NO._____

IN THE

Supreme Court of the United States

October Term 2020

JEFF KITCHEN
Appellant-Petitioner

vs.

BASF
Respondent

PETITION FOR WRIT OF CERTIORARI

Veronica L. Davis

/s/ V.L.Davis

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QUESTION PRESENTED FOR REVIEW

1. Should this Honorable Court resolve the split of authority among Circuit regarding whether a Petitioner seeking relief pursuant to the ADA for wrongful termination must prove "but for causation or may prove causation by showing that discriminatory animus was a motivating factor in his termination.

2. Must reversal be mandated in instances in which the incorrect burden of proof is applied.

3. May the court rely on inadmissible evidence to support summary judgment

4. May summary judgment be granted when material fact issues preclude summary judgment

5. Whether off duty governance of behavior constitutes an invasion of privacy

6. Whether summary judgment may be had when a party fails to meet its evidentiary burden of proof

LIST OF PARTIES

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CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held corporation holding or owning more than 10% of the corporations stock involved with this case known to Petitioner, other than the Respondent itself.

LIST OF PROCEEDINGS

Petitioner filed the trial court cause in the United States District Court for the Southern District of Texas, Galveston Division on February 03, 2017.

Petitioner moved for Summary Judgment on March 21, 2018. (ROA.122). The Court denied same on May 01, 2018(ROA.568) and signed an order reflecting same on May 25,2018 (ROA.666). Petitioner filed a Second Motion for Summary Judgment on June 14, 2018 (ROA.723)

Respondent moved for Summary Judgment on July 05, 2018. (ROA.979) Petitioner filed its Opposition thereto on July 26, 2018 (ROA.1180), with a Corrected Response filed on July 27, 2018. (ROA.1222). On September 17, 2018, the trial court judge referred the pending Motions for Summary Judgment to the magistrate for ruling thereon. (ROA.1574).

The magistrate, the Honorable Andrew Edison issued his Memorandum and

Recommendation on October 16, 2018 (ROA.1580-1599) denying Petitioner's Motion for Summary Judgment and granted Respondent's Motion for Summary Judgment. He also denied Respondent's Motion for Judgment on the Pleadings.

The trial court judge, the Honorable George Hanks, adopted the magistrate's recommendations on November 01, 2018 (ROA.1629) He issued Final Judgment on November 06, 2018.(ROA.1631)

Petitioner filed its Notice of Appeal November 29, 2018. (ROA.1637).

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STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254. Trial court judgment was entered in this cause on November 06, 2018. The Fifth Circuit entered judgment on February 28, 2020 and denied Petitioner's Motion for Rehearing on April 27, 2020.

OPINIONS BELOW

The Fifth Circuit Court of Appeals in Jeff Kitchen vs. BASF, Docket No. 18-41119, decided and filed on February 28, 2020, and reported at 952 F.3d 247 (2020), affirmed the District Court's order granting summary judgment to the Respondent regarding Petitioner's claim for wrongful discharge. The opinion of the Court is set forth in the Appendix hereto.

The Fifth Circuit denied Petitioner's Motion for Rehearing in the unpublished opinion on April 27, 2020.

The unpublished Memorandum Opinion of the United States District Court for the Southern District of Texas, Galveston Division is reported 343 F.Supp. 3d 681(S.D. Tex 2018).

DATE OF JUDGMENT SOUGHT TO BE REVIEWED

The date of the judgment sought to be reviewed is February 28, 2020. Rehearing was denied on April 27, 2020.

CONSTITUTIONAL OR STATUTORY PROVISIONS

AMERICANS WITH DISABILITIES ACT OF 1990 42 U.S.C. 12101

SEC. 101-. DEFINITIONS.

As used in this Act:

(2) DISABILITY- The term `disability' means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment

(8) QUALIFIED INDIVIDUAL WITH A DISABILITY- The term `qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

SEC. 102. DISCRIMINATION.

(a) GENERAL RULE- No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual 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.

(b) CONSTRUCTION- As used in subsection (a), the term `discriminate' includes--

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(3) utilizing standards, criteria, or methods of administration--

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

42 U.S.C. Sec. 12102. Definition of disability

(a) DEFINITION OF DISABILITY.—Section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102) is amended to read as follows:

"SEC. 3. DEFINITION OF DISABILITY.
"As used in this Act:

"(1) DISABILITY.—The term 'disability' means, with respect to an individual—

> "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
> "(B) a record of such an impairment; or
> "(C) being regarded as having such an impairment (as described in paragraph (3)).

"(2) MAJOR LIFE ACTIVITIES.—

> "(A) IN GENERAL.—For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
>
> "(B) MAJOR BODILY FUNCTIONS.—For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

"(3) REGARDED AS HAVING SUCH AN IMPAIRMENT.—For purposes of paragraph (1)(C):

"(A) An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

"(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

"(4) RULES OF CONSTRUCTION REGARDING THE DEFINITION OF DISABILITY.—The definition of 'disability' in paragraph (1) shall be construed in accordance with the following:

"(A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.

"(B) The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

"(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

"(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

"(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

"(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

29 U.S.C. §692

(a)Employer practices:

It shall be unlawful for an employer—

(1)to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2)to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3)to reduce the wage rate of any employee in order to comply with this chapter.

(b)Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

((d)Opposition to unlawful practices; participation in investigations, proceedings, or litigation:

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 C.F.R. § 1630.2(j)(1)(iii)--(iv)

(j) Substantially limits -
(1) Rules of construction. The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity:
((iii) The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has

occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.

(iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA.

42 U.S.C. § 2000e-2(m)[Title VII of the Civil Rights Act]:

Impermissible consideration of race, color, religion, sex, or national origin in employment practices Except as otherwise provided in this subchapter,
an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a
motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 12114(c),

A covered entity—

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under chapter 81 of title 41

4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee;

42 U.S.C. § 12117[the ADA]:

Enforcement

(a) Powers, remedies, and procedures The powers, remedies, and procedures set forth in sections 2000e–4, 2000e–5, 2000e–6, 2000e–8, and 2000e–9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

42 U.S.C. 12112

(a)General rule

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

Construction as used in subsection

(a), the term "discriminate against a qualified individual on the basis of disability" includes—

(1)limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(3)utilizing standards, criteria, or methods of administration—

(A)that have the effect of discrimination on the basis of disability; or

(B)that perpetuate the discrimination of others who are subject to common administrative control;

(A)not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee,

unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B)denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

28 U.S. Code §144.Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.
(June 25, 1948, ch. 646, 62 Stat. 898; May 24, 1949, ch. 139, §?65, 63 Stat. 99.)

28 U.S. Code § 455.Disqualification of justice, judge, or magistrate judge

(a)Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Federal Rule of Evidence 401. Test for Relevant Evidence

Evidence is relevant if:
(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
(b) the fact is of consequence in determining the action.
(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1931; Apr. 26, 2011, eff. Dec. 1, 2011.)

