No.

IN THE

Supreme Court of the United States

JANET PERDUE, PETITIONER

v.

SANOFI-AVENTIS U.S., LLC

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

PETITION FOR WRIT OF CERTIORARI

L. MICHELLE GESSNER
Counsel of Record

Gessnerlaw, PLLC
602 East Morehead Street
Charlotte, NC 28202
michelle@mgessnerlaw.com
(704) 234-7442

CURRY & TAYLOR ♦ (202) 350-9073

QUESTION(S) PRESENTED

1. The Panel held that a neutral company work rule requiring "managerial approval" before a job-share position is even created trumps the ADA's provisions that a job-share accommodation founded on prior practice and company policies is presumptively reasonable absent undue hardship. Does this holding square with the ADA's provisions or with *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) which recognizes this job sharing proposal as a reasonable accommodation on its face?

2. Should the Court resolve the conflict among the Circuits about whether an employer's neutral work rule trumps the provisions of the ADA?

3. Did the Panel refuse on summary judgment to view the parties' evidence in the light most favorable to petitioner when in assessing her reasonable accommodation claim it ignored triable fact issues that respondent's "FlexsWorks Policy" *already* permitted alternative work arrangements like job sharing; that petitioner had *already* successfully job-shared with another willing co-employee as a reasonable accommodation; that such opportunities *already* existed within respondent's marketing territory; that its Human Resources personnel had *already* encouraged and approved petitioner's job share arrangement; and that its changing, inconsistent reasons over time for nonetheless denying petitioner's proposal was a pretext for unlawful discrimination against this disabled employee?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

STATEMENT OF RELATED CASES

None

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

REGULATIONS

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Fourth Circuit in *Janet Perdue v. Sanofi-Aventis U.S., LLC,* Docket No. 19-2094, decided and filed on June 8, 2021, and reported at 999 F.3d 954 (4th Cir. 2021), affirming the District Court's order granting summary judgment to respondent and dismissing petitioner's complaint, is set forth in the Appendix hereto (App.1-15).

The unpublished Memorandum of Decision and Order of the United States District Court for the Western District of North Carolina, Asheville Division, in *Janet Perdue v. Sanofi-Aventis U.S., LLC,* Civil Action No. 1:18-cv-00221-MR, decided and filed October 2, 2019, and reported at 2019 WL 4874815 (W.D.N.C. 2019), granting summary judgment to respondent, denying petitioner's motion for partial summary judgment and dismissing petitioner's complaint, is set forth in the Appendix hereto (App. 16-53).

The unpublished order of the United States Court of Appeals for the Fourth Circuit in *Janet Perdue v. Sanofi-Aventis U.S., LLC,* Docket No. 19-2094, decided and filed on August 3, 2021, denying petitioner's timely filed petition for rehearing *en banc*, is set forth in the Appendix hereto (App. 54).

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit affirming the District Court's order granting summary judgment to respondent, denying petitioner's motion for partial

summary judgment and dismissing petitioner's complaint, was entered on June 8, 2021; and its order denying petitioner's timely filed petition for rehearing *en banc* was decided and filed on August 3, 2021 (App.1-15;54).

This petition for writ of certiorari is filed within ninety (90) days of August 3, 2021. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

42 U.S.C. §§ 2000e--3 [Title VII of the Civil Rights Act of 1964]:

3. OTHER UNLAWFUL EMPLOYMENT PRACTICES.

(a) It shall be an unlawful practice for an employer to discriminate against of his employees or applicants for employment...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 12111(8) & (9): [Section 101 of the Americans with Disabilities Act of 1990 (the ADA)]:

(8) Qualified individual. The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires....

(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.

42 U.S.C. § 12112(a) & (b) [Section 102 of the Americans with Disabilities Act of 1990 (the ADA)]:

(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.

(b) 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;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(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;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability

who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; 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....

29 CFR § 1630.2(o) (Definitions Under the ADA):

(o) Reasonable accommodation.

(1) The term reasonable accommodation means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications 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.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(4) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the "actual disability" prong (paragraph (g)(1)(i) of this section), or "record of" prong (paragraph (g)(1)(ii) of this section), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong (paragraph (g)(1)(iii) of this section).

(p) Undue hardship -

(1) In general. Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a

covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.
(2) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:
(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;
(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;
(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and
(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

N.C. Gen. Stat. § 143-422.2(a):

> Legislative declaration.
> (a) It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.

STATEMENT

Petitioner Janet Perdue ("petitioner") worked for respondent Sanofi-Aventis U.S. LLC ("respondent" or "Sanofi") as a pharmaceutical sales representative in North Carolina since 2001. Respondent is a global healthcare company which employs more than 17,000 persons in the United States and more than 100,000 worldwide. Sales representatives like petitioner market respondent's medical products in person to physicians in their own offices throughout a given sales territory and those physicians then prescribe respondent's medications for their patients.

Petitioner typically spent more than 50% of her time traveling in her automobile, visiting an average of eight physicians daily; she generally worked more than forty (40) hours weekly. Besides making customer calls, she attended medical education programs at night or during the weekend. Petitioner was an exemplary sales representative in her seventeen-year career with respondent. Just prior to her termination in 2017, she received Sanofi's prestigious Platinum Level Award,

one given to just the top 8% of its sales representatives nationally, for her outstanding work in 2016.

That petitioner accomplished so much in 2016 was remarkable since in 2013, at 44 years old, she was diagnosed with Antisynthetase Syndrome, a rare autoimmune disorder that causes difficult breathing and painful inflammation throughout the body. It left her wheelchair-bound, caused the loss of sight in one eye and required an operation to remove a brain tumor. After recovering from the operation and regaining her vision, she successfully returned to work in December of 2013 in the Spartanburg sales territory with an accommodation of participating less than full time in a job share with another sales representative. When her job share partner left Sanofi in July of 2014, Sanofi continued to accommodate petitioner's disability through its so-called Flexible Work Arrangement policy by providing her a variable schedule that allowed petitioner to work at 60% capacity while she managed her condition with medication and avoiding extreme stress.

Petitioner lived in Greenville and requested a transfer to that territory so that she could better manage her autoimmune disorder with her physicians. After this transfer, she was able to increase her flex time to 80% in January of 2016 and then to 100% by August of 2016. She did not require accommodation once she returned to full-time work. But in January of 2017, Sanofi reorganized and restructured its sales territories, assigning petitioner to the Asheville sales territory, forcing her to leave Greenville. The Asheville territory was much larger and far from petitioner's home. Now required to drive one and a half hours from

her home just to reach this sales territory, she had to drive *another* two and a half hours to some of the physicians she was required to call upon.

Driving long distances along challenging rural roads created stress which in six short weeks triggered a resurgence of petitioner's autoimmune disorder; her health immediately began to deteriorate and her mobility was limited. Notified of this relapse, petitioner's former supervisor in Greenville reached out to her new supervisor in Asheville (Merideth Hernandez) to discuss accommodation options. Petitioner suggested the possibility of a job share back in the Greenville territory. In February of 2017, Hernandez wrote her supervisor requesting that he either transfer petitioner back to Greenville or allow her to job share because of her health issues. She also told petitioner to contact Sanofi's Human Resources Department ("HR") to find out if Sanofi could offer job share opportunities.

HR confirmed that petitioner's business unit was eligible for job share and provided her with a document called "Flexible Work Arrangement Guidelines." They allow for four types of flexible work arrangements: Telework, Flexible Hours, Part-Time, and Job-Share. The term "Job-Share" is defined as a "work agreement between two employees who pair up with each handling 50% of the time of a standard position." Any job share applicants "must identify their Job Share partners." It also provided that all flexible work arrangements must be approved in advance and that managers "will approve or deny a request for Flexible Work Arrangements based on business conditions and the employee's satisfactory performance."

