRI service uses remote online sign language interpreters, who can be contacted by way of video phone to facilitate communication between a deaf individual and a hearing individual, both of whom are on the other end of the call from the interpreter. (*Id.*). Costco felt that VRI would assist D'Onofrio in her communication with Pack and other managers, given the equipment could interpose a qualified interpreter between the two parties. To make the VRI more accessible, Costco installed the equipment in two locations within the Pompano Beach warehouse: the managers' office, where informal coaching meetings, counseling notices, and performance reviews typically occurred, (Doc. 118, pp. 8-9), and the pharmacy consultation room, which was located close to D'Onofrio's work space. (*Id.* pp. 9-10). Lastly, Costco ensured that D'Onofrio received VRI training. (Doc. 117, p. 53).

Witnesses introduced by Costco at trial, including Dr. Shana Williams, Director of the Center for Hearing and Communication,[3] spoke of the effectiveness of VRI as a medium to facilitate communication between D'Onofrio and her managers during group sessions. Williams testified that in most situations, VRI is just as effective as an on-site interpreter for communicating with a deaf individual. (Doc. 117., pp. 82-83, 91, 109-11). Williams also testified that while on-site interpreters would be the most preferable medium of interpretation in large-group meetings, such interpreters are by no means mandatory; VRI can be an effective alternative in such settings, even if it functions less efficiently than an on-site interpreters. (*Id.*, pp. 109-11).

D'Onofrio initially considered the installation of the VRI equipment to be positive and "good." (Doc. 117, pp. 53, 60). However, as D'Onofrio herself reports, immediately after Costco began using VRI, she began thinking, "I don't have a communication problem, what do we need this for[?]" (*Id.* p. 68 (emphasis added)). D'Onofrio testified that she had never asked for the VRI equipment, nor did she need the equipment because she "could communicate." (*Id.*, p. 75; Doc. 118, pp. 13, 46).[4]

**2. Deaf-Culture Training: March 2013**

[3] Williams also conducted the March 1, 2013 deaf-culture training that was requested by D'Onofrio.

[4] On the other hand, however, non-expert witnesses produced by Costco, including Williams, testified that the VRI served as an effective tool to facilitate communication between D'Onofrio and her managers during group sessions.

Honoring D'Onofrio's request for deaf-culture training, Costco arranged for instruction to be provided by the Center for Hearing and Communication in Fort Lauderdale, Florida on March 1, 2013. The central objective of the training was to facilitate an interactive and open discussion on deaf culture and good communication practices with deaf individuals. (Doc. 117, pp. 152-53). The managers in D'Onofrio's immediate chain of command attended the session. (*Id*., p. 155; Doc. 121, p. 83).

As part of the training, Williams made a number of suggestions to assist D'Onofrio in her communication during Costco's large-group meetings (i.e., "inventory meetings" and "warehouse meetings") going forward. First, as to large-group meetings, Williams suggested that Costco should consider providing D'Onofrio with an on-site interpreter, given that the VRI technology is considered less effective in this setting. (Doc. 121, pp. 109, 147). Although Williams made clear there was no definitive number of people as to constitute a "group," in her opinion, any gathering of three or more people could be considered a benchmark. *Id*. Second, Williams suggested that Costco designate a small group of no more than three managers, with whom D'Onofrio was already comfortable, to act as the primary conduits for her day-to-day work interactions. These interactions would include providing directions to D'Onofrio, as well as serving as go-to contacts for questions or concerns she might have. (Doc. 121, p. 90). However, D'Onofrio

testified that when Williams proposed the three-manager team, she immediately felt the measure was unnecessary. (Doc. 117, p. 60) ("So first [Williams] asked me who I wanted to communicate with. And I said I'm fine with everyone. Again my job is to communicate with everybody. But, [Williams] went ahead and picked three people out of the audience.").

**a. Proposal One: On-Site Interpreters**

After the March 1, 2013 meeting, Costco arranged for on-site interpreters at large-group meetings but not for counseling or coaching sessions D'Onofrio attended. (Doc. 119, p. 95; Doc. 120, p. 217; Doc 122, p. 59). She argues that many of those sessions included at least three individuals, which, to her, meant that on-site interpreters should have been provided on those occasions as well (as opposed to simply the VRI technology being available). (Doc. 117, p. 76). Costco counters that in the few counseling or coaching sessions involving three or more people present, VRI was still an appropriate measure, given that these sessions were limited to discussions between just two people (including D'Onofrio), with all others in the room observing silently. (Doc. 119, pp. 111-12; Doc. 122, pp. 36, 54-56, 158-59).

**b. Proposal Two: Limiting D'Onofrio's Communications to a Three-Manager Team**

Implementing Williams's second proposal, Costco also agreed to limit certain communications with D'Onofrio to a specific three-manager team, composed of Assistant General Manager Ainsley Brown, Hardlines Manager Carol Sivon, and

Pharmacy Manager Jeff Weisler. (Doc. 117, pp. 60-64; Doc. 118, p. 182; Doc. 120, pp. 43-50). This accommodation, however, came with certain qualifications, one being that the three-manager team arrangement should not be considered an excuse for D'Onofrio to avoid certain Costco managers, including Pack. (Doc 121, pp. 90, 115). The aim of the arrangement was to facilitate D'Onofrio's expanded communication with other managers, as opposed to limit it. (*Id.* at 115). Sivon underscored this objective, testifying that Powers had explicitly requested that D'Onofrio not refuse to take instructions or directions from other managers in the future. (Doc. 122, pp. 157-58).

Yet, even with these explicit warnings, D'Onofrio refused after the training to interact with Pack. (Doc. 120, pp. 48, 50, 55, 57). This resistance led LiCastro to contact D'Onofrio by letter on May 13, 2013, informing her that the three-person arrangement was no longer feasible. This meant that going forward, D'Onofrio would be expected to communicate with, and take directions from, Pack. (*Id.*, p. 30; Doc. 99-3). Yet, it appeared the functional effect of LiCastro's letter was null, given the three-manager arrangement continued beyond May 13, 2013. (Doc. 117, p 87).

**D. Alan Holliday's Transfer to the Pompano Beach Warehouse: April 2013**

In April 2013, Alan Holliday transferred to the Pompano Beach warehouse, assuming the role of merchandise manager. (Doc. 122, p. 20). Holliday was a direct supervisor of D'Onofrio, meaning the two interacted every day that they worked

together. (*Id.* pp. 20-21). Holliday had not been able to attend the March 1, 2013 training because it predated his transfer. Nonetheless, D'Onofrio admitted that she had no problems communicating with Holliday, and actually got along well with him for the first several months that the two worked together. (Doc. 118, p. 13; Doc. 122, p. 20). Holliday came to the Pompano Beach warehouse with some knowledge of sign language and a degree of familiarity with deaf culture, given he grew up with a close relative who was deaf, and had socialized with the relative's immediate deaf community. (Doc. 118, p. 13; Doc. 122, pp. 21-22, 47). Holliday also was familiar with VRI, having used VRI devices previously. (Doc. 122, p. 22). Upon his arrival to the warehouse, Holliday received a tutorial from Pack in the VRI technology available in the vicinity. (*Id.*).

**1. D'Onofrio's Employment under Holliday: August 28 to October 18, 2013**

There were, as noted, only two reported behavioral incidents involving D'Onofrio between 2003 and 2012, but the situation changed while she was under Holliday's direction. Although they had gotten along well at the outset of his tenure at the Pompano Beach warehouse, D'Onofrio testified that, in the fall of 2013, Holliday began repeatedly to accuse her of being loud, angry, and insubordinate. She also received a "flurry" of Employment Counseling Notices (ECNs) from Holliday, relating to her behavior on the floor of Costco and in ECN meetings. Appellant Br. at 18. This conduct included D'Onofrio's reportedly talking loudly,

yelling, being aggressive, demanding eye contact and making dramatic and emphatic gestures. At ECN meetings in particular, D'Onofrio was twice suspended for insubordination and unbecoming conduct, first on September 6, 2013 (Doc. 117, pp. 82-83; Jnt. Exh. 20), and again on October 18, 2013. (Doc. 117, p. 93; Jnt. Exh. 27).

Between August 28 and October 18, 2013, D'Onofrio was coached and counseled on a number of occasions for inappropriate and insubordinate behavior. (Doc. 99, pp. 30, 32-34). Although VRI was made available to D'Onofrio for all of these coaching and counseling sessions, (Doc. 119, pp. 21, 27, 29, 103, 112, 116, 120-2), she frequently refused to use the technology. (Doc. 122, pp. 25, 29, 35, 40, 132, 163, 165-66); (Doc. 118, pp. 13, 42; Doc. 122, pp. 25, 35, 40, 163, 166). In fact, even when asked explicitly by her managers to use VRI, D'Onofrio responded, "why is everybody making such an issue about the VRI. I don't [need] it. There is no communication issue. Just talk to me." (Doc. 117, p. 75). During several counseling or coaching sessions, D'Onofrio even turned off, or attempted to turn off, the VRI phone. (*Id*. p. 81; Doc. 118, p. 42; Doc. 122, pp. 25, 35, 166).

**2. D'Onofrio's Suspension and Termination: October 2013**

On October 18, 2013, D'Onofrio was suspended for repeated policy violations,[5] pending a review of possible termination. (Doc. 99, p. 39). Five days

[5] These policy violations related to specific job-related responsibilities held by D'Onofrio, and they did not relate specifically to her refusal to use the VRI technology.

later, Pack met with D'Onofrio, informing her that her employment was being terminated for excessive policy violations. (Doc. 99, p. 9; Doc. 117, p. 97). At the October 23, 2013 meeting, D'Onofrio requested an in-person interpreter, which Costco provided. (Doc. 117, p. 98).

**E. Procedural History**

Approximately two years following her termination from Costco, D'Onofrio filed a lawsuit against Costco in Florida state court. She advanced two causes of actions, arguing she was discriminated and retaliated against, in violation of Florida Civil Rights Act of 1992, Fla. Stat § 760.01 – § 760.11.[6] (Doc. 1, p. 1). Costco removed the case to the U.S. District Court for the Southern District of Florida on the basis of diversity jurisdiction.