Rule 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;
(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 702 – Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the cas

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

The following definitions apply under this article:

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and
(2) a party offers in evidence to prove the truth of the matter asserted in the statement

Federal Rules of Civil Procedure Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

((c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

((e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;
(2) consider the fact undisputed for purposes of the motion;
(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or
(4) issue any other appropriate order.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 28, 2010, eff. Dec. 1, 2010.)

STATEMENT OF THE CASE

Jeff Kitchen, Petitioner, was employed by BASF from 2006 until the time of his termination on October 01, 2015 in Seaford, Delaware. Due to a successive series of company buyouts, he was deemed continuously employed with BASF since 1983. When the Seaford plant announced its closing, it offered Petitioner a position in Freeport, Texas, which he accepted in February, 2014.

Petitioner was found to be an alcoholic. The Respondent lists several infractions, including an offense for Driving Under the Influence. Moreover, he was reported to have drunk a beer on the job. With the knowledge of BASF, Petitioner obtained in-patient alcohol treatment from November 15- December, 15, 2010, and again from November 29, 2013- January, 2014. Nevertheless, Respondent offered Petitioner the transfer to Freeport, rather than terminate his employment upon the closing of the Seaford plant.

After arrival in Texas, BASF mandated a 90 day mandatory outpatient treatment program for Petitioner requiring treatment through its Employee Assistance Program (EAP). Additionally, he signed a Return to Work Agreement (hereinafter RTWA) that required him to submit to monthly random breathalyzer tests and urinalysis. (ROA.364)

On September 28, 2015, Petitioner was called to Respondent's on site medical facility for his monthly breathalyzer test. After the breath alcohol technician (BAT) conferred with Human Resources, he was sent home on the same day, for allegedly failing the breath test.

Immediately after test administration, Petitioner complained of machine malfunction, due to its problems starting and because he had not been drinking. He requested both another breath test, as well as a blood test in refutation thereof, but was denied. On or about October 01, 2015, Petitioner was terminated due to allegedly failing his breath alcohol test with a reading of 0.10 and 0.14.

Petitioner, then filed suit for wrongful termination on the basis of disability and age pursuant to the **Americans with Disabilities Act,** 42 U.S.C.A. §§ 12101 et seq, the **Age Discrimination in Employment Act of 1967**, as amended; 29 U.S.C. §§ 621 et seq; the **Older Worker's Benefit Protection Act of 1990.**

During litigation, Petitioner sought Summary Judgment alleging that he was provided with false test result which established that his termination was due to discrimination on the basis of disability (alcoholism) and/or age. Same was denied. Petitioner sought a second summary judgment on the undisputed basis that the breath test technician (hereinafter referred to as BAT) was not certified on the machine used to test the Petitioner. Same was also denied.

Respondent sought and was granted summary judgment on the basis that Petitioner did not suffer from a disability. The trial court's opinion and the Fifth Circuit decision to affirm is the basis for Petitioner seeking this Writ of Certiorari.

REASONS FOR GRANT OF WRIT OF CERTIORARI

The Fifth Circuit opinion is contrary to the rulings of the Supreme Court and rulings of the other circuit Courts of Appeals regarding proof of discrimination. It's ruling is contrary to **Tex. Dept. of Community. Affairs v. Burdine**, 450 U.S. 248, 256, 101 S.Ct. 1089 at 1095 which found that a plaintiff may establish discrimination in two ways, "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence ." In spite of the clear and unequivocal showing that the Respondent's reasons were unworthy of credence, the Fifth Circuit still ruled that Petitioner had not met its burden of discriminatory animus, nullifying same with a "reasonable belief standard. " Moreover, the Court ignored the ruling of **Price Waterhouse v. Hopkins,** 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) with respect to the motivating factor analysis.

Additionally, the Fifth Circuit's grant of summary judgment to the Respondent is contrary to the legislative intent of the **Americans with Disabilities Act**, both in its finding of what constitutes discrimination under the act and its defining conclusion regarding the standard of proof thereof. Said opinion perpetuates discrimination on the basis of disability and holds any person who is an alcoholic to a higher standard of proof , thereby perpetuating a Plaintiff's inability to prevail against an employer for wrongful conduct under said Act. Same results in a grievant's inability to prevail against an

employer for wrongful termination.

The Circuit courts have so eroded the strength of the **Americans with Disabilities Act**–"de-teething" said act, so that a plaintiff is summarily precluded from proving its case if it does not "prove" discriminatory animus or "but for" causation prior to trial on the merits. Same takes away the statute's bite in contravention of Congress's intent.

Moreover, it exceeds the statutory authority granted to the employer with respect to alcoholism. Specifically, it intrudes into the rights of the Petitioner with respect to his time "off the clock", thereby invading his constitutional right of privacy as implied in **National Treasury Employees Union v. U.S. Department of the Treasury**, 843 F.Supp 214 (5th Cir 1992),

In the instant case, the Fifth Circuit granted summary judgment to Respondent in contravention of **Federal Rule of Civil Procedure** 56 (a) which precludes summary judgment when there is disputed issues of material fact. The Fifth Circuit opinion is premised on defining facts against Petitioner which are both material and contrary to the evidence presented. Moreover, these material facts necessitated submission to a jury. Said grant was violative of **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 251–52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), thereby warranting reversal.

ARGUMENT

I.

The trial court inappropriately required a but for /discriminatory animus analysis

The **ADA** makes it unlawful for an employer to "discriminate against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). To establish an ADA discrimination claim, a plaintiff may present "direct evidence that [he] was discriminated against *because of* [his] disability or alternatively proceed under the burden-shifting analysis first articulated in **McDonnell Douglas Corp. v. Green**, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)." **Rodriguez v. Eli Lilly & Co** ., 820 F.3d 759, 764 (5th Cir. 2016). The burden shifting analysis requires plaintiff to establish his prima facie case of discrimination by showing that he: (1) has a disability, has a record of a disability, or was regarded as disabled; (2) was qualified for the job; and (3) was subject to an adverse employment decision on account of his disability. **Lily** at 765. The Petitioner made that showing.

The trial court magistrate ruled that Petitioner failed to establish a prima facie case, because he failed to prove that his alcoholism caused a substantial limitation of a major life activity and that his "disability" was not a per se disability, The court's ruling was contrary to the **Americans with Disabilities Act Amendments Act 2008**, hereinafter **ADAAA,** 42 U.S.C. §12102 modified that notion, which modified and relaxed that standard.

The Fifth Circuit states that "Kitchen has offered no evidence to support a causal connection between alcoholism and his discharge" thereby failing to make his prima facie case. Said court further opined that Petitioner failed to show that Respondent's reason for termination was pretextual.

Petitioner produced direct evidence of discrimination. Specifically, he was required to take a monthly breath alcohol test as part of his RTWA, which Respondent contends was an accommodation.[1] (ROA.992). Contrary to the assertion that Petitioner failed same, evidence subsequently revealed that he was unlawfully terminated as he did not "fail" or "test positive" on such breath test. Petitioner showed no signs of drinking or impairment, according to the BAT. He had not engaged in any act of misconduct related to alcohol, nor was he alleged to have done so. Because Kitchen's mandate to submit to breath testing was a direct result of his alcoholism and his termination was allegedly a result of his performance thereon, the causal connection between his disability and termination is abundantly clear.