Petitioner identified Caitlin Hunt ("Hunt") as a willing job share partner. She was assigned as a sales representative to the Greenville territory and in 2016, she won Sanofi's Gold Award for her high sales figures, placing her in the top 15% in the nation. Petitioner and Hunt had partnered before. She knew Hunt to be highly competent and well organized; and she had a proven track record of success. In fact, Sanofi's year-end review of Hunt for 2016 was "Exceeds expectations." In addition, they both had previously shared the same supervisor (Dan Roach); he had no complaints about either of them and had heard none; and Roach considered both to be top employees who met the core competencies for sales representatives. HR personnel anticipated quick approval of the job share proposal and confirmed to Sanofi's managers that it could start mid-quarter, as soon as March 27, 2017.

With the endorsement of both Roach and Hernandez, petitioner and Hunt on March 9, 2017, submitted a detailed proposal to Sanofi seeking to job share Hunt's existing sales representative position in Greenville, explaining that petitioner was seeking this arrangement as an accommodation for her disabling autoimmune disorder. At the time of her submission and as a result of the emotional and physical stress caused by her increased traveling to and from Asheville, petitioner was then on a three-week medical leave. When petitioner did return to work, her physician advised that she could not work full time if traveling to and from Asheville but could eventually attempt full-time duties if she worked in Greenville.

Petitioner proposed that she would work Tuesdays, Thursdays and every other Friday while

Hunt would work Mondays, Wednesdays and every other Friday. When petitioner submitted the proposal, Deborah Anderson ("Anderson") was Hunt's supervisor and Sanofi's Area Business Leader for Greenville where the job share would take place. When she learned that Hunt was going to partner with petitioner in the job share, she called Hunt and told her that she did not understand why she was doing so, suggesting that petitioner was manipulating her and counseled Hunt not to request the job share "just to help" petitioner.

Anderson finally met with petitioner and Hunt on April 19, 2017. After asking petitioner about the extent of her health problems, Anderson again questioned Hunt about why she was applying for job share. She also questioned Hunt about an expense report she had filed two months earlier which, according to Anderson, lacked attention to detail, a criticism never raised at the time and at odds with Hunt's status as a strong sales performer, her stellar mid-year performance review and her Gold Award. At the end of the meeting, she asked petitioner and Hunt to revise their proposal to include more information about achieving 100% sales coverage of the Greenville territory. Within 24 hours, Hunt submitted a revised proposal containing a detailed, color-coded spreadsheet addressing this issue, a proposal which Anderson never acknowledged receiving.

On May 1, 2017, Tim Cole, Sanofi's Regional Business Leader, notified HR that petitioner's job share proposal would be denied because of (1) market needs; (2) the skills of the principals, i.e., petitioner and Hunt; and (3) the geography of the Greenville territory.

However, when Anderson called petitioner and Hunt to notify them of her denial on May 3, 2017, she identified *none* of these factors (App.51). Instead, she told them simply that it was "not a good business decision" (App. 23). Anderson restated this conclusion in an email to HR wherein she wrote that "the business would not support a job share arrangement at this time."

Despite this initial cryptic denial by Anderson, she then changed the reasons for her denial with a different person in HR a few weeks later. She denied the job share because (1) she (Anderson) had never worked with petitioner before; (2) she had just started working with Hunt in 2017; (3) neither petitioner nor Hunt possessed the qualifications Anderson believed were important for job share; and (4) the Greenville territory was currently below its sales goals (App. 23). She felt it was critical to the success of a any job share arrangement *for both individuals* to be highly skilled in key areas and she was not confident that petitioner and Hunt had those qualifications (App. 23-24).

Yet when testifying at her deposition in this matter, Anderson *yet again* changed her reasons for denying the job share. Now it had nothing to do with petitioner or her disability and health issues. It was all because of Hunt's lack of attention to details on an expense report, her oversampling; her Call Plan Adherence performance; and that the proposal did not include a day when she and petitioner would work together. Even if Anderson's reason based on her lack of experience working with petitioner and Hunt could be believed, she *never* consulted with Dan Roach, their supervisor when they last successfully job shared together, about their past performance. In fact, had

Anderson inquired, she would have found his team (which included petitioner and Hunt) won Sanofi's Gold Award in 2016, placing them in the top 15% of sales representatives in the nation.

While HR suggested to petitioner as a possible accommodation a vacant position in Greenville for selling a cardiovascular medical product which she was not yet qualified to sell, that "reassignment" was mentioned *before* petitioner became symptomatic again with her autoimmune disorder in January of 2017; and, in any event, HR never posted this position on its intranet and never offered it to petitioner. In fact, Kaitlin Santana of HR ("Santana") did not even know that petitioner had a disability and did not believe it was HR's responsibility to help petitioner find a vacant position as an accommodation (App. 50). Her only suggestion, made between February of 2017 when petitioner first expressed a need for an accommodation and her eventual termination in September of 2017, was the possibility of spending one night a week or every other week in an Asheville hotel and providing a more comfortable automobile, a suggestion petitioner rejected as unworkable (App. 23;50).

HR's failure to identify any other accommodation for petitioner after Anderson's decision was symptomatic of Sanofi's refusal to engage in, or even initiate, the interactive process required by the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("the ADA"), and its regulations. See 29 CFR § 1630.2(o)(3). Assigned to handle petitioner's accommodation request, Santana did nothing to determine what accommodations petitioner needed other than telling her to look for job postings and to

rely on a third-party job vendor. Instead of interacting with petitioner, Sanofi was investigating whether she was taking classes or pursuing an internship while on medical leave; it accused her of just being unhappy with the Asheville assignment and delaying her long-term disability paperwork; and after she had exhausted her short-term disability, it denied her long-term disability and then terminated her employment on September 19, 2017.

On August 6, 2018, petitioner brought this civil action against respondent in the federal district court for the Western District of North Carolina. Positing jurisdiction on 28 U.S.C. §§ 1331 &1367, she claimed that Sanofi violated the ADA when it failed to reasonably accommodate her disability, failed to engage in the interactive process, terminated her employment, and retaliated against her for requesting a reasonable accommodation (App. 25-26). She also alleged that her wrongful discharge violated North Carolina public policy as expressed in N.C. Gen. Stat. § 143-422.2(a) (App. 26).

After discovery, Sanofi moved for summary judgment on petitioner's claims and petitioner filed a cross motion for partial summary judgment on her reasonable accommodation claim as well as on Sanofi's affirmative defenses in response thereto (App.16-17). On October 2, 2019, the district court, Reidinger, J., granted Sanofi's summary judgment motion, denied petitioner's cross motion for partial summary judgment and dismissed petitioner's complaint (App. 16-53).

Focusing first on whether the summary judgment materials raised a genuine issue of material

fact about whether Sanofi failed to offer a reasonable accommodation for petitioner's disability, the district judge determined that Sanofi was not obligated to provide the job share accommodation which petitioner specifically requested (App. 26-30). As the motion judge saw it, this requested accommodation was really a request for a "reassignment to a vacant position" within the meaning of 42 U.S.C. § 12111(9)(B) (identifying it as a possible accommodation). See also 29 CFR § 1630.2(o)(2)(ii) (same) (App. 27).

However, because petitioner was seeking to job share Hunt's *existing* sales representative position in Greenville, it was not a "vacant position" under the ADA; and half of Hunt's existing position in Greenville did not instantly become vacant when they both applied for this job share (App. 27-28). Instead, the job share proposal had to be approved by Sanofi *before* half of Hunt's position could become vacant under the ADA; and even viewing petitioner's evidence in her favor, "the vacancy was a mere possibility, not something [petitioner] should have 'reasonably anticipated'" (App. 28-29). Since there was no existing "vacant" position to which this job share could be reassigned, Sanofi was not bound under the ADA to create a new position in order to make a reasonable accommodation; and it did not have to assign petitioner to a permanent part-time position when her primary position was full-time (App. 29). Thus the job-share position was not vacant and was therefore unavailable as an accommodation under the ADA (App. 29-30).