The case was tried before a jury from May 29 to June 11, 2018. At the close of D'Onofrio's case, Costco moved for judgment as a matter of law (JMOL) pursuant to Federal Rule of Civil Procedure 50(a). The district court denied Costco's motion and sent the case to the jury. The jury found in Costco's favor on D'Onofrio's claim that she was illegally fired because of her disability and in retaliation for internal complaints she raised about discriminatory treatment she allegedly endured. (Doc. 103; Doc. 124, pp. 118-21). However, the jury found in favor of D'Onofrio on her failure to accommodate claim under the FCRA. Based

[6] The discrimination action under the FCRA is the only claim relevant to this appeal.

on Costco's liability, the jury awarded D'Onofrio $750,000 for emotional pain and mental anguish, and $25,000 in punitive damages.

Costco renewed its JMOL motion, pursuant to Federal Rule of Civil Procedure 50(b), and alternatively moved for a new trial or remittitur. (Doc. 126; Doc. 127). The district court granted Costco's renewed JMOL motion and conditionally granted its new trial motion in the event that the JMOL were reversed on appeal. (Doc. 140). The district court concluded that no reasonable jury could find that Costco did not provide a reasonable accommodation to D'Onofrio, as Costco provided VRI devices in two locations within the Pompano Beach warehouse, the March 1, 2013 deaf-culture training for warehouse managers in D'Onofrio's immediate chain of command, and on-site interpreters in certain situations, including group meetings. (Doc. 140, p. 17). The court also conditionally granted Costco's motion for a new trial, reasoning that the great weight of the evidence was against the jury's verdict. (Doc. 140, pp. 26-27).

## II.

### A. Standard of Review

This Court reviews *de novo* the district court's grant of Costco's motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50. *Abel v. Dubberly*, 210 F.3d 1334, 1337 (11th Cir. 2000) (per curiam). A court should enter a JMOL only when there is "no legally sufficient evidentiary basis for a reasonable

jury to find for [the nonmoving] party." *Home Design Servs., Inc. v. Turner Heritage Homes Inc.*, 825 F.3d 1314, 1320 (11th Cir. 2016) (alteration in original) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149 (2000)).

**B. Florida Civil Rights Act of 1992**

Given the parallel structure of the statutes, this Court analyzes state-law disability discrimination claims under the FCRA using the same framework as it does for claims made under the federal Americans with Disabilities Act (ADA). *Samson v. Fed. Exp. Corp.*, 746 F.3d 1196, 1200 n. 2 (11th Cir. 2014); *see Holly v. Clairson Indus., LLC,* 492 F.3d 1247, 1255 (11th Cir. 2007). To prevail on a failure to accommodate claim under the FCRA, D'Onofrio must demonstrate by a preponderance of the evidence that (1) she was a qualified individual with a disability; (2) she made a specific request for a reasonable accommodation; and (3) her employer, Costco, failed to provide a reasonable accommodation, or engage in the requisite interactive process in order to identify a reasonable accommodation. *Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1363 (11th Cir. 1999) (per curiam).

Here, both parties concede that D'Onofrio is a qualified individual with a disability, Costco knew of her disability, and one or more reasonable accommodations existed that would have allowed D'Onofrio to perform the essential functions of her job. (Doc. 101, pp. 10-11). Consequently, we consider only

whether Costco failed to provide a reasonable accommodation to D'Onofrio, or engage in the requisite interactive process in order to identify a reasonable accommodation for her.

## C. Failure to Accommodate

### 1. Legal Standard and Findings Below

Under the ADA, an employer will not be liable for failure to accommodate if the employee is responsible for the breakdown of the interactive process. *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1287 (11th Cir. 1997). Furthermore, "the [employer's] duty to provide a reasonable accommodation is not triggered unless a specific demand for an accommodation has been made" by an employee. *Gaston*, 167 F.3d at 1363. Even if an employee is legally disabled, she must specifically request an accommodation to trigger the employer's accommodation obligations. *See id.*

Of course, there are limits to the accommodations an employer must provide. The key is "reasonability," meaning an employer is not required to accommodate an employee in *any* manner that the employee desires—or even provide that employee's preferred accommodation. *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285-86 (11th Cir. 1997) ("[A]n employee is entitled only to a reasonable accommodation and not to a preferred accommodation. . . . Stated plainly, under the ADA a qualified individual with a disability is 'not entitled

to the accommodation of her choice, but only to a reasonable accommodation.'" (internal citations omitted)).

Additional nuances to the reasonable accommodation framework are important to highlight as well. First, if an employee does not require an accommodation to perform her essential job functions, then the employer is under no obligation to make an accommodation, even if the employee requests an accommodation that is reasonable and could be easily provided. *See Hilburn v. Murata Elecs. N. Am., Inc*. 181 F.3d 1220, 1229 (11th Cir. 1999); *see also Albright v. Columbia Cty. Bd. of Educ.*, 135 F. App'x 344, 346 (11th Cir. 2005) (per curiam) ("[T]he record clearly shows that [plaintiff] did not require an accommodation to perform her job. It is undisputed that [plaintiff] performed her bus driving duties without an accommodation[.]"). Second, even if an employer has voluntarily provided accommodations to the employee historically, that employer is not obligated to continue providing them and can discontinue such when they exceed what is legally required under the ADA. *See Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1528 (11th Cir. 1997) ("It is equally apparent, however, that the [City's] previous accommodation may have exceeded that which the law requires. . . . [W]e cannot say that [its] decision to cease making those accommodations that pertained to the essential functions of Holbrook's job was violative of the ADA.").

When it granted Costco's renewed Motion for JMOL, the district court made two findings favorable to the FCRA claim: (1) D'Onofrio had presented sufficient evidence that she had made a specific request for an accommodation in order to mitigate the obstacles she was experiencing communicating with her General Manager, Alan Pack; and (2) D'Onofrio had offered sufficient evidence showing her deafness caused her communication problems with Pack, and that communication, both in general with other employees, and specifically with her General Manager, was an function of her Costco job. However, the district court also concluded that (3) D'Onofrio still did not introduce sufficient evidence to support a jury finding that Costco had failed to provide reasonable accommodations to help ease her communication difficulties.

On appeal, D'Onofrio argues for reversal of the JMOL because the evidence was legally sufficient to support the jury's verdict that Costco failed to provide a reasonable accommodation to her disability of deafness. In response, Costco does not contest the district court's first two findings in favor of D'Onofrio. It argues only that we should affirm the district court's third finding, which led to the JMOL. For the reasons explained below, we find Costco's argument persuasive.

**2. Evidence Regarding Reasonable Accommodation**

The evidence of Costco's reasonable accommodation included its installation of the VRI equipment, organization of the deaf-culture training, and temporary

institution of the three-manager communication circle. In response, D'Onofrio introduced three pieces of undisputed evidence, which she believes "are inconsistent" with the district court's conclusion of reasonable accommodation:

- "Costco's failure to train D'Onofrio's [new] manager, Alan Holliday, about 'deaf culture' and the accommodations recommended by the Center for Hearing and Communication," even though Holliday's arrival at the Pompano Beach warehouse post-dated the March 1, 2013 training;

- "Costco's discontinuation of the three-manager communication team after only ten weeks, coupled with the demand that [D'Onofrio] then communicate with Alan Pack, whom she perceived as hostile"; and

- "Costco's failure to provide on-site sign language interpreters at *every* [Employment Counseling Notice] ECN meeting, where three or more people were always present, as recommended by the Center for Hearing and Communication, instead bringing an on-site interpreter only for the termination meeting."

(*Id.* at 25).

According to D'Onofrio the "district court focused too heavily" on Costco's supplying of the VRI within its warehouse at the expense of the aforementioned evidence. This disproportionate focus, she explains, resulted in the court "improperly credit[ing] *Costco's* view of the evidence, i.e., that D'Onofrio obstructed [the VRI's] use," as proof that D'Onofrio actually obstructed the provided accommodation. Most problematically, as D'Onofrio explains, the district court's conclusion here was based on the "mistaken[] assumption that the VRI was a reasonable accommodation," (*id.* at 26), which in light of her above evidence,

equated to a false premise. (*Id.*). Therefore, she believes "[a] reasonable jury, making credibility determinations, could (and did) find" that the VRI was not a reasonable accommodation. (*Id.*). However, as discussed below, none of the proof that D'Onofrio cites is sufficient to support a jury finding of Costco's failure to accommodate.

**a. Costco's Initial Response to D'Onofrio's Letter**

The undisputed evidence shows that Costco took immediate redressive action when D'Onofrio raised her concerns about Pack in her letter to Costco's CEO. (Doc. 117, p. 38; Doc. 99-43). Costco responded by arranging in December 2012 for Powers and LiCastro to fly in from Georgia and Washington state, respectively, to meet with D'Onofrio, along with a sign-language interpreter, to better understand her complaint and find ways to address it. (Doc. 117, pp. 147-48).

At the meeting, D'Onofrio had ample opportunity to reiterate the concerns in her letter: namely, although she had had good communications with her general managers in the past, she was then experiencing difficulties with Pack because he mumbled and refused to write out his communications. She also stated that Pack behaved impatiently and rude towards her. (Doc. 120, p. 37). To address these problems, D'Onofrio proposed two solutions to Powers and LiCastro: (1) that Pack be moved to another warehouse, (Doc. 117, p. 40); and (2) that Costco provide training to her managers on deaf culture. (*Id.*, p. 42) ("I felt like the managers

needed some education, and I wanted to be included in that.") On the latter point, she requested that Costco ensure "that Alan Pack was a part of that [training] class." (*Id.*, p. 44).

Costco responded appropriately to D'Onofrio's two requests. Specifically, in connection with D'Onofrio's first request, Powers informed D'Onofrio that he would not transfer Pack. (Doc. 117, p. 150). This was a legally permissible response, as both this Court and the Equal Employment Opportunity Commission (EEOC) have indicated that "[a] transfer [of an employee] from an incompatible supervisor is not a 'reasonable accommodation.'" *Santandreu v. Miami-Dade County*, No. 10-24616-CIV-ALTONAGA, 2011 WL 13136161, at *11 (S.D. Fla. Aug. 1, 2011) (citing *Gaul v. Lucent Techs., Inc.*, 134 F.3d 576, 581 (3d Cir. 1998)), *aff'd*, 513 F. App'x 902 (11th Cir. 2013); U.S. Equal Emp't Opportunity Comm'n, Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA ¶ 33 (2002), https://www.eeoc.gov/policy/docs/accommodation.html#workplace ("An employer does not have to provide an employee with a new supervisor as a reasonable accommodation."). Still, however, Powers promised D'Onofrio that he would seek to improve her communication with Pack. (Doc. 117, pp. 149-50). He followed up on this promise less than a month after the meeting, when he advised D'Onofrio that Costco would be installing VRI equipment in the Pompano Beach Warehouse not

only to help facilitate her communications with Pack, but also to help her communicate with other managers. (*Id*,, pp. 151-52). The technology was installed by the end of January 2013. (*Id*,, pp. 52-53, 153).