Kitchen's termination violated the RTWA, BASF policy, and the **Americans with Disabilities Act.** Pursuant to the **ADA** at 42 U.S.C. § 12114(c), a covered entity may prohibit the illegal use of alcohol at the workplace, require that employees shall not be under the influence of alcohol and require employees to conform to a drug free

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[1]Petitioner's RTWA specified that in order to continue employment, he must 1) have post rehabilitaiton urine, drug, and alcohol testing and continued participation in aftercare treatment; 2) conduct himself in a professional manner; 3) maintain appropriate behavior when interacting with coworkers, supervisors, or others in the workplace. (ROA.1582)

workplace.

BASF concedes that Petitioner did not have possession of nor did he drink at work. Pursuant to BASF policy BC008.001 §2.8 a blood alcohol level of 0.04% (ROA. 188) is required to be "under the influence." Respondent made no showing nor averred that Petitioner violated the foregoing policy. Therefore, termination in violation thereof constitutes discrimination.

Discrimination is rarely articulated verbally. However, when the evidence demonstrates that plaintiff established a prima facie case, coupled with false explanations of the employer which are unworthy of

credence, same supports an inference of discrimination, even without evidence of defendant's true motive. **Russell v. McKinney Hosp. Venture**, 235 F.3d 219, 225 (2000). **No further evidence of discriminatory animus is required because "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation**. **Laxton v. Gap**, 333 F.3d 572, 578 (5th Cir 2003) citing **Reeves v. Sanderson Plumbing Prods., Inc.**, 530 U.S. 133, 147-148; 120 S.Ct. 2097, 2108-09. [Emphasis added]. Petitioner satisfied its burden in this regard.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)] clearly articulates that a plaintiff may survive the defendant's motion for summary judgment in one of two ways, either by direct or circumstantial evidence.

> Direct evidence .....is evidence "showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated" the adverse employment action. *Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64, 66 (8th Cir.1997).....**A plaintiff with strong (direct) evidence that illegal discrimination motivated the employer's adverse action *does not need the three-part McDonnell Douglas analysis* to get to the jury, regardless of whether his strong evidence is circumstantial**. *Anheuser–Busch, Inc.*, 38 F.3d 968, 971 (8th Cir.1994 *Torgerson v. City of Rochester*, 643 F.3d 1031, 1031 WL 2135636, 112 Fair Empl.Prac.Cas. (BNA) 613 (8th Cir. 2011) [Emphasis added]

"Direct evidence is evidence that, if believed, proves the fact of discriminatory animus without inference or presumption." **Williams-Pyro, Inc. v. Barbour**, 408 S.W.3dPage 6 467, 478 (Tex. App.—El Paso 2013, pet. denied) (quoting *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002)).

Petitioner contends that it has met the standards for providing direct evidence of discriminatory animus by showing that his termination was premised on false test results. Discriminatory animus was evidenced shown by Petitioner's termination as a result of Respondent's fabricated evidence. Only when a Plaintiff fails to show discriminatory animus, need he resort to the **McDonnell Douglas** burden shifting analysis either through direct or circumstantial evidence. **Laxton v. Gap, Inc**., 333 F.3d 572, 578 (5th Cir.2003).

Under said analysis (**Id** at 578), the employer must rebut a presumption of discrimination by articulating a legitimate, nondiscriminatory reason for the adverse employment action. **Auguster v. Vermilion Parish Sch. Bd.**, 249 F.3d 400, 402 (5th Cir.2001). If the employer meets its burden, then it shifts back to the plaintiff to present

substantial evidence that the employer's reason was pretext for discrimination. If the plaintiff can show that the proffered explanation is merely pretextual, that showing, when coupled with the prima facie case, will usually be sufficient to survive summary judgment. **Reeves v. Sanderson Plumbing Products, Inc.**, 530 U.S. 133, 146-48, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). **Turner v. Baylor Richardson Medical Center**, 476 F.3d 337 (5th Cir. 2007). Therefore, Petitioner contends that it need go no further in its analysis, but does so because the Fifth Circuit differs in this opinion.

Moving forward with said analysis, Petitioner shows infra that the employer's explanation is pretextual and unworthy of credence:

PRETEXT/ EXPLANATION UNWORTHY OF CREDENCE

1.Respondent contended that Petitioner "failed his breath test.

Contrary to the recitations of the trial court, Petitioner was not terminated for a positive test, but rather for "failing" the breath test. (ROA.21). After discovery documents proved that Petitioner did not "fail" the test, Respondent subsequently asserted that any result which was not -0- constituted a positive test result.

Pursuant to the **Texas Penal Code** §49.01(2)(B), the statutory limit for failing a breath test is 0.08%. BASF avers that it utilizes the U.S. Department of Transportation (USDOT) guidelines and standards with respect to its alcohol polices. [2](ROA.155.)

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[2] BASF BAT policies indicate that said breath tests are performed in accordance with the Department of Transportation's regulatory guidance at 49 CFR 40, Subparts L & M.

USDOT defines a positive test as 0.02. Pursuant to BASF policy, a 0.02 reading is required to even seek another test, contrary to Damron's assertions.(ROA.1346). Therefore, Petitioner did not fail the breath test pursuant to BASF policy.

The USDOT requires[3] a blank test strip showing a -0- reading prior to blowing the sample. (ROA .178). Discovery evidence reveals that BASF either failed to perform and/or produce an air blank reading immediately prior to Petitioner's test. Same was requested in discovery, but not produced. Additionally, lack of a blank air test negates Respondent's contention that the machine began at a zero reading at the time of Petitioner's test.

Two presumptions for such failure are inherent therein: 1) that the machine did not start at -0-, therefore disqualifying the results and 2) that spoliation of evidence occurred in this case. When spoliation is at issue and the relevant documents were in the hands of the party from whom production is sought, an inference arises that the information contained therein is unfavorable to the withholding party. **LaBarbara v. Angel**, 95 F.Supp.2d 656,665 (E.D.Tx, 2000) . Said absence presents an issue of material fact which would preclude a factual finding that Respondent's reason for termination was legitimate.

2. **Kitchen was terminated for having a positive breath test.**

Respondent initially indicated that Petitioner was terminated for a failed breath

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[3] DOT guidelines require a -0- air blank to ensure that there is no residual alcohol in the machine or in the air around it (ROA. 178).

test. It subsequently indicated that Petitioner tested positive and was therefore terminated. "Failed" and "positive" are not synonymous either by policy, regulation, or statute.

Petitioner was alleged to have blown a 0.10 and 0.14, at the time of his suspension, rather than .010 and .014[4], as produced in discovery. BASF policy 008.002 §§4.3.1 and 4.3.2 define a positive test as 0.04%, while BC008.000 §2.8 defines 0.04% as "Impaired" or Under the Influence. (ROA.188).The Department of Transportation defines a positive test at .020. (ROA.178). Petitioner was tested on a machine called the AlcoPro Intoximeter. Said manufacturer considers any number less than 0.19 to be as negative test. [5] Regardless of the policy or statute deferred to, Petitioner's breath test results was neither positive nor failing.