In addition, the district court ruled that Sanofi was entitled to deny the job share proposal for business reasons related to Hunt's performance (App. 31-32).

Nor were there any "special circumstances" warranting a finding that despite Sanofi's business policies and concern for Hunt's performance, the requested accommodation was reasonable based on the facts of this case (*Id.* citing *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002)). The motion judge also rejected the claim that Sanofi's purported explanation for denying the job share was pretextual, using the *McDonnell Douglas* framework to do so (App. 32-41). In the absence of proof of any reasonable accommodation which would have enabled petitioner to perform the essential functions of the position she held or of a vacant position she desired, he concluded that the evidence was insufficient to show that Sanofi failed to reasonably accommodate petitioner in violation of the ADA (App. 40-41).

Finally, the district judge rejected the claim that Sanofi failed to engage in the interactive process required by the ADA (App. 41-45). Given Hunt's emergent health problems, her ensuing leave of absence and Sanofi's pending restructuring, there was no good reason to reassess petitioner's job share proposal, especially since "reassignment to a permanent part-time position from a full-time position and the creation of an entirely new position are not reasonable accommodations" (App. 44). Nor for these reasons had petitioner stated triable claims for wrongful termination, retaliation or the violation of North Carolina public policy (App. 45-47).

Petitioner appealed and on June 8, 2021, the court of appeals unanimously affirmed the district court's rulings but for a different reason (App. 1-15). The Panel concluded that in order to prevail on the

claim that her job share proposal of Hunt's position in the Greenville territory was a reasonable accommodation under the ADA, petitioner "must show that the job-share position she sought was both vacant *and existing*" (App. 9) (emphasis supplied). Yet it thought that petitioner had made neither showing, especially that the job share position existed in the first place (App. 9-11).

The Panel determined that this job share position *never existed* because "under Sanofi's undisputed policies, no job-share position existed unless and until the Area Business Leader approved [petitioner's] proposal to create the position" (App. 10). That is, when petitioner sought this job share, the position did not exist; instead, one full-time position---- not two part-time positions---- existed in the Greenville territory (*Id.*). Since by company rule splitting Hunt's existing position into two jobs required Sanofi's approval, its failure to agree to this division rendered the position nonexistent and thus unavailable for the purposes of providing a reasonable accommodation under the ADA (App. 10-11).

The Panel also ruled that the "special circumstances" exception described in *U.S. Airways, Inc. v. Barnett*, *supra*, did not apply because *Barnett* addressed the superiority over ADA accommodations of company policies that determine how to fill vacant *existing* positions whereas Sanofi's company rule addresses when a new position can be created (App. 11-12). While the ADA can "in special circumstances" influence how a company fills its existing positions even if that requires overriding otherwise neutral company policies or rules, *Barnett's* analysis does not require

that a company *create* new positions in order to accommodate their employees with disabilities; and it is for this reason that summary judgment should have been granted by the district court (*Id.*). Finally, having failed to show that a reasonable accommodation was available, petitioner cannot hold Sanofi "separately...liable for failing to engage in the interactive process" (App. 12).

August 3, 2021, the Panel denied petitioner's timely filed petition for rehearing *en banc* (App. 54).

REASONS FOR GRANTING THE PETITION

1. The Panel Held That A Neutral Company Work Rule Requiring "Managerial Approval" Before A Job-Share Position Is Even Created Trumps The ADA's Provisions That A Job-Share Accommodation Founded On Prior Practice And Company Policies Is Presumptively Reasonable Absent Undue Hardship. This Holding Undercuts The Purposes Of The ADA And Nullifies *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) Which Recognizes That Petitioner's Job-Sharing Proposal Is A Reasonable Accommodation On Its Face.

Petitioner's proposed job-share accommodation with a willing co-employee to work together as sales representatives in Sanofi's Greenville territory was a reasonable accommodation on its face for petitioner's disability under the rubric of *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). It was an accommodation Sanofi successfully provided petitioner previously in its Spartanburg territory while she returned to full-time

work after the first onset of her disability; it was authorized by Sanofi in its promulgated Flexible Work Arrangement policy; and it was enabled by its own HR personnel. Its execution required that no employee be "bumped" while, at the same time, it helped Sanofi retain not only one but two of its most productive sales representatives. In the ordinary run of cases, it was a reasonable accommodation which deserved approval under the ADA and *Barnett's* holding interpreting its provisions.

Yet the Panel negated this presumptively reasonable job-share accommodation by interposing in the process an ordinary neutral work rule of Sanofi which requires that before an accommodation can take place, it first must be approved in advance by its managers who will do so "based on business conditions and the employee's satisfactory performance." It concluded that this ordinary neutral work rule must first be satisfied in order to create an existing position to which the disabled job-share applicant can then be reappointed as an accommodation under the ADA.

This conclusion undercuts the purposes of the ADA, is at odds with *Barnett's* analysis and deprives disabled employees of *any* job-share opportunities to which they are entitled under the ADA whenever the position sought is not already being job-shared at the time of the request or whenever "managerial approval" is required to create it. Employers like Sanofi in the Fourth Circuit can now unilaterally determine if a job-share opportunity even *exists* in the first place, ultimately depriving a jury of assessing whether under *Barnett* a job-share accommodation is reasonable in the ordinary run of cases or, in the alternative, whether

special circumstances exist to render the accommodation reasonable despite the employer's otherwise neutral work rule.

For purposes of the ADA , petitioner's job-share proposal with Hunt, a willing co-employee, itself created a "vacant" and "existing' position or one which Sanofi should have reasonably anticipated would soon become vacant and existing , i.e., Hunt's position as a sales representative in the Greenville territory. As Sanofi's Santana admitted in her deposition, it was a position "to be filled" by the job-share partners of petitioner and Hunt working together. See *Miller v. Ill. Dep't of Transp.*, 643 F.3d 190, 198-200 (7th Cir. 2011) ("team approach" to one job is a reasonable accommodation under ADA). Alternatively, the job-share arrangement constituted a "job restructuring" under the ADA whereby both petitioner and Hunt together would perform the duties of Hunt's former Greenville sales position. *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 112 (8th Cir. 1995) citing 42 U.S.C. § 12111(9)(B) & 29 CFR § 1630.2(o)(2)(ii).This proposed accommodation was therefore reasonable on its face, authorized by prior practice as well as Sanofi's own established Flexible Work Arrangement policies and deserved to be implemented absent undue hardship, an issue which Sanofi never asserted below.

The Panel ruled that *Barnett* does not apply because that decision addresses the superiority over ADA accommodations of company policies that determine how to fill vacant *existing* positions whereas Sanofi's company rule addresses when a new position can be created and begin to exist (App. 11-12). But allowing an employer to promulgate a rule or policy

which determines whether a particular accommodation even *exists* in the first place is precisely the result the Court in *Barnett* anticipated and cautioned against. The Panel's ruling encourages employers in the Fourth Circuit and beyond to promulgate any number of work rules or policies that will cause any accommodation afforded by the ADA to cease to exist unless and until the employer approves it.

This ruling is one of exceptional importance implicating, as it does, the entire machinery of the ADA in providing disabled employees with equal opportunity in the workplace. A decision which allows a company's ordinary neutral work rule to trump the provisions of the ADA and *Barnett's* analysis comes within this Rule 10(c)'s guidance about the considerations which point toward the granting of a petition for certiorari, i.e., that "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by th[e] Court, or has decided an important federal question in a way that conflicts with relevant decisions of th[e] Court." The Court should accordingly grant certiorari, reverse the judgment below, clarify the Panel's error and remand this matter to the district court for the entry of partial summary judgment in petitioner's favor and the trial of petitioner's remaining claims under the ADA.