Addressing D'Onofrio's second explicit request within the same timeframe, Costco also advised her that it would organize the type of deaf-culture training she requested. (*Id*.). This session, hosted in conjunction with the Center for Hearing and Communication, occurred on March 1, 2013. Everyone in D'Onofrio's chain of command, including Pack, attended the training. (*Id*. p. 155). We address the evidence related to this training in the section that follows.

**b. Costco's Planning and Implementation of Deaf-Culture Training**

In preparation for the deaf-culture training, Costco brought in Williams for a site visit with D'Onofrio. (Doc. 121 at 80–81). Williams and a colleague were joined by D'Onofrio and three of her managers: Ainsley Brown, Carol Sivon, and Jeff Weisler. (*Id*. at 81). The visit allowed Williams to "evaluate the environment" at the Pompano Beach warehouse. (*Id*.). That way, Williams could do more than offer a stock, generic training session; she could "train and tailor whatever recommendations [she was] going to make to the environment that [was] being presented to" her. (*Id*.). Williams testified that the visit was "very useful." (*Id*.).

As for the training session itself, Williams also testified that she "felt it went very well" and that "everybody was very amenable to the information they

received." (*Id*. at 85). D'Onofrio "was very happy with the session." (Doc. 117, pp. 59–60). Likewise, Pack thought the training was "very interesting" and "informative." (Doc 118, p. 168). Williams noted that, like the installation of the VRI equipment, the training program represented a significant, meaningful investment from Costco. Steve Powers even flew in for the training session, (Doc. 121, p. 83), which was significant, as Williams testified:

> I train quite a bit, still do, and I haven't ever seen a regional vice president fly in for a training. I have never seen that. So I was very pleased and encouraged that upper management was really involved in this process.

(*Id*. at 94–95). All in all, Williams thought the Costco team "did a really good job" with the training, was "very open and receptive," and went above and beyond what she typically sees from employers. (*Id*. at 95).

D'Onofrio introduced no evidence to call into question the appropriateness of the deaf-culture training for the employees who attended.

**c. Alan Pack's Follow-Up to the Deaf-Culture Training**

The training session was tailored to the specific concerns about Alan Pack expressed by D'Onofrio during her December 2012 meeting with Powers and LiCastro. This was evident by the fact that part of the training session involved a "constructive," smaller group meeting between Powers, Pack, Williams, and D'Onofrio. (*Id*. at 86). At that meeting, Pack and D'Onofrio "committed to coming back and meeting with [Williams] in a mediation session." (*Id*.). Pack also "offered

to meet with [D'Onofrio] on site in their work environment every month and work through any concerns that she might have." (*Id.*).

After the training session, Pack was "very proactive." (*Id.* at 87). However, when he tried to schedule appointments with D'Onofrio, she would not agree to meet with him. (*Id.*). So, on his own, Pack returned to the Center for one-on-one meetings with Williams. (*Id.*). Those two meetings, Williams testified, were very educational. (*Id.*). Pack came in "to see how he could respond [to D'Onofrio] better and what he could learn." (*Id.*). Williams recalled D'Onofrio's complaint that Pack mumbled, so she worked with him on "clarity without exaggerated speech and tone." (*Id.* at 88). Williams also testified that, at these one-on-one meetings, Pack

> was not guarded. He wasn't resistant. He felt very sincere to me. He asked good questions. He seemed to take the information from our first session, bring it in practice, and then come back to me and ask me, well this seemed to work really well, this didn't, what do you think, what can I do better. So he seemed pretty motivated and genuine.

(*Id.* at 95). D'Onofrio offered no evidence to contradict the proof regarding Pack's participation in deaf-culture training and his efforts to learn from that training.

**d. Costco's VRI Technology**

D'Onofrio testified that she did not request VRI, insisting that she simply wanted Pack to communicate with her by writing:

> I just wanted him to write to me. That's all. We can write back and forth when we need to communicate. That's all I wanted.

(Doc. 118, p. 13). On appeal, D'Onofrio couples her preference for "in-writing" communication with Pack, with her argument that the VRI failed to represent a "reasonable accommodation." However, the problem with D'Onofrio's argument is two-fold.

First, although communication by writing back-and-forth with Pack may have been D'Onofrio's preferred mode of communication, an employer is not obligated to accommodate an employee in any manner she desires; rather, the employer need only provide a *reasonable* accommodation. *Stewart*, 117 F.3d at 1285-86.

Second, D'Onofrio presented no testimony as to the lack of "reasonability" of the VRI technology; rather, she cites only three isolated statements made by Pack, Powers, and Williams while testifying as evidence that Costco's installation of VRI equipment was not a reasonable accommodation. Collectively, according to D'Onofrio, these statements convey the testifiers' beliefs that "the VRI alone was not the solution to [D'Onofrio's] communication problems," "the VRI was just a tool," and "that the VRI alone was not enough to fully accommodate D'Onofrio's special needs." (Appellant Br. at 15-17). The portions of these statements that D'Onofrio cites are as follows:

- **Pack's Testimony**

> Q: And the reason [Costco] did several things to help her in her accommodation was because the VRI machine alone was not enough without training for the deaf culture, correct? You couldn't do one without the other; you needed both?

A. [PACK]: Yes.

Q: The [three-manager communication] team was also designed to accommodate her hearing impairment?

A. Yes.

(Doc. 118, p. 182).

- **Powers's Testimony**

Q: You were not expecting at that point in time when you set up that meeting at the center for the deaf culture that the VRI machine was the sole exclusive answer to the communication problems that Christine was experiencing at Costco, correct?

A. [POWERS]: No, it was just an assistance, a tool.

Q. Just an assistance?

A. Yes, sir.

(Doc. 120, p. 196).

- **Williams's Testimony**

Q. Did you believe that the installation of the VRI phone by itself would solve the communication issues that were existing between Christine and Mr. Pack?

A. [WILLIAMS]: I made a recommendation that they both come in to work on some of their communication challenges, so I don't think that was the only intervention that we suggested.

Q. But the installation of the VRI phone by itself would not have solved all the communication problems, correct?

A. No.

(Doc. 121, p. 128).

These statements are insufficient to support a jury finding that Costco failed to provide a reasonable accommodation. As that testimony itself suggests, Costco did not rely on the VRI as its sole accommodation to D'Onofrio's request. Instead, the VRI was merely one solution amongst three it provided to D'Onofrio after she voiced her concerns at the December 2012 meeting. Aside from the installment of VRI equipment, Costco's accommodations for D'Onofrio included the organization of the deaf-culture training already mentioned, and the arrangement for the three-person management communication team, discussed below.

Furthermore, Williams made other statements to demonstrate that the VRI represented a reasonable accommodation. For one thing, Williams explained in her testimony that the way in which Costco had set up the VRI phones was "very effective." (Doc. 121, p. 82). The phones provided D'Onofrio with "an on-demand communicating tool to facilitate communication whenever [she] needed it," (*id.* at 82-83), and Costco deliberately located them in convenient locations around the warehouse, including placing one in the managers' office, a location where informal coaching, counseling notices, and performance evaluations took place, (Doc. 118 at 9), and in the pharmacy consultation room. (*Id*. at 9-10). Despite D'Onofrio's claims to the contrary, these locations were hardly out-of-the way spots. Quite to the contrary, the pharmacy consultation room, for example, was "very close" to where D'Onofrio worked, and gave her a "private space" where her manager could

give instructions and where D'Onofrio could "make personal calls." (*Id*. at 11–12). Not only that, Costco even "offered to move [the phones] if they weren't in a place that Ms. D'Onofrio felt comfortable using" them. (Doc. 121, p. 82). Williams also testified that the installation of the VRI equipment amounted to an "unusual" commitment on Costco's part. (*Id*. at 84). In her experience, Williams had encountered "some challenges getting organizations to put in [the] technology," particularly because "the technology isn't free for hearing people." (*Id*.). Costco, however, was willing to bear the expense of installing two "video phones in two different offices," (*Id*. at 94)—a commitment that Williams testified was "wonderful to see" and "unusual." (*Id*.).

We recognize that Williams did not provide testimony as an expert witness. However, given her qualifications, which include being the Director of the Center for Hearing and Communication, and the fact that she served as the instructor for the deaf-culture training, Williams's opinion warrants consideration regarding the reasonableness of the VRI as an accommodation. And, at trial, Williams did attest to the technology's effectiveness in facilitating communication between a deaf person and non-deaf person, which, as she also explained, was a function of the technology's reliance on an on-screen hearing and a speaking sign-language interpreter.

Additionally, LiCastro sent an email to D'Onofrio describing the benefits of the VRI equipment two weeks before the phones' installation. LiCastro explained that the technology was easy to use and offered on-demand, video access to a certified interpreter 24/7. (DX 8). Critically as well, the VRI equipment offered specific advantages over an in-person interpreter: there was no need for the typical two weeks' advance notice to arrange the visit of the interpreter, and D'Onofrio could access the VRI devices "as needed without the hassle of scheduling or re-scheduling as needs change." (*Id.*). Costco had already installed these devices in 26 of its stores and had seen them deliver "tremendous benefits." (*Id.*).

Furthermore, as the district court rightly noted, the trial record is "utterly devoid of any testimony that the VRI did not function adequately." (Doc. 140 at 26). Instead, the evidence shows it was D'Onofrio who regularly refused to use the phones or stood in the way of their proper functioning. As Holliday testified:

> Q: What happened when you went into the pharmacy consultation room?
>
> A: I attempted to start the VRI, and Ms. D'Onofrio ended the call before it connected. And I go, no, we need to use this. And she goes, I don't want to use it. You can talk to me. I understand you just fine. And I go, no, I want to be clear with what I have to tell you.

(Doc. 122 p. 25). Holliday described another meeting like this:

> Q: Okay. So that was the meeting when this counseling notice was being presented to Ms. D'Onofrio?
>
> A: Correct.

> Q: Okay. And was a VRI machine used during that meeting?
>
> A: It was not. She refused to use it. So [Ainsley] Brown agreed to write what he had to say to her.

(*Id*. at 35).