BASF argues that in an amended Policy No. 008.001, there in no definition for what constitutes a positive test. Said policy is not applicable to the issue of test result standards and deals with rehabilitation procedures only. However, that information is contained in Policy BC008.002 (ROA.156 which defines a positive test as 0.04). The last page of Policy 008.000 refers to Polices 008.001, 008.002 and 008.003. (ROA.1298)

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[4] As shown by test strips ordered to be produced in discovery.

[5]https://www.alcopro.com/cut-off-levels-for-positive-alcohol-tests/
"For workplace and other evidential testing applications we recommend using a 0.020 cut-off level; results of 0.019 and below are regarded as a negative test. This is the cut-off level established by the Department of Transportation (DOT) for workplace testing, and thus can be readily defended". Anything less than that be considered a negative test

Therefore, it acknowledges four separate polices, contrary to the assertions of the Respondent that BC 008.001 was an amended policy replacing BC008.000 which defines "positive" and "impairment" limits on breath tests. (See also ROA. 913)

Consequently, a number of policies exist regarding drug and alcohol testing and related procedures, all bearing a different number and speaking to a different issue. (Same are attached as an Appendix for the Court's verification thereof. [6] Same is similar to legal statutes which outline one section as definitions and provide the law in a separate section. Therefore, the provisions must be read together to understand its applicability, rather than "in lieu of" as proposed by the Respondent.

The parties vehemently disagree regarding the policy, with Petitioner contending that he did not violate the policy and Respondent contending that there is no definition of "positive" within its policy. Respondent simply lied to the Court to perpetuate its position that it had a basis to terminate Petitioner. Morever, as presented, same constitutes another issue of fact for determination by a jury which precludes summary judgment in this case.

It should also be noted that Petitioner requested amendments to these alleged policies in its Amended Requests for Production (ROA.1302-4). Respondent refused to

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[6] On #10 of BASF's Testing Procedures (1298), it clearly mentions the related polices and the substance of each BC008: Controlled Substances/Authorized Substances/Alcohol Policy; BC008.001- Testing Categories for U.S.Sites; BC008.003 Management Request for Testing for U.S.Sites; BC008.004 Random Testing for U.S.Sites; BC009.001 Retention and Release of Medical Information/Records.

produce same, claiming irrelevance, [7] thereby further showing that Respondent's reasons for termination lacked credence and was in all things discriminatory.

Whether the policy was superseded raises a *false* but factual issue which must be resolved by a jury. Consequently, a material fact issue exists which precludes summary judgment for BASF regarding whether Petitioner was terminated pursuant to any policy or RTWA.

If BASF's assertion was meritorious-- that no defined limits existed -- , then it is inane to conclude that Petitioner could possibly have violated a "nonexistent " policy. More specifically, if BASF set no parameters for failing a test, then it could not terminate Petitioner for violation of same. Same is clearly a pretext for Petitioner's discriminatory termination.

In addition to violation of Respondent's own policies regarding whether Petitioner "failed" or "tested positive", both standards violate the **Americans with Disabilities Act** which require that the discharged employee either engage in the use of alcohol at work or be under the influence of alcohol at work as outlined in 42 U.S.C. § 12114(c),

Respondent made no allegation that Petitioner's behavior failed to conform with requirements in chapter 81 of title 41. There is also no evidence that Petitioner was under the influence of drugs or alcohol. Therefore, BASF's termination of Petitioner unequivocally violated the **Americans with Disabilities Act** as set forth above.

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[7] The trial court did not further intervene in discovery and demand its production

3. The breath alcohol technician BAT lacked certification to test Petitioner

Additionally, BASF knew or should have known that the BAT, Roseanne Buentello, lacked the requisite certification to perform Petitioner's breath alcohol test. Petitioner contends that Respondent's refusal to disclose her name, address and qualifications for purposes of appearing for a deposition were indicative of Respondent's knowledge thereof.

Her deposition testimony revealed that she was only certified to perform tests on the Intoxylyzer 5000, however Respondent was tested on the Alco-Pro Intoximeter. (ROA.793:17-25;ROA.795, 1336). Therefore, contrary to the assertions of the Fifth Circuit, the type of machine on which Petitioner was tested is highly significant.

In **Kelly v. State**, 824 S.W.2d 568, 573 (Tex Crim.App. 1992), the Texas Court of Criminal Appeals established law for breathalyzers, stating that "the underlying science is valid.....,as long as it is administered by individuals certified by, and using methods approved by the rules of DPS.[8]" Pursuant to Texas law, since the BAT was not certified, the test is in all things invalid.[9]

4. The Respondent's contention that there was no problem with the machine lacks credence.

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[8] Texas Department of Public Safety

[9] See also DOT guidelines requiring BAT to test on the machine for which certified. (ROA.747)

In Kitchen's EEOC statement (ROA.200), he stated that at the outset the machine had technical problems, was malfunctioning, and produced a faulty reading.

BASF responded thusly:

> BASF denies that there were any technical problems with the machine. The machine is calibrated monthly and had been calibrated in accordance with its regular schedule on September 11,2015, prior to the test of Complainant on September 28, 2015. There was no problem with the machine.(ROA.200-201). [10]

Seventeen days passed between the last calibration and Petitioner's test, thereby calling into question the test results. Additionally, the BAT statedd that the machine hesitated, however she had never experienced that before. (ROA. 1338,1505). Therefore, the Respondent's reson for believing that the test results were reliable and could form the basis for termination lacks credence, especially given its refusal to provide an alternative form of testing to validate the alleged " test failure". The hesitation of the machine, the failure to calibrate prior to the test, and the lack of a -0- reading call into question the validity of the test, and is merely pretext for Respondent's rush to terminate Petitioner on the basis of his disability.

5. The Respondent violated its policy when it refused to give Petitioner a blood test.

Upon realizing a problem, Petitioner requested a blood test, but said request was

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[10] Note the 5th Circuit states that the machine used is uncertain. However, this information (ROA.206-7) coupled with the calibration results (ROA.352) reveal it to be the same machine on which Petitioner was tested.(ROA.1336)

refused. (ROA. 201). BASF contended that it had no obligation to provide Petitioner with a blood test and therefore did not do so. (ROA.201,1327) Contrary to the assertions of Respondent, it had a duty to provide such testing and breached same pursuant to the ***Petitioner's Mandatory Report Format Guidelines*** (ROA.193), which states:

> [Petitioner] **shall** be given random testing with a Breathalyzer test and/or blood alcohol level and urine drug testing).

BASF's ardent refusal to allow Petitioner to take a blood test, in addition to providing him with false results negates the notion that BASF had a "good faith belief" in the accuracy of the tests. Further, same negates the finding that there was no discriminatory animus.

6. **Damron's explanation lacks credence**.