The ADA prohibits employers from discriminating against an individual with a disability who, with reasonable accommodation, can perform the essential functions of a job, unless the employer can demonstrate that the requested accommodation would impose undue hardship on the operation of the employer's business. See 42 U.S.C. §§ 12112(a);

(b)(5)(A). In order to prevail in her suit against Sanofi based upon its failure to provide her reasonable accommodation, petitioner was bound to show that (1) she is disabled within the meaning of the ADA; (2) she is qualified (with or without reasonable accommodation) to perform the essential functions of the job; (3) she suffered an adverse employment decision because of her disability; and (4) a reasonable accommodation is possible. *Office of the Architect v. Office of Compliance*, 361 F.3d 633, 639 (Fed. Cir. 2004) citing *Cravens v. Blue Cross & Blue Shield*, 214 F.3d 1011, 1016 (8th Cir. 2000).

If petitioner successfully makes this showing, Sanofi then must show that it was unable to accommodate petitioner without undue hardship in the particular circumstances. *Barnett*, 535 U.S. at 402 citing *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 258 (1st Cir. 2001); *Borkowski v. Valley Central School Dist.*, 63 F.3d 131, 138 (2nd Cir. 1995); and *Barth v. Gelb*, 2 F.3d 1180, 1187 (D.C. Cir. 1993). Petitioner demonstrated below that she is disabled; that she could still perform the job of sales representative if offered the reasonable accommodation of a job share with Hunt; and that she suffered an adverse employment decision on September 19, 2017, when she was terminated.

Sanofi, without asserting any claim of undue hardship, contended that it was not obligated to offer petitioner a reasonable accommodation in the form of a job share for her disability under the ADA because her request for same lacked "managerial approval" required under its disability-neutral rule and therefore the job share position never came into existence and could not be the subject of an accommodation. The issue thus became whether the summary judgment materials

raised a genuine issue of material fact about whether Sanofi's refusal to provide petitioner the reasonable accommodation of a job-share opportunity with a willing co-employee was actionable under the ADA .

In *Barnett*, the Court considered whether a proposed accommodation that would normally be reasonable is rendered unreasonable because the assignment would violate the employer's seniority system's rules. The majority concluded that an employer was not exempted automatically from compliance with the ADA simply because a reasonable accommodation conflicts with the employer's established seniority system. 535 U.S. at 397-398.

The Court rejected the employer's claim that overriding a seniority system in order to offer reasonable accommodation amounts to preferential treatment of disabled employees, something the ADA does not require:

> ...the Act specifies...that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal.
> ....By definition any special "accommodation" requires the employer to treat an employee differently, i.e., preferentially.
> And *the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's reach*. Were that not so, the "reasonable accommodation" provision could not accomplish its intended objective.
> ....The simple fact that an accommodation would provide a "preference"---in the sense that it

> would permit the worker with a disability to violate a rule that others must obey----
> cannot, *in and of itself*, automatically show that the accommodation is not "reasonable."

Id. at 397;398 (former emphasis supplied; latter in original). See 29 CFR § 1630.2(0)(2)(ii) ("Reasonable accommodation may include...appropriate adjustment or modifications of...[the employer's] policies ....").

Barnett thus stands for the proposition that as a legal matter, the fact that an accommodation would require overriding an employer's disability-neutral policy or rule----like Sanofi's rule requiring "managerial approval" of a job-share proposal----does not necessarily demonstrate unreasonableness or even undue hardship. *Id.* See *Taylor v. Rice*, 451 F.3d 898, 911 (D.C. Cir. 2006). "Were that not so,...[n]eutral office assignment rules would automatically prevent the accommodation of an employee whose disability-imposed limitations require him to work on the ground floor;" the same was true for neutral "break from work" rules, or furniture budget rules which could automatically interfere with a reasonable accommodation. *Id.* at 397-398. Many employers like Sanofi have neutral rules governing the way it can reasonably accommodate a disabled employee. *Id.* at 398. But as *Barnett* explained, Congress "said nothing suggesting that the presence of such neutral rules would create an automatic exemption" from the ADA. *Id.* As one court observed, "[a]llowing uniformly-applied, disability-neutral policies to trump the ADA requirement of reasonable accommodations would utterly eviscerate that ADA requirement." *Holly v.*

Clairson Industries, L.L.C., 492 F.3d 1247, 1263 (11th Cir. 2007).

Besides invalidating the Panel's reliance on Sanofi's "managerial approval" work rule to render petitioner's job-share accommodation unavailable, *Barnett* is important for establishing a rational protocol for considering the propriety of any request for an accommodation under the ADA. First, where an employer's seniority system is *not* involved (and thus does not invoke employees' property rights and long-held expectations of entitlement based on prior service), the rule in the ordinary run of cases is that where a proposed accommodation plausibly and reasonably meets a disabled employee's need to perform the essential functions of the job she seeks, the employee satisfies her burden of showing a reasonable and effective accommodation on its face. *Id.* at 401-402. This shifts to the employer the need to show case-specific circumstances that demonstrate undue hardship. *Id.* at 402.

But as adverted to *supra*, Sanofi *never* asserted a claim of undue hardship below; and its reliance on the supposed fact that Hunt's Greenville job never became "vacant" so as to be the subject of petitioner's proposed accommodation is persuasively answered by *Barnett's* observation that "[n]othing in the [ADA]...suggests that Congress intended the word 'vacant' to have a specialized meaning....[and] we [do not agree] that the Act would automatically deny Barnett's accommodation request for that reason." *Id.* at 398-399. In fact, for purposes of the ADA, Hunt's Greenville position became vacant as soon as she voluntarily decided to job share her position with petitioner, see *Emrick v.*

Libbey-Owens-Ford Co., 875 F. Supp. 393, 397 (E.D. Tex. 1995); and as Sanofi's Santana admitted in her deposition, it was a position "to be filled" by the job-share partners of petitioner and Hunt working together. See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1174 (10th Cir. 1999) (a "vacant position" includes positions that are vacant at the moment as well as positions the employer reasonably anticipates will become vacant in the fairly immediate future). Petitioner's job share accommodation request was therefore a reasonable one on its face under *Barnett's* first inquiry and it deserved to be approved for that reason alone.

Second, even if Sanofi had a company policy possessing the dimensions of an established seniority system making it unreasonable in the run of cases to provide an accommodation (it does not), petitioner could still show that"special circumstances" warranted a finding that her particular accommodation is nevertheless reasonable. *Id.* at 404-405. Specifically, Sanofi successfully provided petitioner this very accommodation previously in its Spartanburg territory; it was authorized by Sanofi in its promulgated Flexible Work Arrangement policy; and it was enabled by its own HR personnel. Its execution required that no employee be "bumped" and it helped Sanofi retain not only one but two of its most productive sales representatives. All these circumstances render the requested accommodation reasonable despite any contrary policy by Sanofi with the heft of the seniority system considered in *Barnett* (Sanofi had no such company policy).

The fundamental sense of *Barnett's* second inquiry is that employers should be held to their *past* practices----whether haphazard, unpredictable or consistently applied----which generate a reliance or expectation by their employees that reasonable accommodation under the ADA would be provided in the same or similar manner as before and that employers would follow those past practices in addressing any present requests for accommodation. See, e.g., *Dunderdale v. United Airlines, Inc.*, 807 F.3d 849, 859 (7th Cir. 2015) (Ripple, J., dissenting); *Tobin v. Liberty Mut. Ins. Co.*, 553 F.3d 121, 137-138 (1st Cir. 2009); *Office of the Architect v. Office of Compliance*, 361 F.3d at 640-643. See also *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, 289 n.19 (1987) (under the Rehabilitation Act, ADA's predecessor, "employer cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies."). The Panel's refusal to consider petitioner's showing of these "special circumstances" under *Barnett's* second inquiry is error as well.