**e. Absence of Evidence that Costco Refused to Provide any of D'Onofrio's Requested Alternative Accommodations**

D'Onofrio argues that Costco's accommodations were not reasonable because she requested alternative accommodations that were not granted. However, D'Onofrio cites no evidence to show that she requested alternative accommodations that went unfulfilled. In particular, her argument on appeal about not being allowed an on-site interpreter is without merit. She references only three alleged occasions following the December 9, 2012 meeting where she claims she asked for an on-site interpreter. (Doc. 117, pp. 76, 98). In each alleged instance, either the evidence was not sufficiently clear that D'Onofrio, in fact, had made the request or the uncontradicted proof was that Costco had granted her request.

For example, D'Onofrio claims that she asked for on-site interpreters in a July 8, 2013 email sent to LiCastro. (*Id.*, p. 76; Doc. 99-25, pp. 2-3). But D'Onofrio does not point to any specific statements where she made this request. In fact, the email shows that D'Onofrio made no such request; rather, her reference to interpreters involved her simply complaining that she should be compensated for not having been given the benefit of interpreters in the past. (Doc. 99-25, pp. 2-3). The relevant email text read as follows:

> You know what I never had an interpreter for 12 years. Costco violated the policy. I had to complain all the time. I was too damn nice for not making Costco responsible to pay me for my disability as a reasonable accommodation. Costco is responsible to provide as an assistance with ADA and also is reponsible [sic] to pay me for all those years.

(*Id.* at 2).

D'Onofrio also claims that even prior to the July 8 email, she made another request for on-site interpreters. However, she could not remember the date when she made this request and did not provide any other detail. (Doc. 117, p. 76) ("And there was another request I put in prior to that, but I don't remember the day."). This is not sufficient evidence of a request. Such a vague assertion, devoid of any context, explanation of Costco's response, or even a date, cannot support a finding that Costco failed to make reasonable accommodation in not providing on-site interpreters.

Finally, D'Onofrio acknowledges that she requested and was provided an on-site interpreter for her October 23, 2013 termination meeting with Costco. (*Id.* p. 98).

**f. D'Onofrio's Complaints Regarding Holliday**

D'Onofrio also contends that the jury could have found that Costco failed to provide reasonable accommodations for her by allowing Holliday, who transferred into the Pompano Beach warehouse after the March 1, 2013 training program, to interact with and supervise her without first ensuring that he received the same deaf-

culture training that was provided to her other supervisors in that program. (Appellant's Br. at 25, 31, 35). Relatedly, she contends the training itself was inadequate because Costco did not make the training materials widely available for other employees at the Pompano Beach warehouse. We find these arguments unpersuasive for several reasons.

First, as D'Onofrio repeatedly emphasized during her November 20, 2012 letter to Craig Jelinek, her December 12, 2012 meeting with LiCastro and Powers, and during her testimony at trial, she never had any difficulty communicating with any of her managers other than Pack. There is no evidence that she ever requested that Holliday be trained in deaf culture. To the contrary, D'Onofrio testified that she had no trouble communicating with Holliday, and also confirmed that Holliday knew sign language. (Doc. 118, p. 13). Holliday, too, confirmed the good relationship between the two; in his testimony, Holliday even described in detail their good relations when he first arrived at the Pompano Beach warehouse, which included his revealing to D'Onofrio that he had a deaf aunt with whom he was close while growing up. And, because of this experience, he knew a bit of sign language. (Doc. 122, p. 21). Holliday also testified, without contradiction, that he was familiar with deaf culture based on the time he spent with his aunt and her deaf friends, and he had previously supervised deaf employees. (*Id.* pp. 47-48).

Second, although Costco did not distribute the training materials to other employees at the Pompano Beach warehouse, this Court does not require accommodations provided by an employer to be perfect; our lodestar, instead, is reasonability. The ADA does not impose liability on an employer for its failure to provide "all the accommodations [the employee] feels are appropriate." *Doe v. Dekalb Cty. Sch. Dist.*, 145 F.3d 1441, 1451 (11th Cir. 1998); *see also* Stewart, 117 F.3d at 1285 (explaining that "the word 'reasonable' would be rendered superfluous in the ADA if employers were required in every instance to provide employees the maximum accommodation or every conceivable accommodation possible" (quotation omitted)). D'Onofrio asked for a training program on deaf culture, an altogether reasonable request, and Costco provided a first-rate one.

Given the evidence assessed above, Costco sufficiently honored its reasonable-accommodations obligations to D'Onofrio in providing deaf-culture sensitivity training to Pack and the other managers in D'Onofrio's direct chain of command, without having to make Holliday undergo the same training. In response to this evidence of Holiday's background, D'Onofrio advances no reason why he needed the training. Furthermore, her argument is at odds with case law stating that the ADA, and by extension the FCRA, cannot interfere with an employer's choice of supervisors over a given employee. *See Weiler v. Household Fin. Corp.*, 101 F.3d 519, 526 (7th Cir. 1996).

**g. D'Onofrio's Complaint Regarding Use of VRI at Meetings of Three or More Individuals**

D'Onofrio also argues that VRI could not be considered a reasonable accommodation for any meeting in which three or more individuals were present, even if the only people speaking were her and her manager. (Appellant's Br. at 25). She bases this argument on information conveyed at the March 1, 2013 training by Williams, who suggested that for large-group meetings (i.e. staff meetings or inventory meetings) where people might be speaking, Costco should consider providing an on-site interpreter.

We find D'Onofrio's line of argument to be unavailing. (Doc. 140, pp. 18-20). To reiterate, D'Onofrio offers no evidence to establish that she ever submitted a request for on-site interpreters that Costco failed to honor. And, in fact, Costco regularly provided on-site interpreters in certain group settings. Undisputed evidence shows that on-site interpreters were in the room during D'Onofrio's initial meeting with Powers and LiCastro in December 2012 (Doc. 121, p. 108); when the Pompano Beach warehouse distributed the latest version of Costco's employee handbook (Doc. 117, pp. 68-69); and when Pack fired D'Onofrio. (*Id*., p. 98). But that is not all. Holliday testified that "[w]henever we had a meeting, we would set up in advance an interpreter to come and interpret for" D'Onofrio. (Doc. 122 at 59). And, as Pack testified, he even "hired a live interpreter, a physical person on site to where [D'Onofrio] was in a meeting with other employees." (Doc 118, p. 173). In

response, D'Onofrio offers no evidence that Costco held any other large-group meetings after the March 1, 2013 training program, for which an on-site interpreter was not present.

On this note, as well, Williams testified that although the statements she made during the deaf-culture training (about the on-site interpreter being preferable to the VRI even in situations of a three-person meeting) were genuine indications of her opinion, she did not believe that an on-site interpreter would be required in *every* such case.[7] D'Onofrio has not offered evidence to undermine this proposition. Therefore, we are left only with Williams's statement that an on-site interpreter is *not always* necessary—a point demonstrated by the record, based on Williams's accompanying statements regarding the general effectiveness of the technology in facilitating communication between deaf and non-deaf individuals. Furthermore, we note the following: (1) evidence showing that there were typically, three, and occasionally, four people in the room at the disciplinary meetings in which Costco relied upon VRI; and (2) uncontradicted testimony from Costco employees that the additional people in the meetings, beyond D'Onofrio and the manager, were witnesses or observers who generally said nothing during the meetings. (Doc 140, p 19).

[7] To reiterate, Williams also explained that an on-screen interpreter, like the VRI, can still work in a group setting, just not as easily or efficiently as an on-site interpreter would work. (Doc. 121, p. 111).

Regardless of whether an on-site interpreter *might have been preferable* in the opinion of Williams, there is simply no basis in the evidentiary record to conclude that Costco's use of a supposedly less preferable medium—VRI—represented a failure to make reasonable accommodations. *Stewart*, 117 F.3d at 1285-86. This is especially true, given the absence of any evidence that D'Onofrio ever requested an on-site interpreter for these meetings, other than when she requested an interpreter for her October 23, 2013 termination meeting, which Costco provided.

**h. The Three-Person Management Circle**

At the March 1, 2013 training, Williams also suggested that it might be helpful for Costco to designate a small group of managers to be the primary people to interact with D'Onofrio in relaying directions to her and answering her questions. (Doc. 117, pp. 60-61; Doc. 121, p. 90). Costco agreed with the proposal, and immediately implemented a three-person circle for D'Onofrio to primarily correspond with during her workdays. However, Costco eventually decided to stop the arrangement after it appeared to D'Onofrio's supervisors that she was using the accommodations as an excuse to avoid all communication with individuals beyond that immediate circle. Nonetheless, D'Onofrio insists that Costco's decision to terminate the arrangement supports that jury's finding that Costco failed to provide reasonable accommodations.

D'Onofrio's argument is unpersuasive. Although Costco implemented the three-person circle at the recommendation of Williams, D'Onofrio herself never requested it. (Doc. 117, pp. 40, 42-43, 149). An employer has no obligation to make any accommodation unless, and until, the employee specifically requests an accommodation. *See Gaston*, 167 F.3d at 1363 ("[T]he duty to provide a reasonable accommodation is not triggered unless a specific demand for an accommodation has been made[.]"). There is no evidence that D'Onofrio ever requested this accommodation; therefore, Costco cannot be legally at fault for terminating an arrangement it voluntarily implemented.

Moreover, when implementing this proposal, Costco made clear to D'Onofrio that the arrangement "did not mean she could circumvent her managers." (Doc. 121, p. 115; Doc. 122 pp. 157-58). Notwithstanding this fact, under this Court's case law, any sort of accommodation that could be construed as essentially insulating D'Onofrio from any need to interact with Pack (or other managers) beyond the three designated primary points of contact, would have been unreasonable under the ADA. *See Gaul*, 134 F.3d at 581 (ADA does not limit employer's prerogative to determine with whom employees will work within company); *see also Weiler*, 101 F. 3d at 526 (ADA does not require employer to transfer employee to a different supervisor or to transfer supervisor). Relatedly, even if the accommodation had theoretically been reasonable when implemented, an employer is allowed to discontinue

accommodations that it had previously offered to an employee when those accommodations exceed what is required by the ADA. *See Holbrook*, 112 F.3d at 1528; *Schwertfager v. City of Boynton Beach*, 42 F. Supp. 2d 1347, 1365 (S.D. Fla. 1999); *Sheets v. Fla. E. Coast Ry. Co.*, 132 F. Supp. 2d 1031, 1035 (S.D. Fla. 2001).