Damron's Written Declaration (ROA.375) stated that Petitioner's prior history of drinking, his test results, along with his tardiness led him to believe that Petitioner arrived to work late because he under the influence. "Based on these concerns, BASF concluded that Petitioner had violated his Final Warning and RTWA and terminated Petitioner Kitchen's employment."

Contrary to said declaration, Damron's deposition testimony revealed that Kitchen had notified his immediate supervisor that he would be late due to having to pick up his fiancee' from the airport. ROA.1338. Therefore, Damron's supposition regarding his

tardiness lacks credence.

ARGUMENT REGARDING PRETEXT

All of the foregoing shows that Respondent's reasons for terminating Petitioner were pretextual. As in Title VII cases where pretext is an issue, the question the factfinder must answer is whether the employer's proffered reasons were "a coverup for a ... discriminatory decision." **Rojas v. Florida**, 285 F.3d 1339, 1343 (11th Cir. 2002) (quoting **McDonnell Douglas** at, 806. Clearly, it is in the instant case.

The trial court stated that it does NOT matter that Respondent terminated him in error, as long as it had a reasonable belief that it had a basis to discharge him. (ROA.1593).The Fifth Circuit has attempted to water down pretext, by stating that the issue turns on "whether BASF reasonably believed its nondiscriminatory reason for firing Kitchen and then acted on that basis." **Waggoner v. City of Garland**, 987 F.2d 1160, 1156-66 (5th Cir 1993). The **Waggoner** Court further stated that the Respondent "must, instead, produce evidence demonstrating that [the employer did not in good faith believe the allegations, but relied on them in a bad faith pretext to discriminate against him" Id at 1166.

Neither the Fifth Circuit nor the District Court may rely on the reasonable belief standard set out in **Clark v. Boyd Tunica**, 665 Fed Appx. 367, 371-72 (5th Cir 2016) because it allows any explanation provided by an employer-- no matter how tainted, untrue, or wrongful to be permitted, as long as the employer claims a "reasonable belief"

that the basis for termination was true, even if said reasoning proves to be false, thereby perpetuating discrimination . However, **Clark** provides a caveat that the employer must believe "in good faith". Good faith is a concept that is more conducive to being disproved, rather than proved.

In **Clark,** unlike the instant case, the testing results came from an independent laboratory. Also, unlike the plaintiff in that case, Petitioner asked for another breath test and a blood test immediately after being told that he failed. The BAT was not certified on the testing instrument used. Finally, the Petitioner was given false information regarding his test results by the Respondent. Therefore, there can be no good faith belief in a lie.

The Supreme Court does not appear to support the "good faith belief" standard. In **Reeves v.Sanderson.**, 530 U.S. 133, 120 S.Ct. 2097 (20000) stated that one may:

> "reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. See, e. g., *Wright v. West*, 505 U.S. 277, 296. Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Cf. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577.

Reasonable belief should no longer be used to perpetuate discrimination against the disabled.

The "but-for causation standard, in practice, obligates a plaintiff to resort to a conjectural inquiry into an employer's state of mind or internal motivations which an employer can succinctly reject with myriad other reasons for termination.

The Court in **Price Waterhouse** at 241 stated:

> We need not leave our common sense at the doorstep when we interpret a statute. It is difficult for us to imagine that, in the simple words "because of," Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges.

C. McDonnell Douglas vs. Price Waterhouse Standard

Because the Fifth Circuit found that there was no direct evidence of discrimination, it invoked the requirement that the *McDonnell Douglas'* burden-shifting analysis be applied. Though analyzed thoroughly herein, the *McDonnell Douglas* framework is *not* required at the summary judgment stage with mixed motive claims. The Fifth Circuit acknowledges that at the summary judgment stage, the burden or persuasion that the Respondent would have made the same employment decision, regardless of disability is one for the fact finder at trial, not at the summary judgment stage. **Fabela v. Socorro Independent School District,** 329 F.3d 409, 418 (5th Cir 2003).[11] Because "mixed motive" causation controls, Petitioner could prevail at trial, even if his discharge resulted from both permissible and impermissible considerations.

Instead of employing this approach, however, the district court and the Fifth Circuit Court of Appeals overlooked Petitioner's direct evidence of discrimination and wrongly imposed a "but-for" causation standard, forcing him to show his termination would not have occurred "but for" his disability. In fact, such a showing is impossible in the instant case, because his disability is so inextricably intertwined with the reason for

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[11] Overruled by **Smith v. Xerox,** 602 F.3d 320 (5th 2010) on other grounds.

his testing, that a clear line of demarcation can not be set forth between the disability and ramifications of his disability.

When Congress amended Title VII in 1991, it kept and clarified ***Price Waterhouse's*** "motivating factor" analysis and specifically provided that a plaintiff establishes an unlawful employment practice when it demonstrates that prohibited discrimination was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). The **ADA** incorporated this remedial language of Title VII by force of 42 U.S.C. § 12117(a), giving **ADA** plaintiffs the right to recover under a "motivating factor" standard. That the **ADA** was subsequently amended to substitute "on the basis of"for "because of" does not disturb the conclusion that Congress in 1990 intended that the remedies of Title VII, then currently in effect and as amended in1991, would be applicable to persons with disabilities. See *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312,326-331 (6th Cir. 2012) (*en banc*) (Stranch, J., concurring in part and dissenting in part).

There is an acknowledged split of authority among the circuit courts of appeals about whether a mixed motive plaintiff seeking relief under the ADA must prove but-for causation or can satisfy his burden of proof on causation by showing only that the discriminatory animus"played a motivating part" in his termination. **Gentry v. E.W. Partners Club Mgmt. Co.**, 816 F.3d 228, 235-236 (4th Cir 2016), the Sixth Circuit in **Lewis v. Humboldt 29 Acquisition Corp.**, 681 F.3d at 317-320; and the

Seventh Circuit in **Serwatka v. Rockwell Automation, Inc**., 591 F.3d 957, 958-963 (2010), have all concluded that a plaintiff claiming wrongful discharge under the **ADA** must prove that discriminatory animus was the but-for cause of her termination. The remaining Circuits which have addressed the question, on the other hand, have reasoned that the motivating factor test of **Price Waterhouse** as codified in Title VII applies to a claim for wrongful discharge under the **ADA**. See **Lewis**, supra, 681 F.3d at 324-325 (Clay, J., concurring in part and dissenting in part) (listing seven Circuits); **Pinkerton v. Spellings**, 529 F.3d 513, 518 n.30 (5th Cir. 2008) (listing seven Circuits).

The Fifth Circuit, in **Pinkerton** at 212- 213 (5th Cir 2007) held:

> The causation question under the ADA is really a question of whether "the ADA's use of the causal language `because of,',`by reason of,'and `because' means that discriminatory and retaliatory conduct is proscribed only if it was solely because of, solely by reason of, or solely because an employee was disabled or requested an accommodation." *Head v. Glacier NW., Inc*. 413 F.3d 1053, 1063-64 (9th Cir.2005).....
>
> Under a plain reading of the statute, ...we conclude that the "sole causation" standard **is not the appropriate standard for ADA claims**. We hold that under a straightforward reading of the statute, the "motivating factor" test should be applied to ADA claims.....[Emphasis added].....