For these reasons, petitioner's showing satisfied both prongs of *Barnett's* two-pronged analysis in order to establish that her accommodation request was reasonable under the ADA. The Panel's interposition of Sanofi's neutral "managerial approval" work rule to trump the ADA and Sanofi's obligation thereunder to provide petitioner the reasonable accommodation she requested absent undue hardship undercuts the ADA's fundamental purposes, is at odds with *Barnett* and deprives disabled employees like petitioner of the job-share opportunities to which they are entitled under the Act.

2. The Decision Creates Split Of Authority Among the Circuits About Whether An Employer's Neutral Work Rule Trumps The Provisions Of The ADA.

The Panel's decision giving primacy to Sanofi's neutral "managerial approval" work rule over the provisions of the ADA so that it controls when and whether Sanofi's employees are entitled to reasonable accommodation under the Act creates a split of authority among the Circuit courts of appeals on the issue. Specifically, the Fourth Circuit, as demonstrated by the Panel's decision, now subscribes to this approach of allowing an employer's neutral work rule or policy to trump the provisions of the ADA.

However, the First Circuit (*Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647-648 (1st Cir. 2000)), the Seventh Circuit (*EEOC v. United Airlines, Inc.*, 693 F.3d 760, 763-764 (7th Cir. 2012)), the Eleventh Circuit (*Holly v. Clairson Industries, L.L.C.*, 492 F.3d at 1263)), and the District of Columbia Circuit (*Taylor v. Rice*, 451 F.3d at 911)) all recognize that the text of the ADA itself as well as *Barnett's* holding make clear that allowing an employer's uniformly-applied, disability-neutral policies to trump the ADA would eviscerate that Act's requirement of providing reasonable accommodation to disabled employees in the workplace.

This split of authority implicates Rule 10(a)'s guidance for granting certiorari here, i.e., that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter...." The Court should resolve this split of authority and clarify the Panel's ruling so that the Circuits are in harmony

on this exceptionally important issue affecting equal opportunity in the workplace

3. The Panel Ignored A Summary Judgment Record Which Creates Unresolved Genuine Issues Of Fact For A Jury About The Parties' Prior Practices With Job Sharing As Well As The Pretextual Nature of Respondent's Denial of Petitioner's Accommodation Proposal As It Bears On Any Undue Hardship Defense To Be Raised By Respondent.

In opposing summary judgment, petitioner adduced facts showing that Sanofi's "FlexsWorks Policy" *already* permits alternative work arrangements like job sharing and job restructuring; that petitioner had *already* successfully job-shared with another willing co-employee as a reasonable accommodation; that such opportunities *already* existed within Sanofi's Greenville marketing territory; that its Human Resources personnel had *already* encouraged and approved petitioner's job- share arrangement; and that its changing, contradictory reasons over time for nonetheless denying petitioner her accommodation request was a pretext for unlawful discrimination against this disabled employee.

However, contrary to *Tolan v. Cotton*, 572 U.S. 650, 660(2014) (*per curiam*), the Panel ignored this relevant evidence of petitioner showing her fitness and eligibility for the job-sharing accommodation she was requesting under the ADA. Moreover, some of this proof, read in the light most favorable to petitioner, went to Sanofi's prior established practice of recognizing that a job share opportunity was a

reasonable accommodation for petitioner in addressing her disabilities. None of it was addressed or otherwise harmonized by the court of appeals in ruling in Sanofi's favor.

This abuse of summary judgment protocol failed to give the materials adduced by petitioner as the non-moving party the deference they deserved; failed to draw all reasonable inferences from these materials *against* Sanofi as the moving party; and made crucial credibility determinations which a jury—not judges—should make at trial. These failures to comply with Rule 56 procedure unfairly skewed the record in Sanofi's favor, denying petitioner a jury trial on these genuine issues of material fact.

Finally, while the *McDonnell Douglas* framework is inappropriate to employ in assessing ADA violations since the failure to provide a reasonable accommodation absent undue hardship is *itself* discrimination, Anderson's shifting, contradictory explanations she made over time for denying petitioner's job-share proposal is evidence of pretext for a reasonable jury to assess if, on remand, Sanofi attempts to offer these serial explanations as evidence of undue hardship. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-149 (2000) (a *prima facie* case together with sufficient evidence to reject employer's differing explanations permits a finding of liability by the factfinder); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510-511 (1993). See also *Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 432 (1st Cir. 2000) ("when a company, at different times, gives different and arguably inconsistent explanations, a jury may infer that the articulated reasons are

pretextual.") *Tyler v. Re/Max Mountain States, Inc.*, 232 F.3d 808, 813 (10th Cir. 2000) (same).

CONCLUSION

For all of these reasons identified herein, petitioner respectfully requests that this Court grant her petition for a writ of certiorari and review the judgment and decision of the United States Court of Appeals for the Fourth Circuit, reverse said judgment and remand the matter to the federal district court for the Western District of North Carolina, Asheville Division, for the entry of partial summary judgment in petitioner's favor and the trial of petitioner's remaining claims under the ADA, or provide her with such other relief as is fair and just in the circumstances.

Respectfully submitted,

L. Michelle Gessner
Counsel of Record
GESSNERLAW, PLLC
602 East Morehead Street
Charlotte, NC 28202
(704) 234-7442
michelle@mgessnerlaw.com

United States Court of Appeals, Fourth Circuit.

Janet PERDUE, Plaintiff - Appellant,

v.

SANOFI-AVENTIS U.S., LLC, Defendant - Appellee.

Equal Employment Opportunity Commission, Amicus Supporting Appellant.

No. 19-2094

Argued: January 29, 2021

Decided: June 8, 2021

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Martin K. Reidinger, Chief District Judge. (1:18-cv-00221-MR-WCM)

Attorneys and Law Firms

ARGUED: L. Michelle Gessner, GESSNERLAW, PLLC, Charlotte, North Carolina, for Appellant. Theresa Sprain, WOMBLE BOND DICKINSON (US) LLP, Raleigh, North Carolina, for Appellee. Julie Loraine Gantz, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae. ON BRIEF: Jonathon D. Townsend, WOMBLE BOND DICKINSON (US) LLP, Raleigh, North Carolina, for Appellee. Sharon Fast Gustafson, General Counsel, Jennifer S. Goldstein, Associate General Counsel, Elizabeth E. Theran, Assistant General Counsel, Office of General Counsel, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae.

Before AGEE, RICHARDSON, and RUSHING, Circuit Judges.

Opinion

Affirmed by published opinion. Judge Richardson wrote the opinion, in which Judge Agee and Judge Rushing joined.

RICHARDSON, Circuit Judge:

We must decide whether "job sharing" a single full-time position with a willing partner qualifies as a reasonable accommodation that an employer must provide under the Americans with Disabilities Act ("ADA"). It does not. If the job share in question did not *exist* at the time it was proposed as an accommodation, the ADA does not require the employer to create the new position to accommodate a disabled employee.

At Sanofi-Aventis U.S., LLC, a part-time job-share position does not exist unless and until the Area Business Leader approves an employee's proposal. Such a proposal thus asks Sanofi to *create* a new part-time position. And that is an accommodation the ADA does not mandate. So the plaintiff's claims cannot succeed.

I. Background

A. Perdue's tenure at Sanofi

Janet Perdue was hired as a pharmaceutical sales representative at Sanofi in 2001. In that role, she called an average of eight physicians a day and attended medical education programs, which often happened at night or over the weekend. Sales representatives like Perdue spent 50% or more of their time traveling.

Perdue first worked in Anderson, South Carolina, but she later transferred to an open position in Greenville where she lived. She appears to have performed well, even winning Sanofi's platinum sales award in 2017.