**i. Summary**

Ultimately then, as we see it, D'Onofrio, understandably, needed help communicating with Pack. She relied on lip reading to communicate with her coworkers and supervisors, and Pack mumbled. So Costco installed two VRI phones. However, D'Onofrio says that was not enough; she wanted her supervisors to write back and forth with her. (JX 31; Doc. 117, p.68; Doc. 122 p. 35). Setting aside our oft-repeated reminder that a plaintiff is entitled to a reasonable accommodation, and not the specific accommodation of her choosing, *see Stewart*, 117 F.3d at 1286, the evidence shows that D'Onofrio's supervisors, including Pack, from time to time accommodated that request. (JX 25; JX 28; JX 29). But, even that was not enough for D'Onofrio, as she further states that Costco needed to provide in-person interpreters. But, we do not see any record evidence that suggests Costco failed to provide an on-site interpreter once D'Onofrio requested this accommodation. Again, to the contrary, we see evidence of the opposite: that Costco provided on-site interpreters for group meetings, in addition to the VRI technology for other communications. Therefore, the only accommodation Costco did not

provide that D'Onofrio had specifically requested was to move Pack to another location—and, given the circumstances of this case, Costco was not required to honor that request by the ADA.

## III.

We cannot hold that an employer fails to reasonably accommodate a deaf employee when it provides her with on-demand access to live sign-language interpreters at two, convenient locations within her place of work; when it goes further to provide on-site person interpreters for larger, group meetings; when it arranges a thorough training session on deaf culture, pursuant to the plaintiff's request; and when the plaintiff's general manager—the supervisor who was the sole subject of her sole complaint—resolves to improve his relationship with the plaintiff by attending multiple, one-on-one training sessions. Therefore, because D'Onofrio cannot point to "a specific instance in which she needed an accommodation and was denied one," *Batson v. Salvation Army*, 897 F.3d 1320, 1326 (11th Cir. 2018), we **AFFIRM** the district court's January 30, 2019 Order granting Costco's motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b).

WILSON, Circuit Judge, dissenting:

Following a nine-day trial, a jury found in favor of Christine D'Onofrio—an employee of Costco for over 20 years—on her claim that Costco failed to provide reasonable accommodation for her disability of deafness. The jury awarded D'Onofrio $750,000 in damages for emotional pain and mental anguish and $25,000 in punitive damages. The district court then granted Costco's renewed motion for judgment as a matter of law and conditionally granted its motion for a new trial, finding that no reasonable jury could have found that Costco failed to provide a reasonable accommodation to D'Onofrio.

On appeal, D'Onofrio argues that the evidence was sufficient to support the jury's verdict because it showed that (1) the video remote interpreter (VRI) devices, alone, were not a reasonable accommodation; (2) the deaf-culture training was ultimately ineffective because one of her managers, Alan Holliday, never received deaf-culture training; and (3) a three-member communication team was discontinued. The majority sets forth trial testimony supporting Costco's defenses and affirms the district court. But the jury, after a nine-day trial where it heard the testimony and observed the witnesses, found in favor of D'Onofrio on her failure-to-accommodate claim, awarding not just compensatory damages, but also punitive damages. I would reverse the judgment as a matter of law, as the jury was well

within its prerogative to accept D'Onofrio's evidence over Costco's and make credibility determinations. I therefore dissent.

I.

Judgment as a matter of law is only proper if there is "no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party." *Home Design Servs., Inc. v. Turner Heritage Homes, Inc.*, 825 F.3d 1314, 1320 (11th Cir. 2016) (alteration adopted). "[I]t is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." *Watts v. Great Atl. & Pac. Tea Co.*, 842 F.2d 307, 310 (11th Cir. 1988) (per curiam).

To prevail on her failure to accommodate claim, D'Onofrio had to show that (1) she was disabled, (2) she was a "qualified" individual, and (3) she was subjected to unlawful discrimination because of her disability. *Samson v. Fed. Express Corp.*, 746 F.3d 1196, 1200 (11th Cir. 2014). "[A]n employer's failure to reasonably accommodate an 'otherwise qualified' disabled employee itself constitutes unlawful discrimination, unless the employer can show 'undue hardship.'" *Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1249 (11th Cir. 2007).

Here, a reasonable jury could have concluded that Costco failed to provide a reasonable accommodation for D'Onofrio's disability. First, D'Onofrio presented sufficient evidence that the installation of the VRI devices was not a reasonable

accommodation to her communication problems. From the outset, D'Onofrio expressed that her communication difficulties took place mostly on the sales floor—where she performed her essential job functions—but the VRI devices were in a managers' office and a pharmacy consultation room. Further, while the district court relied largely on the installation of the VRI devices in its order granting judgment as a matter of law, Alan Pack, Steve Powers, and Dr. Shana Williams testified that the VRI devices were not intended to be the only solution to D'Onofrio's communication problems. Finally, D'Onofrio presented evidence that her communication problems were due to certain managers' apparent ignorance of deaf culture—demonstrated by them failing to make eye contact, mumbling, and negatively interpreting her use of body language—and a jury could reasonably conclude that a VRI device did not address this issue in most circumstances.

A reasonable jury also could have concluded that the deaf-culture training did not amount to a reasonable accommodation. While the training session with a handful of managers was positive, D'Onofrio presented evidence that Costco did not pass on that training information to other Costco employees or managers who worked with D'Onofrio, even though Dr. Williams gave Costco training materials that could have been given to other employees.

More specifically, a reasonable jury could have concluded that the failure to train D'Onofrio's subsequently hired manager, Holliday, in deaf culture resulted in

a failure to provide reasonable accommodation. The majority dismisses this argument because D'Onofrio initially complained to Costco about problems with Pack and because Holliday had a deaf aunt that he spent time with while growing up. But the district court found that while D'Onofrio primarily struggled with communicating with Pack, a reasonable jury could find that her request for accommodation was sufficient to communicate that her deafness caused more general communication problems and that her problems went beyond Pack. Further, the assertion that Holliday could have no need for training in deaf culture because he has one deaf relative sounds of tokenism, and a reasonable jury could have concluded that he did need such training. Indeed, the jury heard evidence that Holliday disciplined D'Onofrio for displaying "aggressive behavior" through her body language, the volume of her voice, and demanding eye contact—behaviors that D'Onofrio asserted were common within deaf culture.

Last, though the three-person communication team was initially effective, and certainly not required, it was short term and there was no evidence that it resulted in a lasting change to D'Onofrio's communication problems with Costco managers. Simply put, the implementation of this team for 10 weeks was not sufficient to undermine the jury's verdict that Costco failed to provide reasonable accommodation.

Accordingly, reasonable persons could have differed on the question of whether Costco failed to reasonably accommodate D'Onofrio's disability. The jury acted within its role as the finder of facts "to weigh conflicting evidence and inferences, and determine the credibility of witnesses." *Watts*, 842 F.2d at 310. Therefore, I would reverse the district court's order granting judgment as a matter of law.

For similar reasons, I would reverse the district court's conditional grant of the motion for a new trial. *See Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984) (stating that a motion for a new trial is proper only where the jury's verdict is against the clear weight of the evidence or would result in a miscarriage of justice).

# APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 19-10663-CC

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CHRISTINE D'ONOFRIO,

Plaintiff - Appellant,

versus

COSTCO WHOLESALE CORPORATION,

Defendant - Appellee.

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Appeal from the United States District Court
for the Southern District of Florida

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BEFORE: WILSON, MARCUS and BUSH,* Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Christine D'Onofrio is DENIED.

ORD-41

* Honorable John K. Bush, United States Circuit Judge for the Sixth Circuit, sitting by designation.

# APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-62065-CIV-ZLOCH

CHRISTINE D'ONOFRIO,

Plaintiff,

vs. **O R D E R**

COSTCO WHOLESALE CORPORATION,

Defendant.
_____/

THIS MATTER is before the Court upon Defendant Costco Wholesale Corporation's Renewed Motion For Judgment As A Matter Of Law Under Rule 50(b) (DE 126) and Motion For New Trial And/Or Remittitur Under Rule 59 (DE 127). The Jury returned a Verdict (DE 103) on June 11, 2018, finding that Defendant Costco Wholesale Corporation (hereinafter "Defendant") failed to provide Plaintiff Christine D'Onofrio (hereinafter "Plaintiff") with reasonable accommodations after December 9, 2012, and awarding Plaintiff $750,000 to compensate her for emotional pain and mental anguish proximately caused by Defendant's denial of said reasonable accommodations, as well as $25,000 in punitive damages with respect to this same claim. The Court has carefully reviewed said Motions, the entire court file and is otherwise fully advised in the premises.

## I. Background

Plaintiff initiated the above-styled cause with the filing of her Complaint (DE 1-1) in the Circuit Court of the Seventeenth

Judicial Circuit, in and for Broward County, Florida. Defendant filed its Notice Of Removal (DE 1). Plaintiff, a hearing impaired individual, asserted two causes of action for discrimination and retaliation pursuant to the Florida Civil Rights Act of 1992, Fla. Stat. § 760.01, et seq. (hereinafter the "FCRA"). This matter was tried before a jury on May 29-31, June 4-8, and 11, 2018. Defendant initially made its Motion For Judgment As A Matter Of Law Under Rule 50(a) (DE 94) at the close of Plaintiff's case, and this Motion was renewed at the close of Defendant's Case. See DE 96. The Court denied both of Defendant's Rule 50(a) Motions. Id. In addition to finding that Defendant failed to provide Plaintiff with a reasonable accommodation, the Jury also found in favor of Defendant, that Defendant had not discriminated against Plaintiff by terminating Plaintiff due to her disability and that Defendant had not terminated Plaintiff in retaliation for her complaints about discrimination or request for accommodation.

Defendant argues that its instant Motion (DE 126) should be granted and judgment entered in its favor because, during the relevant time period, beginning on December 9, 2012, Plaintiff did not prove at trial, by a preponderance of the evidence, and thus, no reasonable jury could find, that Plaintiff made a specific request for accommodation, that Plaintiff needed an accommodation to perform an essential job function, or that Defendant failed to provide Plaintiff with a reasonable accommodation.

II. Standard For Rule 50 and Rule 59 Motions

Federal Rule of Civil Procedure 50(b) states: "the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59." Rule 50(c)(1) provides that, "If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial." And, pursuant to Rule 59, "The court may, on motion, grant a new trial on all or some of the issues — and to any party — as follows: (A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court."