This Court should resolve this important and recurring question in the Circuits, as it has done with other **ADA** cases which have produced a division of opinion among the courts of appeals on other issues. See, e.g., *Chevron, USA Inc. v. Echazabal*, 536 U.S. 73(2002); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

II.

The court erred regarding standards of proof in the instant case.

Proof of disability

The trial court concluded that Petitioner could not prove that he was disabled, thereby ignoring Congress's expansion of the definition of disability when it amended the **ADA** in 2008; . 42 U.S.C. § 12102(3) - **Americans with Disabilities Act Amendment Act** . The Court in **Cannon v. Jacobs Field Servs. N. Am., Inc.**, 813 F.3d 586 (5th Cir. 2016) stated that the **ADAAA** relaxed the threshold issue of whether an impairment 'substantially limits' a major life activity, which no longer "demands extensive analysis," with same being interpreted and applied to require a degree of functional limitation that is lower than the standard for 'substantially limits' applied" previously. 29 C.F.R. § 1630.2(j)(1)(iii)--(iv). Additionally, "major life activity" was expanded to include both physical and physiological manifestations in bodily systems.

Additionally, said standard is not required when the Plaintiff is "regarded as" or has a record of having such a disability. Pursuant to 42 U.S.C. § 12102(3) (2009),

> an individual is " regarded as having such an impairment" if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity.

Clear and convincing vs. Preponderance of the evidence

The Fifth Circuit seeks to hold Petitioner to a higher standard of evidentiary proof,

which belies discrimination that is so patently obvious on its face. In **Price Waterhouse** , the court stated that "conventional rules of civil litigation" apply in discrimination cases .....and "that parties to civil litigation need only prove their case by a preponderance of the evidence. See, e.g., **Herman & MacLean v. Huddleston**, 459 U.S. 375, 390, 103 S.Ct. 683, 691, 74 L.Ed.2d 548 (1983), rather than by "clear and convincing proof" **Gertz v. Robert Welch, Inc**., 418 U.S. 323, 342, 94 S.Ct. 2997 3008, 41 L.Ed.2d 789 (1974). The Fifth Circuit sought clear and convincing proof in the instant case, rather than a preponderance of the evidence, thereby committing error.

EEOC standard

Petitioner contends that due to his alcoholism, he has been held to a higher standard than other employees. The **ADA** specifically provides that employers "may hold an employee ... who is an alcoholic to the same qualification standards for ... job performance and behavior that such entity holds other employees.....," 42 U.S.C. § 12114(c). Though an employee may be held to the same standard, he may not be held to a higher one. In this instance, Petitioner was.

The link between the disability and termination is particularly strong where a work standard is imposed due to the disability itself, such as breath testing. The permissible requirement of testing to ensure compliance may be employed, however, the testing protocol, requirements, and rules associated therewith may not be imposed in a more onerous fashion and with discriminatory requirements.

> An employer may not, ..., condition employment opportunities on the satisfaction of **facially neutral tests** ..... that have a disproportionate, adverse impact on members of protected groups when those tests or qualifications are not required for performance of the job. See *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988); *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). [Emphasis added]

The mandatory monthly breath test defy said ruling. Though allegedly facially neutral, breath tests impact more greatly on alcoholics than on nonalcholics.

The EEOC cites one such example with respect to placing more onerous requirements for a disabled person:

> An employer has a lax attitude about employees arriving at work on time. One day a supervisor sees an employee he knows to be a recovered alcoholic come in late. Although the employee's tardiness is no worse than other workers and there is no evidence to suggest the tardiness is related to drinking, the supervisor believes such conduct may signal that the employee is drinking again. Thus, the employer reprimands the employee for being tardy. The supervisor's actions violate the ADA because the employer is holding an employee with a disability to a higher standard than similarly situated workers .
> http://www.eeoc.gov/facts/performance-conduct.html.

Petitioner cites this EEOC guidance because Mark Damron's Declaration (ROA.375) acknowledged that Kitchen's tardiness was a factor in his decision to terminate him, because he presumed that said tardiness was due to drinking. Kitchen's work history revealed that he had never been late for work and usually worked over time. Therefore, Damron used an impermissible and higher standard in contravention of the EEOC guidelines mentioned supra.

BASF policy allows different treatment for recovering or post rehabilitation employees (alcoholics) versus others who "test positive" for alcohol . Same is strictly

prohibited by both the EEOC and the **Americans with Disabilities Act** at 42 U.S.C. § 12114(c). BASF employees who are not undergoing rehabilitation BC008 §2.8 (BASF 201), are afforded the opportunity to have breath tests confirmed by saliva or blood pursuant to BASF Policy 4.3.2.B. (ROA.156) [12] and to explain any discrepancies. Post rehabilitation employees, such as Petitioner, were not.

Therefore, refusing to give Kitchen a method of verification of test results is violative of the EEOC guideline, as well as the **ADA.** Holding Petitioner to a more stringent standard than other employees who are not undergoing rehabilitation is a violation of the **ADA** and constitutes discrimination pursuant thereto.

III.

Both the trial court and the Fifth Circuit Court of Appeals committed reversible error in allowing inadmissible extrapolation evidence.

Mark Damron testified that he terminated Petitioner in large part due to the findings of the company physician, Dr. Boswell. Damron contends that Kitchen had been at work approximately three hours when tested and that he did not have anything to drink at work.[13] Boswell, after subsequent notification of Petitioner's alleged test

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[12] Compare BASF BC8.001 (ROA 903-914) Testing Categories with BC008 Medical-Alcohol Policy (ROA 188 to BC8.002 Testing Procedures (ROA155, 150)

[13] Time clock records indicate that Kitchen had been at work since 5:30 a.m. Consequently, there is a disputed issue of fact regarding his arrival at work.

results, "performed" retrograde extrapolation, a technique by which alcohol concentration at some earlier time is estimated based on the results of testing at a later time.

Admissibility and reliability of findings from doctor

The Fifth Circuit's erred in finding that the retrograde extrapolation provided by BASF was admissible for the following reasons:

1) Boswell was not deposed nor was any actual testimony taken from Boswell

2) Boswell's opinion was not obtained via an expert report

3) Damron's deposition testimony was based on information obtained from Boswell;

4) No evidence was submitted showing that Boswell was an expert.

Consequently, all extrapolation "findings were violative of the **Federal Rules of Evidence** §701 and 702 and **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.C. 2786 (1993) and inadmissible.

More specifically pursuant to **Federal Rule of Evidence** § 801, Damron's statement regarding Boswell's extrapolation conclusions are hearsay. Moreover, pursuant to **Federal Rule of Evidence** § 701, Damron is prohibited from testifying as a lay witness regarding matters involving "scientific, technical, or other specialized knowledge" (ROA.1345) within the scope of **Federal Rules of Evidence** 702 which requires that in order to be deemed an expert, the witness must testify. Boswell did not testify, but rather allegedly passed information on to Damron.