In 2013, Perdue was diagnosed with antisynthetase, an autoimmune disease, and had surgery to remove a benign brain tumor that had impacted her ability to walk and see out one eye. Sanofi gave her leave for ten months to recover. At the end of 2013, Perdue returned to work in the Spartanburg territory with a job-share partner. The job share allowed Perdue to split the workload of a normal position with another employee, subject to manager approval. Her job-share partner later resigned, and Perdue began working part time (60% capacity). She eventually returned to work full-time in the Greenville territory.

In 2017, Perdue was reassigned to North Carolina's Asheville territory during a company reorganization. This reassignment increased her travel time from two to three hours per day to four hours per day. After the reorganization, the Greenville Area Business Leader told Perdue that a cardiovascular sales representative position might soon open up in Greenville. Perdue believed that her background selling diabetes medication left her unqualified for that job. And she also believed that the job "didn't seem like a good fit," given that she was just starting in the Asheville territory and was "kind of excited" about the new area. J.A. 80–81.

Within six weeks of starting in the Asheville territory, Perdue noticed problems with joint pain and stiffness related to her autoimmune disorder. So the Asheville Area Business Leader raised Perdue's health concerns to the Regional Business Leader, requesting

that Perdue be considered for a job share or an open position "within the geography where she lives." J.A. 241.

Perdue's doctor soon determined that Perdue was "medically unable to work, effective immediately" for at least three weeks. J.A. 218. Sanofi approved her request for FMLA leave and short-term disability benefits. At the end of the three weeks, her doctor "advised another month off work," explaining that "[s]he should not expect to be able [to] return to full time work if travelling. Could possibly retry full time if local in Greenville but may need to cut hours if local too." J.A. 271–72. Eventually, the doctor imposed permanent medical limitations that prevented Perdue from traveling more than 20 miles from Greenville and restricted her from working more than 30 hours a week. Sanofi was told of these limitations.

During this time, Perdue considered applying for a flexible-work arrangement. Sanofi's flexible-work policy permitted telework, flexible hours, part-time work, and job sharing (two employees each handling 50% of a standard position) with manager approval. J.A. 128–38; *see also* J.A. 130 ("Managers will approve or deny a request for Flexible Work Arrangements based on business conditions and the employee's satisfactory performance."). Under that policy, flexible-work arrangements were "not an entitlement," J.A. 137, but were "available for discussion between employees and their managers," J.A. 128. The policy expressly noted that "[n]ot all positions may be suitable [for a flexible-work arrangement] due to the type of work being performed, business needs, or performance concerns." *Id.* And the Regional Business Leader explained that although Perdue job shared previously in Spartanburg, Sanofi had not approved of "too many" job shares, as

they "add[ ] a nuance that we had to carefully work out between the representative and the manager." J.A. 146; *see also* J.A. 150 (explaining that a job share will not "necessarily" be approved).

Perdue decided to pursue a job-sharing arrangement. She approached Caitlyn Hunt, a sales representative in Greenville to ask if Hunt would be her job-share partner. Hunt eventually agreed. She too appears to have been well regarded within the company, having received a gold sales award and an "exceeds expectations" end-of-year rating in 2016.

So Perdue and Hunt submitted their proposal to job share Hunt's primary-care diabetes representative position in Greenville. They needed the approval of the Greenville Area Business Leader, so they met with her to pitch their proposal. During that meeting, the Leader asked about Perdue's health and Perdue explained the situation. The Leader said that she had concerns about Hunt's competence and attention to detail. As an example, she explained that Hunt had submitted an expense report incorrectly when she had first started working in the Greenville territory that January. And the Business Leader also told Perdue and Hunt that their 2016 end-of-year reviews were not relevant because they were completed by another Area Business Leader.

In early May, Sanofi's human-resources department suggested other accommodations. Sanofi offered "a hotel stay in order to better break up [Perdue's] days and limit her travel." J.A. 243. But Perdue said that "wouldn't help." J.A. 243. Sanofi also asked if Perdue had a comfortable car. But Perdue explained that she liked her Equinox and it was comfortable. Perdue testified at her deposition that her doctor said that hotel stays and a new car would not help

her symptoms. J.A. 108. Sanofi also suggested that Perdue check for job openings listed on the company's internal portal.

The next day Sanofi—through the Greenville Area Business Leader—denied Perdue and Hunt's request to create the job share, explaining that "the business would not support a job share arrangement" at that time. J.A. 321. The Greenville Area Business Leader added that "at this point in time with all the changes happening at Sanofi, this would not be a good business decision." J.A. 103–04. The Leader stated in her deposition that she was concerned about Hunt being "a good fit at that time for a job share." J.A. 200. She noted that Hunt "had just started reporting to [her], and [she] had concerns about her attention to detail and her meeting metrics." *Id.* These concerns, she explained, were magnified by the "tense environment within the company" after the recent restructuring and layoffs. The Regional Business Leader approved the decision to deny the job share for similar reasons.

After the job share was denied, Perdue continued on short-term disability leave. With her short-term disability benefits running out and no sign that her medical restrictions would be abated, Perdue spoke with human resources about her next steps. This led her to apply for long-term disability. Soon after, she was fired, as Sanofi could not provide her "with an indefinite leave of absence" and there were "no other accommodations that would enable [her] to perform the essential functions of [her] job." J.A. 48.

B. The proceedings below

After she was fired, Perdue sued Sanofi in federal district court alleging violations of the ADA, 42 U.S.C. §

12101 *et seq.*, and wrongful discharge under North Carolina law. Sanofi moved for summary judgment on all claims, and Perdue moved for partial summary judgment. The district court granted Sanofi's motion and denied Perdue's. *See Perdue v. Sanofi-Aventis U.S. LLC*, No. 1:18-cv-00221-MR, 2019 WL 4874815, at *16 (W.D.N.C. Oct. 2, 2019). Perdue timely appealed, and we have jurisdiction under 28 U.S.C. § 1291.

II. Discussion

We review a district court's grant of summary judgment de novo, "applying the same standard that the district court was required to apply." *Calloway v. Lokey*, 948 F.3d 194, 201 (4th Cir. 2020). Granting summary judgment is appropriate when "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." Fed. R. Civ. P. 56(a). We must construe the evidence in the light most favorable to the non-moving party, but we may not "weigh the evidence or make credibility determinations." *Betton v. Belue*, 942 F.3d 184, 190 (4th Cir. 2019).[1]

On appeal, Perdue mainly challenges the district court's disposition of her ADA failure-to-accommodate claim. The ADA generally prohibits employers from "discriminat[ing] against a qualified individual on the basis of disability" 42 U.S.C. § 12112(a). One form of discrimination is failing to make "reasonable accommodations" for a disabled employee's "known physical or mental limitations," unless the employer "can demonstrate that the accommodation would impose an undue hardship" on its business. *Id.* § 12112(b)(5)(A).

To show an employer's failure to accommodate, the plaintiff must prove: (1) that she had a disability

within the statutory meaning; (2) that the employer knew of her disability; (3) that a reasonable accommodation would permit her to perform the essential functions of the position; and (4) that the employer refused to make the accommodation. *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 345 (4th Cir. 2013). But even if the plaintiff makes this showing, the employer can still defeat the failure-to-accommodate claim by demonstrating that the reasonable accommodations would impose an undue hardship. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 395, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002) (quoting § 12112(b)(5)(A)). This appeal focuses on the plaintiff's third element: whether Perdue identified a "reasonable accommodation" that would enable her to perform her job.[2]

8A "reasonable accommodation" includes a "[m]odification[ ] or adjustment[ ] to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position." 29 C.F.R. § 1630.2(o)(1)(ii). The ADA includes a non-exhaustive list of accommodation examples: "job restructuring, part-time or modified work schedules, reassignment to a ***960** 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, [or] other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9)(B); *see also* 29 C.F.R. § 1630.2(o)(2)(ii). To carry her burden on summary judgment, Perdue need only "present evidence from which a jury may infer that the [identified] accommodation is 'reasonable on its face, *i.e.*, ordinarily or in the run of cases.' " *Halpern v. Wake Forest Univ.*

Health Scis., 669 F.3d 454, 464 (4th Cir. 2012) (quoting *Barnett*, 535 U.S. at 401–02, 122 S.Ct. 1516).