In evaluating the instant Renewed Motion For Judgment As A Matter Of Law Under Rule 50(b) (DE 126), the Court notes that it has considered all of the evidence and the inferences drawn therefrom in the light most favorable to the non-moving party. If the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict, a motion for judgment as a matter of law should be granted. Bishop v. City of Birmingham Police Dept., 361 F.3d 607, 609 (11th Cir. 2004) (citing Carter v. City of Miami, 870 F.2d 578, 581 (11th Cir. 1989)). Conversely, if there is substantial

evidence opposed to the motion such that reasonable people, in the exercise of impartial judgment, might reach different conclusions, then such motion must be denied. Id. There must be a substantial conflict in the evidence to create a jury question. A mere scintilla of evidence will not suffice. Bishop, 361 F.3d at 609 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)). Moreover, the Court may not weigh the evidence or evaluate the credibility of the witnesses. Edic v. Century Prods. Co., 364 F.3d 1276, 1283 (11th Cir. 2004) (citing Lipphardt v. Durango Steakhouse of Brandon, Inc., 267 F.3d 1183, 1186 (11th Cir. 2001)). As the Eleventh Circuit has explained, "Under Rule 50, the 'proper analysis is squarely and narrowly focused on the sufficiency of evidence,' that is whether the evidence is 'legally sufficient to find for the party on that issue.'" Chmielewski v. City of St. Pete Beach, 890 F.3d 942, 948 (11th Cir. 2018) (quoting Chaney v. City of Orlando, 483 F.3d 1221, 1227 (11th Cir. 2007)).

Because the Court will grant Defendant's Renewed Rule 50(b) Motion (DE 126), the Court will conditionally address, as it is required to do, Defendant's Rule 59 Motion (DE 127). In Lipphardt, the Eleventh Circuit described the applicable standard for granting a Rule 59 motion for a new trial:

> A judge should grant a motion for a new trial when "the verdict is against the clear weight of the evidence or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." Because it is critical that a judge does not merely substitute his judgment for that of the jury, "new trials should not be granted on

> evidentiary grounds unless, at a minimum, the verdict is against the great—not merely the greater—weight of the evidence."

267 F.3d at 1186 (quoting Hewitt v. B.F. Goodrich Co., 732 F.2d 1554, 1556 (11th Cir. 1984)). There is a significant distinction between the standard applied in evaluating a Rule 50 motion and a Rule 59 motion: "'Although a trial judge cannot weigh the evidence when confronted with a motion (for judgment) notwithstanding the verdict [a Rule 50(b) motion for judgment as a matter of law], in a motion for a new trial the judge is free to weigh the evidence.'" Williams v. City of Valdosta, 689 F.2d 964, 973 (11th Cir. 1982) (quoting Rabun v. Kimberly-Clark Corp., 678 F.2d 1053, 1060 (11th Cir. 1982)(citing King v. Exxon Co., 618 F.2d 1111, 1115 (5th Cir. 1980))).

## III. Analysis

Plaintiff brings all of her claims, including the failure to accommodate claim, pursuant to the FCRA. "[D]isability-discrimination claims under the FCRA are analyzed using the same framework as ADA claims." Holly v. Clairson Indus., LLC, 492 F.3d 1247, 1255 (11th Cir. 2007)(citing D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1224 n.2 (11th Cir. 2005)). The Americans With Disabilities Act, 42 U.S.C. § 12101, et seq. (hereinafter "ADA"), prohibits an employer from discriminating against an employee on the basis of disability. It reads, in pertinent part:

> No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job

> application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a). The elements of a prima facie case of discrimination are: (1) Plaintiff is disabled; (2) Plaintiff is a 'qualified individual,' as referenced above, within the meaning of the ADA, which means that Plaintiff "could perform the essential functions of the job in question with or without reasonable accommodations"; and (3) Defendant discriminated against Plaintiff because of the disability. Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1255 (11th Cir. 2001) (citing Reed v. Heil Co., 206 F.3d 1055, 1061 (11th Cir. 2000)). Under the ADA, "an employer's failure to reasonably accommodate a disabled individual itself constitutes discrimination under the ADA, so long as that individual is 'otherwise qualified,' and unless the employer can show undue hardship. Holly, 492 F.3d at 1262 (emphasis in original). Here, the relevant provision states that among the definitions of discrimination in 42 U.S.C. § 12112(a) is:

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity

Id. at § 12112(b)(5)(A). The ADA defines a reasonable accommodation:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with

> disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id. at § 12111(9)(A)-(B). An accommodation is reasonable, and hence required by the ADA, "only if it enables the employee to perform the essential functions of the job." Lucas, 257 F.3d at 1255. See also Williams v. Revco Discount Drug Centers, Inc., 552 Fed. App'x 919, 921-22 (11th Cir. 2014) (explaining the standard for succeeding on a reasonable accommodation claim in the same way). The mere fact that an accommodation appears in the definition's list does not mean that the particular accommodation is reasonable for the particular Plaintiff. Terrell v. USAir, 132 F.3d 621, 626 (11th Cir. 1998). This inquiry is carried out within the context of specific circumstances. Id. (citing Wernick v. Federal Reserve, 91 F.3d 379, 385 (2d Cir. 1996)).

Before Defendant has a duty to provide such an accommodation, Plaintiff must make a specific request. See Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1363 (11th Cir. 1999) (citing Wood v. President and Trustees of Spring Hill College in the City of Mobile, 978 F.2d 1214, 1222 (11th Cir. 1992) ("[O]ur holding in Wood that the duty to provide a reasonable accommodation is not triggered unless a specific demand for an accommodation has been

made, is binding precedent for purposes of defining the scope of the duty to provide a reasonable accommodation under the ADA."). Plaintiff must make a request, but the Eleventh Circuit has favorably cited, very recently, a Tenth Circuit case which held that the employee "'need not use magic words,' but 'should provide enough information about his or her limitations and desires'" in that case, relating to job reassignment. Adigun v. Express Scripts, Inc., No. 17-15225, 2018 WL 3752403, at *2 (11th Cir. Aug. 7, 2018) (quoting Smith v. Midland Brake, Inc., 180 F.3d 1154, 1172 (10th Cir. 1999)). Some courts have even indicated that there are situations in which a plaintiff's need is "sufficiently obvious" that a defendant may be on notice even without a specific request. See, e.g., Jacobson v. City of West Palm Beach, No. 16-cv-81638-MIDDLEBROOKS, 2017 WL 6366841, at *7 (S.D. Fla. May 16, 2017); McCullum v. Orlando Regional Healthcare System, Inc., No. 6:11-cv-1387-Orl-31GJK, 2013 WL 1212860, at *4 (M.D. Fla. Mar. 25, 2013) (citing Robertson v. Las Animas County Sheriff's Dep't, 500 F.3d 1185, 1197 (10th Cir. 2007); Taylor v. Principal Financial Group, Inc., 93 F.3d 155, 164 (5th Cir. 1996)).

Sufficient evidence in the record supports a finding that Plaintiff made a request, which was specific enough that Defendant understood her need for accommodation. Plaintiff testified that Alan Pack became the General Manager at the Pompano Beach location in 2012. DE 117 at 34:6-11. Because she had difficulty

communicating with Mr. Pack, she sent a letter to Defendant's President and Chief Executive Officer Craig Jelinek. See DE 117 at 38:3-6. This November 20, 2012 letter (Joint Exh. 31, DE 99-43) makes clear that Plaintiff is "a born deaf person," and that she is having a communication problem, even if her articulation of this communication problem focuses on her relationship with Mr. Pack: "I have always been able to communicate with my managers. I am a lip reader and can speak well, however, Mr. Pact [sic] mumbles when he talks so I asked him to please write down what he was saying to me. Not only did he refuse, but his attitude towards me was very disrespectful and sarcastic." Joint Exh. 31, DE 99-43. The letter itself was sent prior to the December 2012 time period; however, in response to this letter, Defendant initiated a meeting with Plaintiff to discuss her concerns, which took placed within the applicable time period on December 12, 2012. DE 117 at 41:12. Plaintiff describes this meeting with Steve Powers, Regional Vice President, and Angela LiCastro, from Defendant's Human Resources Department: "We had a meeting to discuss what had happened with this letter. . . . We talked about the communication issues. . . . I just simply recommended —— I just made a friendly recommendation if they were able to move Pack to another warehouse." DE 117 at 40:20-25. When Plaintiff was asked about other recommendations that arose from the discussion at the meeting, she explained that the Video Remote Interpreting (hereinafter "VRI") phone was

mentioned, but to her mind, not fully explained. See DE 117 at 42:4-15. And, Plaintiff says she recommended training, but that Defendant said that they could not do that. Id. She acknowledges that later, Defendant agreed to provide the training, and that she had a positive response to this development. See DE 117 at 43:11-24.

From the December 2012 meeting, Mr. Powers testified that there were "two takeaways": "Apparently [Mr. Pack] mumbles, and she wasn't able to read his lips. So that's a big problem if she can't understand the general manager. And the other thing that came out of the meeting, my takeaway, was that [Plaintiff] felt very strongly that Costco just didn't understand the deaf culture. . . . Again, the two takeaways that I remember were lack of communication and that we needed to do a better job of educating Costco on the deaf culture." DE 120 at 191:4-21. When asked about the result of the meeting and if Plaintiff required accommodations, Ms. LiCastro responded: "That we were looking into different things. She hadn't requested anything. We were just trying to find different ways to improve communication." DE 120 at 22:22-24. Ms. LiCastro again stated that, "I felt that the communication problem she was having was unique to her and Mr. Pack," rather than "unique to deaf people." DE 120 at 36:21-24. But, Ms. LiCastro also affirmatively answered the question: "So is it fair to say at the December meeting, you acknowledge that [Plaintiff] had a need

for special accommodation?" DE 119 at 223:13-16.

While the testimony of Plaintiff agrees with that of Mr. Powers and Ms. LiCastro, that Plaintiff primarily struggled with communicating with Mr. Pack, a reasonable jury could find that Plaintiff's request for accommodation was specific enough as to communicate that her deafness caused communication problems, even if these communication problems primarily arose between herself and her general manager. Defendant was aware of her deafness, began an interactive process with Plaintiff that was cognizant of this disability, and took measures consistent with this understanding, that being deaf posed communication difficulties. Plaintiff indicated specifically enough that the problem, at least to some extent, went beyond Mr. Pack through her comments about the deaf culture and her recommendation of training, a recommendation upon which Defendant ultimately acted.