Additionally, said rule requires that the "testimony" must be based on "sufficient facts and data." No facts or data were shown to have been considered in Boswell's alleged analysis. Factors which must be considered in an extrapolation analysis have been outlined in criminal cases such as **Bhakta v. State**, 124 S.W.3d 738 (Tex. App.—Houston [1st Dist.] 2003, pet. struck) In **Bhakta** at 742, the Court indicated that not only was time a factor, but the defendant's gender, height, weight, the last meal eaten and the time it was eaten must be considered in extrapolation. If the basis for the expert's opinion is unreliable, the district court may disregard that opinion in deciding whether a party has created a genuine issue of material fact for summary judgment purposes. **Munoz v. Orr**, 200 F.3d 291, 301(5th Cir 2000); **Daubert** at 596 (1993). As well being wholly unreliable, the information provided by Boswell is inadmissible.

In **Mata v. State**, 46 S.W.3d 902, 908-09 (Tex.Crim.App. 2001), the Court of Criminal Appeals has suggested that a reasonable interval between the offense and the test is less than one hour. **Id.** at 912 and that potential rate of error increases as time passes and "was particularly large when extrapolating back one hour or more." More than three hours transpired between Petitioner's arrival at work and testing. Boswell's calculations regarding the alleged time of Kitchen's "last drink" were even more remote than that, thereby making the potential rate of error great.

Respondent articulated its " legitimate, nondiscriminatory" reason by proffering the "extrapolation evidence" as its "burden shifting"rebuttal to the presumption of

discrimination . **Olitsky v. Spencer Gifts, Inc**., 964 F.2d 1471 (5th Cir.1992), cert. denied, 507 U.S. 909, 113 S.Ct. 1253, 122 L.Ed.2d 652 (1993). However, the defendant may only meet this burden by proffering **admissible evidence** of an explanation that would be **legally sufficient** to justify a judgment for the defendant. **Guthrie v. Tifco Indus**., 941 F.2d 374, 376 (5th Cir.1991), cert. denied, 503 U.S. 908, 112 S.Ct. 1267, 117 L.Ed.2d 495 (1992). The Respondent did not proffer legally sufficient admissible evidence.

The extrapolation evidence suggests that Kitchen had his last drink hours before arriving at work. Same raises privacy issues regarding Petitioner's off duty conduct. The Court in **National Treasury Employees Union v. U.S. Department of the Treasury**, 843 F.Supp 214 (5th Cir 1992), suggests that a person has the right to freedom from intrusion regarding drinking while not on the job stating that there are two stands of privacy- the autonomy strand and the confidetiality strand which prohibits inquiring into private facts or disclosing private facts about an individual without a legitimate reason. **Whalen v. Roe**, 429 U.S. 589, 600, 97 S.Ct. at 877; **Ramie v. City of Hedwig Village, Texas**, 765 F.2d 490, 492 (5th Cir. 1985). Although this case dealt with government intrusion, same should be applicable in this case regarding both Kitchen's alleged off duty conduct and his medical records after his termination.

Additionally, Respondent tendered undisclosed medical information from Petitioner's alleged visit to the emergency room after termination. Petitioner objected to

same on the basis that it had not been authenticated, was hearsay, was irrelevant and was obtained after the discovery deadline in violation of **Federal Rules of Evidence** 801, 401, 901, 902. Before granting summary judgment, the Court must rule on evidentiary objections that are material to its ruling. An objection is material if the Court has considered the evidence that is the subject of the objection. **Norse v.City of Santa Cruz** , 629 F.3d 966 , 973 (9th Cir 2010). The trial court failed to rule on Petitioner's objections to the evidence, as requested. The Fifth Circuit erred in considering same as a basis for the grant of summary judgment, in violation of the foregoing.

IV.

The trial court and COA violated Federal Rule of Civil Procedure 56 as issues of material fact precluded summary judgment

As set forth in **Harville v. TAMU** 833 F.Supp 2d 645, 658 2011):

> A summary judgment may not be had in an instance in which there is a disputed issue of material fact..... . When determining whether the nonmovant has established a genuine issue of material fact, a reviewing court must construe "all facts and inferences ... **in the light most favorable to the [nonmovant]**." *Boudreaux v. Swift Transp. Co., Inc.*, 402 F.3d 536, 540 (5th Cir.2005) (citing *Armstrong v. Am. Home Shield Corp.*, 333 F.3d 566, 568 (5th Cir.2003)).. **Nonetheless, a reviewing court may not "weigh the evidence or evaluate the credibility of witnesses**." *Boudreaux*, 402 F.3d at 540 (citing *Morris*, 144 F.3d at 380). Thus, "[t]he appropriate inquiry [on summary judgment] is '**whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.**' " *Septimus v. Univ. of Houston, 399 F.3d 601, 609 (5th Cir.2005)* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). [Emphasis added]

The Court views the evidence in the light most favorable to Plaintiff as the non-movant and resolves all factual disputes in his favor, as it must on summary judgment. See **Reeves v. Sanderson Plumbing Prods., Inc.,** 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

The trial court raised the summary judgment standard cited in **Brandon v. Sage Corp.**, 808 F.3d 266, 269-270 (5th Cir 2015) that the nonmoving party must do more than show some metaphysical doubt regarding the material facts, and come forward with specific facts showing a genuine issue for trial. Petitioner proffered proof that was in contravention of the attestations of Respondent. The material fact issues which preclude summary judgment for Respondent are:

1) Did Petitioner fail or test positive on the breath test for which he was fired? Discovery proved said allegation as false.[14]

2) What are BASF's current policy mandates regarding a person who fails or tests positive for a breath test ? Do any of the policies conflict? May they form the basis for Petitioner's termination?

3) Which BASF policies are applicable in the situation?

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[14] Respondent began to use "failed" and a "non-zero" reading as interchangeable, though each connotes a highly different standard of compliance. In none of the standards of compliance could Petitioner be deemed positive. No mention of a non-zero reading is contained in BASF policy.

4) How does Respondent reconcile the lack of physical evidence or observation of intoxication or impairment with its alleged failed test results, especially in light of the BAT's observations?

5) Was the BAT qualified to administer the test ?

6) Was Petitioner's termination based upon his test results or any factor other than discrimination?

7) Was there disputed issues of material fact regarding whether any policy or agreement existed which would allow Petitioner to be terminated for a non-zero reading?

8) Was there any other factor(s) which could account for a non-zero reading, which had nothing to do with Petitioner?

9) Did the termination of Petitioner violate the **Americans with Disabilities Act** at 42 U.S.C. § 12114(c)?

10) Was age a motivating factor in Petitioner's termination?

The Fifth Circuit did exactly what case law prohibits. It weighed evidence in favor of Respondent which should have been submitted to a jury and placed itself in the role of fact finder, rather than deny summary judgment as required by the **Federal Rules of Civil Procedure** 56.

V.