The only accommodation Perdue argues Sanofi had a duty to provide is the job share of Hunt's position in the Greenville territory.[3] Accepting her job-share proposal, she argues, would have been a "reassignment to a vacant position," which is an accommodation required by statute and regulation. *See* 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii).

But the proposed job share is not an accommodation required by the ADA. That conclusion lies at the intersection of two limiting principles. First, the ADA only requires "reassignment to a *vacant* position" as an accommodation for an employee with a disability. 42 U.S.C. § 12111(9)(B) (emphasis added); *see also* 29 C.F.R. § 1630.2(o)(2)(ii); *E.E.O.C. v. Sara Lee Corp.*, 237 F.3d 349, 355 (4th Cir. 2001) ("The ADA does not require reassignment when it would mandate that the employer bump another employee out of a particular position."). And second, the position must already exist because "the ADA does not require that an employer create a new position for a disabled employee." *Laird v. Fairfax Cnty.*, 978 F.3d 887, 892 n.3 (4th Cir. 2020); *see also Smith v. Midland Brake, Inc., a Div. of Echlin, Inc.*, 180 F.3d 1154, 1174 (10th Cir. 1999) (collecting cases).[4] So to prevail on her reasonable-accommodation claim, Perdue must show that the job-share position she sought was both vacant and existing. This she cannot do.

The district court focused on whether the job-share position was "vacant." *See Duvall v. Ga.-Pac. Consumer Prods., L.P.*, 607 F.3d 1255, 1262 (10th Cir. 2010) ("In the employment context, ... a position is 'vacant' with respect to a disabled employee for the purposes of the ADA if it would be available for a similarly-situated non-disabled employee to apply for

and obtain."). But this inquiry skips over the logically preceding question of whether the position existed. For a position cannot be vacant unless it already exists. And here, under Sanofi's undisputed policies, no job-share position existed unless and until the Area Business Leader approved Perdue's proposal to create the position.

Sanofi employees, with and without disabilities, may apply to create a job-share position. But when Perdue sought the job-share position, it did not exist. One full-time position in the Greenville territory, not two part-time positions, existed. Hunt's willingness to job share with Perdue does not mean that a new job-share position came into existence. The uncontradicted evidence established, even if construed in the light most favorable to Perdue, that splitting Hunt's existing position into two required Sanofi's agreement. And that agreement is something the ADA does not demand. *Laird*, 978 F.3d at 892 n.3; *see also Terrell*, 132 F.3d at 626–27 ("Whether a company will staff itself with part-time workers, full-time workers, or a mix of both is a core management policy with which the ADA was not intended to interfere."); *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 950 (8th Cir. 1999) (requiring a company to create a permanent co-manager position was not a reasonable accommodation).

Perdue argues that because Sanofi once permitted her to job share as she worked her way back from her initial diagnosis and brain surgery, it could have done so in Greenville. But this prior decision does not require Sanofi to do the same thing when Perdue proposed the new job-share position with Hunt. We applaud Sanofi for going beyond its legal obligation under the ADA in accommodating Perdue's recovery. And Sanofi appears willing to consider flexible-

employment situations. But its generosity and overall flexibility does not raise the legal standard. *See Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995) (An employer that "bends over backwards to accommodate a disabled worker ... must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation."); *see also Myers v. Hose*, 50 F.3d 278, 284 (4th Cir. 1995) ("Discouraging discretionary accommodations would undermine Congress' stated purpose of eradicating discrimination against disabled persons.").

The parties dispute how *US Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002), applies to Sanofi's policy that a job share will be permitted only if the Area Business Leader approves. *Barnett* addressed whether reassignment to a vacant position was reasonable in the ordinary run of cases when that reassignment would trump the company's established neutral seniority system. *Id.* at 393–94, 122 S.Ct. 1516. The Court said that it was not, unless the plaintiff "present[ed] evidence of special circumstances that make 'reasonable' a seniority rule exception in the particular case." *Id.* at 394, 122 S.Ct. 1516. We recently extended *Barnett*'s reasoning to hold that reassignment in violation of a company's "best-qualified" hiring policy is not reasonable in the ordinary run of cases. *Elledge*, 979 F.3d at 1016.

But *Barnett* and its Fourth Circuit progeny do not apply here. Those cases discuss the superiority of company policies that determine how to fill vacant *existing* positions over ADA accommodations. Sanofi's policy instead dictates when a new position can be created. The ADA can, in "special circumstances," influence how a company fills its positions, even if that

requires overriding otherwise neutral company policies. *Barnett*, 535 U.S. at 397, 122 S.Ct. 1516. But it cannot require the company to create new positions.

So providing Perdue a job-share position with Hunt in the Greenville territory was not a reasonable accommodation required by the ADA—not because the position was not "vacant" but because the position she sought did not exist. The ADA does not require employers to create new positions to accommodate their employees with disabilities. It is on this ground that summary judgment should have been granted to Sanofi on Perdue's ADA failure-to-accommodate claim.

Perdue separately argues that Sanofi should be liable for failing to engage with her in an interactive process. But "the interactive process 'is not an end in itself' " but a "means for determining what reasonable accommodations are available to allow a disabled individual to perform the essential job functions of the position sought." *Wilson*, 717 F.3d at 347 (quoting *Rehling v. City of Chi.*, 207 F.3d 1009, 1015 (7th Cir. 2000)). So "an employer will not be liable for failure to engage in the interactive process if the employee ultimately fails to demonstrate the existence of a reasonable accommodation that would allow her to perform the essential functions of the position." *Jacobs v. N.C. Admin. Off. of the Cts.*, 780 F.3d 562, 581 (4th Cir. 2015). As Perdue fails to demonstrate the existence of a reasonable accommodation, Sanofi cannot separately be liable for failing to engage in the interactive process.

* * *

We hold today that a part-time job-share position that requires managerial approval to create is not a reasonable accommodation in the ordinary run of cases because the ADA does not require companies to create new positions to accommodate their employees with

disabilities. With that conclusion, the rest of Perdue's claims cannot succeed.[5] Accordingly, the district court's grant of summary judgment to Sanofi is
AFFIRMED.

1Footnotes

1Perdue argues at the outset that the district court improperly applied the summary-judgment standard by using the language "forecast of evidence" to discuss Perdue's burden to survive summary judgment. But we find no error in the district court's use of that terminology. "The summary judgment inquiry ... scrutinizes the plaintiff's case to determine whether the plaintiff has proffered sufficient proof, in the form of admissible evidence, that could carry the burden of proof of h[er] claim at trial." *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993). That inquiry necessarily requires the district court to consider a "forecast of evidence" that the parties intend to present at trial to determine whether it raises any "genuine dispute[s]" of "material fact." Fed. R. Civ. P. 56(a). And if Perdue's contention is instead that the district court improperly required her to show that she *would* win at trial, rather than that she *could* win at trial, that argument is not supported by the opinion's language or analysis.

2Perdue argues on appeal that the district court erred in finding that Sanofi denied the job share for a "legitimate business reason" when the evidence showed those reasons were "pretextual." Appellant Br. 2. But the district court's analysis of those aspects of the *McDonnell-Douglas* burden-shifting approach was irrelevant to the legal claim Perdue brought. Her failure-to-accommodate claim requires no evidence of discriminatory intent. So *McDonnell-Douglas*—

addressing legitimate business reasons and pretext to infer discriminatory intent—does not apply here. The failure to provide a "reasonable accommodation" that would not impose an "undue hardship" is itself the discriminatory act prohibited by the ADA. *See Punt v. Kelly Servs.*, 862 F.3d 1040, 1049 (10th Cir. 2017) ("The *McDonnell Douglas* test is inapposite in a failure-to-accommodate case" because a failure-to-accommodate case does not require proof of the employer's motives.); *Lenker v. Methodist Hosp.*, 210 F.3d 792, 799 (7th Cir. 2000) (describing *McDonnell-Douglas*'s burden shifting as "both unnecessary and inappropriate" in a failure-to-accommodate case).