Sufficient evidence in the record also supports a finding that communication, and specifically communication with her general manager, was essential to Plaintiff's job function. There was no testimony that Plaintiff needed any accommodation to actually undertake the actions to perform any of her daily tasks. As detailed above, Plaintiff's need as understood by both herself and Mr. Powers and Ms. LiCastro was related to communication. Specifically, she had difficulty communicating with Mr. Pack. Plaintiff herself admitted that she had from 15 to 20 managers at

her former location in Davie and that she did not have trouble communicating with any of these managers. See DE 117 at 11:2-5. And, at the Pompano Beach location, where she estimated she had 20 to 25 managers, she again stated, that until 2011, she did not have any trouble communicating with a manager. See DE 117 at 22:19-23. Plaintiff described her communication with Mr. Pack, which prompted her to write the letter quoted above: "Because Pack refused to communicate with me. He would mumble. I couldn't understand him. And he would say to me why are you always moving your hands in the air. Can't you lip read. It was very rude. It was very sarcastic, and it was very hurtful. I also told him that I have always been able to communicate with all of my other managers, but I am not able to communicate with him. He refuses to even write to me." DE 117 at 38:15-22. Plaintiff stated that she did not ask for the VRI and that she did not have a problem communicating and did not need the VRI. See DE 117 at 68:10-13. But at the same time, she also testified that she did not need the VRI because she could communicate by writing back and forth. Id. at 68:17-20.

Because courts generally defer to employers in framing the essential functions of a job, the Court finds Defendant's employees' statements highly relevant in determining that a reasonable jury certainly could have concluded that communicating with Mr. Pack was essential to Plaintiff's position. As to this point, Plaintiff's past job performance, particularly outside of

the relevant time period, is not determinative. The testimony of Plaintiff and Ms. LiCastro agree as to a conversation they had in which Plaintiff stated that she refused to communicate with Mr. Pack, and Ms. LiCastro informed Plaintiff that she could be disciplined for not communicating with the general manager. See DE 117 at 55:16-24; DE 120 at 5:3-6. Admittedly, this conversation makes a slightly different point than whether communication with Mr. Pack was essential to Plaintiff's job. But the consistency with which all of Defendant's employees in leadership positions state that Plaintiff was not excused from communicating with her general manager indicate that Defendant is incorrect in its argument that no reasonable jury could find this communication to be essential to the job. On this point, Mr. Powers answers, "He's the general manager. She's the employee. I think that if [Mr. Pack] needs to communicate with her, then he should be able to communicate with her." DE 120 at 215:18-23. Ms. LiCastro testified that one of the problems with maintaining the three-person communication team, which will be discussed in more detail below, was that Plaintiff was not communicating with her general manager. DE 120 at 48:5-10. And again, as to this same point, Mr. Powers's testimony is consistent with Ms. LiCastro's: "[W]e needed to make sure that she understood that she needed to continue to communicate with Mr. Pack." DE 121 at 4:20-21.

As has been discussed above, the Court will not here find that

no reasonable jury could have found for Plaintiff as to whether Plaintiff's request was specific enough, or whether communicating with Mr. Pack was actually essential to Plaintiff's job. Nevertheless, the Court here finds that no reasonable jury could find that Defendant did not provide a reasonable accommodation to Plaintiff. At least within the applicable time period, beginning in December of 2012 and continuing up to Plaintiff's termination, Defendant provided accommodations which were reasonable. While the accommodation provided must be reasonable, this requirement does not mean that the accommodation must be in the exact form in which Plaintiff asks or wishes to be accommodated. See Doe v. Dekalb Cnty. Sch. Dist., 145 F.3d 1441, 1451 (11th Cir. 1998) (citing Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285 (11th Cir. 1997) ("In making this determination, we do not ask whether an employer has made all accommodations it feels are appropriate, or whether an employer has made all the accommodations that a disabled plaintiff desires. Instead, we decide whether a requested accommodation 'would impose an undue hardship on the employer.'")). The court in Stewart was at pains to make clear that the concept of a reasonable accommodation does not mean that a disabled individual is entitled to choose how an employer accommodates her disability. 117 F.3d at 1285-86. See also Shepard v. United Parcel Service, Inc., 470 Fed. App'x 726, 730 (11th Cir. 2012) (citing Stewart, 117 F.3d at 1285) (further

citations omitted); Matthews v. Village Center Community Development Dist., No. 5:05-cv-344-Oc-10GRJ, 2006 WL 3422416, at *15 (M.D. Fla. Nov., 28, 2006) ("Although this may not have been [Plaintiff's] preferred accommodation, the ADA (and in turn the FCRA) does not require that [Defendant] accommodate [Plaintiff] in any way she sees fit."). Certainly, an employer is not legally required to provide the 'maximum' accommodation or 'every conceivable' accommodation. Stewart, 117 F.3d at 1285 (quoting Lewis v. Zilog, 908 F. Supp. 931, 947 (N.D. Ga. 1995)). In Santandreu v. Miami-Dade County, the district court explored a process through which an employer might be obligated to seek 'technical assistance' in order to identify an appropriate accommodation, but still concluded, "It is then the employer's decision, with the individual's preference considered, as to which accommodation is most appropriate." 10-24616-CIV-ALTONAGA, 2011 WL 13136161, at *10 (S.D. Fla. Aug. 1, 2011). This case also specifically noted that, "A transfer from an incompatible supervisor is not a 'reasonable accommodation.'" Id. at *11 (citing Gaul v. Lucent Techs., Inc., 134 F.3d 576, 581 (3d Cir. 1998). Further, "[T]he employer may chose the least expensive accommodation or the accommodation that is easiest for the employer to provide." Sheets v. Florida East Coast Railway Co., 132 F. Supp. 2d 1031, 1035 (S.D. Fla. 2001) (citing Hankins v. The Gap, Inc., 84 F.3d 797, 800 (6th Cir. 1996)). And, the court in

Holbrook v. City of Alpharetta explained that even if an employer offered an accommodation which "exceeded that which the law requires" in the past, doing so does not bind the employer to offer that accommodation in perpetuity. 112 F.3d 1522, 1528 (11th Cir. 1997).

The cases discussing failure to accommodate claims take great care in explaining the Parties' respective burdens of persuasion. The Eleventh Circuit has held that, "The plaintiff retains at all times the burden of persuading the jury that reasonable accommodations were available," and, "The employer, on the other hand, has the burden of persuasion on whether an accommodation would impose an undue hardship." Holbrook, 112 F.3d at 1526 (citing Moses v. American Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996); Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1183 (6th Cir. 1996)). But, an employer is not required to demonstrate that there is an undue hardship until an employee has shown that a reasonable accommodation exists. Earl v. Mervyns, Inc., 207 F.3d 1361, 1367 (11th Cir. 2000) (citing Willis v. Conopco, Inc., 108 F.3d 282, 286 (11th Cir. 1997)). In defining the plaintiff's burden, the court in Stewart described two aspects: "the burden of identifying an accommodation that would allow a qualified individual to perform the job," and "the ultimate burden of persuasion with respect to demonstrating that such an accommodation is reasonable." 117 F.3d at 1286 (citing Willis v.

Conopco, 108 F.3d 282, 283 (11th Cir. 1997)). In Tate v. Potter, the district court applied the law about the burdens, and concluded, "Thus, where the employer has already offered a reasonable accommodation, the statutory inquiry is at an end. The employer need not further show that the employee's suggested or alternative accommodations would result in undue hardship." 04-61509-CIV-JORDAN, 2008 WL 11400757, at *4 (S.D. Fla. Mar. 25, 2008).

As cited above, the primary accommodations offered to Plaintiff were the VRI and training on the deaf culture, which took place at the Center for Hearing and Communication. See DE 121 at 83:3-9. Additionally, Defendant at times, such as for group meetings, provided an on-site interpreter. See DE 117 at 68:24-69:5. It is apparent in the evidence that the accommodations Defendant provided were not the accommodations Plaintiff desired. First, at her December 2012 meeting with Mr. Powers and Ms. LiCastro, Plaintiff testified that she "didn't understand why they were asking me about getting a video phone." DE 117 at 42:8-9. Plaintiff admits briefly that the video phone was "good," before explaining her reaction to this accommodation with a story, unrelated at least to the failure to accommodate claim, about an interaction she had with Mr. Pack when they had a misunderstanding about the break room in which the phone was installed. See DE 117 at 53:25-54:6. Plaintiff later explains her reaction to the phone,

"But I didn't even ask for a video phone, so I didn't understand why it was there. They just put it in. They set up VRI, and I'm thinking, I don't have a communication problem, what do we need this for." DE 117 at 68:10-13.

Another issue with respect to the VRI that arose in the testimony of multiple witnesses was the number of people who were present for meetings, typically counseling sessions, in which the VRI phones were used. Dr. Shana Williams, a director of mental health with the Center for Hearing and Communication, who was involved with the training sessions and additional meetings with Plaintiff and Mr. Pack, testified, albeit not as an expert, that she thought that the VRI was effective and based on her observation, was set up at the Pompano Beach store in a manner that would be effective. DE 120 at 82:19-25. She stated that both VRI and on-site interpreters are one-on-one, but because a VRI phone is stationary, an on-site interpreter would be recommended for a group meeting. DE 121 at 89:12-22; 109:6-10. Dr. Williams was asked, "And from your understanding, if it's three or more people in a meeting, that meeting must have an actual on-site interpreter," to which she answered, "I'm saying that that is preferable. There are places where an on-site interpreter is really mandatory, for example, when a woman is giving birth and you really have to have an on-site interpreter. And then there's less critical situations." DE 121 at 109:15-22. Plaintiff testified that,

during counseling sessions, "When I used the VRI, it was always more than three people in the office. They would not give me an on-site interpreter." DE 117 at 76:5-7. Mr. Pack confirms that the VRI, not an on-site interpreter, was used as the counseling sessions. DE 118 at 173:12-18. He also testified that the additional person at a counseling session is primarily observing and not necessarily taking part in the conversation. DE 119 at 111:22-24. When asked if there were instances in which the VRI was used with four or more people in the room, Alan Holliday, a manager who worked with Plaintiff, responded, "Not using the machine. When there were others in the room, they were witnesses." DE 122 at 53:20-21. And, the testimony of Carol Sivan, another manager who worked with Plaintiff, agreed with that of Mr. Pack and Mr. Holliday, that as a witness in a counseling sessions, "You just sit there and observe and make sure that nothing wrong is happening." DE 122 at 159:4-7. But, regardless of whether or not an on-site interpreter would have been a better accommodation, and there was no witness who was offered as an expert who so testified; indeed, there is no testimony from any witness which could meet the burden of establishing that this accommodation was not reasonable. No reasonable jury could find that a reasonable accommodation was not offered. Plaintiff's evidence proffers no reasons why VRI is not a reasonable accommodation; instead, Plaintiff's testimony focused on her preferences and the reasons that she did not agree with

Defendant's choice. The law does not dictate that an employer is required to provide the maximum possible or most expensive accommodation.