Whether the Respondent met its summary judgment burden of proof

1. *To be entitled to summary judgment, Respondent must show that, Petitioner's termination was not violative of the ADA*

In order to prevail on summary judgment, Respondent must establish that Petitioner's termination was not violative of the **ADA** as a matter of law and there is no disputed issues of material fact regarding whether he violated BASF policy or his RTWA. Respondent made no such showing.

In order to show that it did not violate the ADA, Respondent must show that Petitioner did not have a disability and that his termination was for reasons other than his alcoholism.

Respondent contended that not only did Petitioner not have a "per se disability, he did not have a condition that substantially limited a major life activity. Respondent's Summary Judgment gives an extensive exegesis of his alcoholism and the accommodations Respondent in response thereto. (ROA.1484) If Petitioner had no disability, he had no need of an accommodation from Respondent.

Moreover, the Respondent has misconstrued the law as it relates to the **ADAAA**, which modifies the standard for "disability", "substantially limits" and "major life activity" as discussed herein. Therefore, its argument fails.

Respondent's contended that Petitioner violated his RTWA by failing "to be sober" (ROA.364). Even though, the RTWA contains no such language and the evidence refutes that he did not violate same, Respondent still maintained that it had a right to terminate him for allegedly failing a breath test that Respondent knew that he did not fail.

2. *Insufficiency of summary judgment evidence*

The Court contended that Petitioner failed to timely submit its Opposition exhibits indicating that Petitioner put forth no summary judgment evidence to negate Respondent's basis for summary Judgment. Petitioner filed its Opposition to Summary Judgment on the due date, however, the exhibits did not transmit under the efiling system. Immediate notification was sent to the court coordinator via email, however the exhibits would not attach, presumably due to the size of the exhibits. . (ROA.1515).

Because Petitioner already had exhibits on file, as a result of his Motions for Summary Judgment, said exhibits were of record and could be considered pursuant to **Federal Rules of Civil Procedure** 56(c)(3).

Federal Rules of Civil Procedure 56(e) along with the Advisory Committee notes specifically states:

> Subdivision (e) addresses questions that arise when a party fails to support an assertion of fact or fails to properly address another party's assertion of f act as required by Rule 56(c). As explained below, summary judgment cannot be granted ***by default*** even if there is a complete failure to respond to the motion, much less when an attempted response fails to comply with Rule 56 (c) requirements. Nor should it be denied by default even if the movant completely fails to reply to a nonmovant's response. Before deciding on other possible action, subdivision (e)(1) recognizes that the court may afford an opportunity to properly support or address the fact. In many circumstances this opportunity will be the court's preferred first step.

Though Petitioner's exhibits were tendered the following day, the court rejected said exhibits in contravention of the "court's preferred first step" consideration set out

infra and advisory committee's directive.

3. Opposition not necessary when Respondent fails to meet its summary judgment burden

Before summary judgment may be entered, the district court must ensure that each statement of material fact is supported by the record sufficient to satisfy the movant's burden, even if the statement is unopposed. If the court construed Petitioner's Opposition as a "nonanswer" due to failure to attach exhibits, the court was bound to act pursuant to **Federal Rule of Civil Procedure** 56(e)(4). In **Vermont Teddy Bear Co., Inc. v. 1-800 Beargram Co.**, 71 U.S.P.Q.2d 1365, 373 F.3d 241, (Cir. 2004), the Court stated when a party fails to oppose a summary judgment motion,

> ..... the district court may not grant the motion without first examining the moving party's submission to determine if it has met its burden of demonstrating that nomaterial issue of fact remains for trial." *Amaker*, 274 F.3d at 681. If the evidence submitted in support of the summary judgment motion does not meet the movant's burden of production, then "summary judgment must be denied even if no opposing evidentiary matter is presented. " Id. (internal quotation marks omitted);*Giannullo*, 322 F.3d at 141 (noting that the "non-movant is not required to rebut an insufficient showing").

One does not obtain summary judgment by default.

4. Docket management

This Honorable Court has held that district courts have the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases. See, e.g., **Landis v. North American Co.**, 299 U.S. 248, 254, 57

S.Ct. 163, 81 L.Ed. 153 (1936)so as to achieve the orderly and expeditious disposition of cases." **Link v. Wabash R. Co.,** 370 U.S. 626, 630-631, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), however the exercise of an inherent power must be a " reasonable response to the problems and needs" confronting the court's fair administration of justice. **Degen v. United States**, 517 U.S. 820, 823-824, 116 S.Ct. 1777, 135 L.Ed.2d 102 (1996). In the instant case, the trial court's response was not reasonable.

In **Justice v. Town of Cicero, Illinois,** 682 F.3d 662, (Cir. 2012), the court indicated that allowances are to be made for computer transmission failures pursuant to **Federal Rule of Civil Procedure** 6:

> Computers can crash, and a court's e-filing software can have bugs. .....If Justice had tried to file at 11 PM on November 22, only to discover that the system would not accept his document, then he could take advantage of Rule 6(a)(3), which extends the time when the clerk's office is inaccessible. What's more, we held in **Farzana K. v. Indiana Department of Education**, 473 F.3d 703, 706-08 (7th Cir.2007), that a document tendered to an e-filing system is deemed filed on the day of the tender, even if a programmer's failure to anticipate all possible combinations of circumstances leads the system to reject the filing....., so a document transmitted electronically to the court is filed on the date of transmission no matter what the e-filing system does in response.....

Petitioner's counsel received notice of a 2020 lawsuit against Century Link, her telephone and internet provider in Cause No. MDL 18-2795, in the United States District Court of Minnesota. Said suit contends that internet and transmission difficulties abounded which may have been a factor regarding efiling submissions.

Regardless of the reason, the one day delay did not operate to hinder the progress of the instant case. The Court 's objection had nothing to do with the docket of the court

but rather a bias due to the court's allegation that there was a late tender in another case. Same injects bias into the case which operates to hurt the Petitioner in contravention of 28 U.S.C. §144 or 455.

In any event, the Court should not have granted summary judgment to the Respondents. In addition to issues of material fact, Respondent did not carry its burden showing that it was entitled to judgment as a matter of law.

CONCLUSION AND PRAYER

For all of the foregoing reasons identified herein, Petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari, review the judgment and decision of the United States Court of Appeals for the Fifth Circuit, remand the matter to the Southern District of Texas for trial on the merits regarding his wrongful discharge and provide him with such other and further relief to which he is justly entitled.

Respectfully submitted,

/s/ V.l.Davis

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Petitioner's Petition for Writ of Certiorari shall be sent to Carolyn Russell and Samantha Seaton of Ogletree, Deakins, Nash, Smoak , and Stewart on the 10th day of October via email.

/s/ V.L.Davis

CERTIFICATE OF COMPLIANCE

I hereby Certify that Petitioner's Petition for Writ of Certiorari has been prepared in Century 725 BT font, contains 59 pages from Statement of the Case to the end, and contains 8938 words, 478 sentences, 184 paragraphs, and 782 lines.

/s/ V.L.Davis