With respect to an additional accommodation, several witnesses testified about a recommendation from the Center for Hearing and Communication that Defendant provide what was described as a communication team, by which Plaintiff could limit the number of people from whom she received directions. Defendant was not required to provide this accommodation. Thus, it was free to discontinue its use. Dr. Williams confirmed that the purpose of this recommendation was "to decrease the number of people coming at [Plaintiff] with information and directions." DE 121 at 113:16-17. But, she also unequivocally stated that it was supposed to be used, "not circumventing other needed communications." DE 121 at 114:3. Plaintiff also testified that when this accommodation was discussed at the March 1, 2013 training: "So first [Dr. Williams] asked me who I wanted to communicate with. And I said I'm fine with everyone. Again, my job is to communicate with everybody. But [Dr. Williams] went ahead and picked three people out of the audience." DE 117 at 60:19-21. By Plaintiff's own account, she did not need this accommodation to perform her job. Mr. Pack also testified that he saw the three people as "three points of contact to try to limit the communication, but that doesn't mean that [Plaintiff didn't] talk to everybody." DE 120 at 230:24-231:1.

When Ms. LiCastro described this accommodation she stated, "I think there is a group of managers that were going to be her direct reports but that any manager could still provide guidance to her." DE 120 at 27:12-14. Ms. LiCastro wrote the May 13, 2013 letter that informed Plaintiff that, "[D]uring the March 1 meeting, [the three individuals] were the designated managers assigned to address any issues, changes or direction given to you, as a temporary solution. This solution cannot realistically continue." Defendant's Exh. 14 (introduced by Plaintiff) (DE 99-11). Ms. Licastro's letter informed Plaintiff that she would be required to communicate with Mr. Pack. Id. During her testimony, Ms. LiCastro stated that Plaintiff's resistance to communicating with Mr. Pack was the issue with the communication team. DE 120 at 48:9-10. When Mr. Pack was asked about the removal of this communication team, he explained that they were not being "disband[ed]," but, "What we were telling her is that these aren't the ones that you are going to talk to exclusively all the time." DE 120 at 234:15-18. Ms. Sivan, who was one of the members of the communication team, likewise testified that Mr. Powers explained her role and that "[the communication team] didn't give [Plaintiff] the right to not accept any other manager coming and approaching her for directions or anything that was work related." DE 122 at 178:14-16. The argument that the discontinuation of this team, to the extent it was ever intended to be exclusive, which all of the

employees of Defendant who were involved deny, and which Plaintiff does not rebut, is a red herring. Defendant was not required to provide this particular accommodation. Thus, Defendant cannot be said to fail to comply with the law when it removes an accommodation that is not legally mandated. A defendant is free to try different methods for providing an employee accommodations. The law merely requires that the accommodation provided be reasonable. Defendant was not being unreasonable to discontinue the use of an additional accommodation that it believed was interfering with Plaintiff's ability to function in the workplace.

Yet another aspect of providing a reasonable accommodation that courts have discussed is the interactive process between employees and employers in which they try to reach a solution for accommodating a disability which has been brought to the employer's attention. In the Stewart case, the court found fault with the employee for not engaging with the employer in this process. 117 F.3d at 1286-87. The court explained that it was inappropriate for the employee to demand that her own suggestions be followed without even attempting to explain why the employer's proffered accommodations were not reasonable. Id. Employees cannot cause the process to breakdown and prevail on a failure to accommodate claim:

> Liability simply cannot arise under the ADA when an employer does not obstruct an informal interactive process; makes reasonable efforts to communicate with the employee and provide accommodations based on the

> information it possesses; and the employee's actions cause a breakdown in the interactive process.

Id. at 1286 (further citations omitted). See also Gilliard v. Georgia Dep't of Corr., 500 Fed. App'x 860, 868 (11th Cir. 2012).

It is also apparent that breakdowns in the use of both of the primary accommodations were due, at least in part, to Plaintiff's unwillingness to engage. In particular, both Plaintiff and employees of Defendant agree in their testimony that it was Plaintiff who would repeatedly, sometimes more than one time within a given meeting, hang up the VRI phone, or even, request not to use the phone. After receiving the first in the series of Employee Counseling Notices (hereinafter "ECN") which more immediately preceded her termination, Plaintiff describes a meeting with Mr. Pack, in which she asked if he would write to her, and she testifies that he insisted that they use the VRI. See DE 117 at 81:3-8. She admits that she hung up the phone two times because Mr. Pack, "was very combative," and "was trying to control the interpreter and tell them what to do." DE 117 at 81:12, 15-16. See also DE 118 at 12:20-24. Plaintiff also agrees that she hung up the VRI phone in a meeting with Mr. Holliday. DE 118 at 39:15-17. And, Mr. Holliday confirmed this: "I attempted to start the VRI, and [Plaintiff] ended the call before it connected." DE 122 at 25:9-10. Mr. Holliday also testified at least on that instance, on August 30, 2013, he was ultimately able to use the VRI to communicate with Plaintiff. See DE 122 at 25:14-15. Mr. Holliday

testified about a September 22, 2013 meeting where Plaintiff refused to use the VRI so another manager, Ainsley Brown, wrote for her instead. See DE 122 at 35:19-21. Ms. Sivan's testimony similarly describes Plaintiff's resistance to the VRI and preference for writing, to which Defendant's employees sometimes deferred. See DE 122 at 163:13-17; 166:17-21. At a September 5, 2013 meeting with Mr. Pack, Plaintiff says that she did not want to use the VRI, that she wanted Mr. Pack to write to her instead. DE 118 at 40:11-15. Again, in the midst of describing her many complaints with Mr. Pack and his treatment of her, Plaintiff states that she hung up the VRI, and again, she admits she hung it up two times. DE 118 at 42:12-22. Mr. Pack's testimony is consistent with Plaintiff's testimony, in that he also remembered her hanging up the VRI phone on September 5, 2013. See DE 119 at 25:16-22; 29:19-22; 117:22-24. Plaintiff testified that later that day, after the failed VRI conversation, Mr. Pack agreed to write back and forth. DE 118 at 44:2-4. Certainly, Plaintiff's testimony reveals that the relationship between Plaintiff and Mr. Pack was fraught with many difficulties. But the question before the jury, with respect to the claim at issue, and now, before the Court, is whether VRI, among other accommodations, is a reasonable accommodation by which Defendant could seek to fulfill its legal obligation to a disabled employee. Nothing in Plaintiff's testimony indicates that there was any deficiency in the actual

accommodation, even if there were many interpersonal conflicts in the relationship between Plaintiff and Mr. Pack. The fact remains that Plaintiff frequently obstructed the use of the accommodation Defendant provided. Her obstruction of this accommodation is not evidence that the accommodation itself was not reasonable.

In addition to resisting the accommodation of the VRI provided by Defendant, another example of Plaintiff not participating in attempts Defendant made to improve communication between Plaintiff and Mr. Pack was that she refused to attend additional recommended meetings. Dr. Williams discussed these proposed meetings between Plaintiff and Mr. Pack as one of the solutions which arose out of the March 1, 2013 training session. DE 121 at 86:17-87:1. Dr. Williams testified that while Plaintiff was initially amenable to the meetings, she ultimately refused to meet with Mr. Pack even though she did have two meetings individually with Dr. Williams. DE 121 at 87:8-16. Dr. Williams also had two meetings with Mr. Pack individually. DE 121 at 87:17-23. Mr. Pack similarly testified about the recommendation of these meetings, and that Plaintiff refused to meet with Dr. Williams and him in meetings which would be scheduled with the three of them. DE 119 at 50:24-51:4. Ms. LiCastro also testified that Plaintiff was unwilling to meet with Dr. Williams and Mr. Pack. DE 120 at 104:24.

An on-site interpreter would have been another possible way for Defendant to accommodate Plaintiff, but as the case law makes

clear, as long as Defendant provides a reasonable option, the accommodation does not have to be Plaintiff's choice, and it does not have to be the maximum or most expensive option. The record in this case is utterly devoid of any testimony that the VRI did not function adequately. Plaintiff did not like using the VRI and preferred an on-site interpreter. Or, she preferred her supervisors to write to her, and there is some testimony and evidence, that, at times they attempted to accommodate this preference. But, Plaintiff cannot hang up on video phone interpreters, repeatedly, and then claim that Defendant is not accommodating her disability. That conclusion is not permissible under the existing body of cases interpreting this requirement of the ADA, and by extension the FCRA. In fact, the evidence supports the conclusion that Plaintiff was obstructing the reasonable accommodation which Defendant was providing.

For all of the reasons provided herein, and recognizing the applicable standard, because the Court has found that no reasonable jury could have found in favor of Plaintiff on her failure to accommodate claim, the Court also finds that the clear weight of the evidence——that is the great and not merely the greater weight of evidence——is against the Verdict (DE 103) rendered herein. Thus, the Court will conditionally grant Defendant's Motion For New Trial And/Or Remittitur Under Rule 59 (DE 127), in the event that the grant of Defendant's Renewed Motion For Judgment As A Matter Of

Law Under Rule 50(b) (DE 126) is reversed on appeal.

Accordingly, after due consideration, it is

**ORDERED AND ADJUDGED** that

1. Defendant's Renewed Motion For Judgment As A Matter Of Law Under Rule 50(b) (DE 126) be and the same is hereby **GRANTED;**

2. Pursuant to Rules 58(a)(1), no separate judgment in favor of Defendant will be entered, and this Order will constitute judgment in favor of Defendant Costco Whole Corporation as to Plaintiff's claim for failure to accommodate; and

3. Pursuant to Rule 50(c), Defendant's Motion For New Trial And/Or Remittitur Under Rule 59 (DE 127) be and the same is hereby **conditionally GRANTED** if the Final Judgment herein is later vacated or reversed on appeal.

**DONE AND ORDERED** in Chambers at Fort Lauderdale, Broward County, Florida, this 29th day of January, 2019.

WILLIAM J. ZLOCH
Sr. United States District Judge

Copies furnished:

All Counsel of Record