3Sanofi argues that Perdue's claim is barred because she rejected other "reasonable accommodations" that Sanofi offered. And it is true that rejecting another reasonable accommodation would defeat her reasonable-accommodation claim. *See Elledge v. Lowe's Home Ctrs., LLC*, 979 F.3d 1004, 1013–14 (4th Cir. 2020); *Talley v. Fam. Dollar Stores of Ohio, Inc.*, 542 F.3d 1099, 1108 (6th Cir. 2008). But since we otherwise affirm the district court's grant of summary judgment to Sanofi, we need not decide whether the hotel stays, a new car, or the potential position in Greenville's cardiovascular business unit were reasonable accommodations.

4Moving an employee to part-time work may be a reasonable accommodation in some circumstances. *See* 42 U.S.C. § 12111(9)(B). But it may be required only when "the employer has part-time jobs readily available," *i.e.*, when a new position need not be created. *See Terrell v. USAir*, 132 F.3d 621, 626 (11th Cir. 1998); *Treanor v. MCI Telecomms. Corp.*, 200 F.3d 570, 575 (8th Cir. 2000).

5

Perdue also seeks to revive her state-law wrongful-discharge claim on appeal. But her arguments fail for the same reasons her ADA arguments fail. *See* N.C. Gen. Stat. § 143-422.2(a); *N.C. Dep't of Corr. v. Gibson*, 308 N.C. 131, 301 S.E.2d 78, 82 (1983) (To determine the content of a state-law wrongful-discharge claim, North Carolina courts "look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases.").

And we reject Perdue's argument that the district court failed to separately consider her cross-motion for partial summary judgment. Granting summary judgment to Sanofi, which required construing all facts and factual inferences in Perdue's favor, necessarily meant that Perdue's cross-motion for partial summary judgment could not prevail. *See Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003). The district court's opinion said as much. *See Perdue*, 2019 WL 4874815, at *16 ("The Court having determined that the Defendant's Motion for Summary Judgment should be granted, for the same reasons the Plaintiff's motion is denied.").

United States District Court, W.D. North Carolina, Asheville Division.

Janet PERDUE, Plaintiff,

v.

SANOFI-AVENTIS U.S. LLC, Defendant.

CIVIL CASE NO. 1:18-cv-00221-MR
Signed 10/02/2019

Attorneys and Law Firms

L. Michelle Gessner, The Law Offices of Michelle Gessner, PLLC, Charlotte, NC, for Plaintiff.
Jonathon D. Townsend, Womble Bond Dickinson (US) LLP, Theresa M. Sprain, Womble, Carlyle, Sandridge & Rice, Raleigh, NC, for Defendant.

MEMORANDUM OF DECISION AND ORDER

Martin Reidinger, United States District Judge

THIS MATTER is before the Court on the Defendant's Motion for Summary Judgment [Doc. 16] and the Plaintiff's Motion for Partial Summary Judgment [Doc. 19].

I. PROCEDURAL BACKGROUND

Janet Perdue (the "Plaintiff") brings this action against her former employer, sanofi-aventis U.S. LLC (the "Defendant"), asserting claims for violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq., and for wrongful discharge in violation of North Carolina public policy as codified in the North Carolina Equal Employment Practices Act, N.C. Gen. Stat § 143-422.2(a).

The Defendant moves for summary judgment on the Plaintiff's claims. [Doc. 16]. The Plaintiff moves for partial summary judgment regarding her reasonable accommodation claim and the Defendant's Twelfth, Fourteenth, Fifteenth, and Sixteenth Affirmative Defenses. [Doc. 19].[1]

II. STANDARD OF REVIEW

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "As the Supreme Court has observed, 'this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.' " Bouchat v. Baltimore Ravens Football Club, Inc., 346 F.3d 514, 519 (4th Cir. 2003) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986)).

A genuine issue of fact exists if a reasonable jury considering the evidence could return a verdict for the nonmoving party. Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir. 1994), cert. denied, 513 U.S. 814 (1994). "Regardless of whether he may ultimately be responsible for proof and persuasion, the party seeking summary judgment bears an initial burden of demonstrating the absence of a genuine issue of material fact." Bouchat, 346 F.3d at 522. If this showing is made, the burden then shifts to the nonmoving party who must convince the Court that a triable issue does exist. Id.

In considering the facts on a motion for summary judgment, the Court will view the pleadings and

material presented in the light most favorable to the nonmoving party. Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986). Where, as here, the parties have filed cross-motions for summary judgment, the Court must consider "each motion separately on its own merits 'to determine whether either of the parties deserves judgment as a matter of law.' " Rossignol v. Voorhaar, 316 F.3d 516, 523 (4th Cir. 2003) (quoting Philip Morris Inc. v. Harshbarger, 122 F.3d 58, 62 n.4 (1st Cir. 1997)).

III. FACTUAL BACKGROUND[2]

The Defendant operates a multinational pharmaceutical company in various locations, including Asheville, North Carolina. [Doc. 1 at ¶ 9]. The Plaintiff began working for the Defendant in November 2001. [Id. at ¶ 10, 28]. The Plaintiff worked as an Executive Sales Professional ("ESP"), which involves making drug sales calls with physicians across a set territory in addition to attending meetings and education programs. [Doc. 18-3 at 1]. ESPs typically spend 50% of more of their time traveling, depending on the geography of the territory they are assigned. [Id. at 2]. Generally, ESPs work more than forty hours per week. [Doc. 18-2 at 30-31].

In February 2013, the Plaintiff was placed on medical leave due to inflammation of her lungs, joints, and muscles, and a severe decrease in her ability to breathe. [Doc. 1 at ¶ 12]. In April 2013, the Plaintiff was diagnosed with an autoimmune disorder called Antisynthetase Syndrome. [Id. at ¶ 13]. The Plaintiff remained on short and long-term disability due to her symptoms as well as a surgery to remove a tumor in her head that was causing her to lose sight in one eye. [Id. at ¶¶ 15-19]. In December 2013, the Plaintiff returned to

work on a 50% flex-time schedule. [Id. at ¶ 20]. The Plaintiff returned to work full-time in late 2015 and continued to work in that capacity until January 2017. [Id. at ¶ 21-22].

In January 2017, the Defendant restructured its entire sales organization. [Doc. 18-17 at 2]. As part of the restructuring, the Plaintiff was transferred from a territory where she resided in Greenville, South Carolina to a territory in Asheville, North Carolina. [Doc. 18-2 at 17]. The Asheville territory is much larger than the Greenville territory and required the Plaintiff to drive longer distances. [Id. at 49]. After the reassignment, the Plaintiff's commute from Greenville to Asheville took an hour and twenty minutes one-way. [Doc. 18-17 at 2]. Shortly after the restructuring, the Plaintiff's health began to deteriorate because of the increased travel. [Doc. 18-28 at 2].[3]

Deborah Anderson ("Anderson") served as the Area Business Leader ("ABL") for the Greenville territory. [Doc. 28-2 at 74]. At the time of the restructuring in January 2017, Anderson told the Plaintiff that there was a position opening in Greenville for which she believed the Plaintiff was qualified. [Doc. 18-2 at 79, 147]. The Plaintiff, however, told Anderson that she was not interested in the position because she did not believe she was qualified for it. [Id. at 81].

Merideth Hernandez ("Hernandez") served as the ABL for the Asheville territory and was the Plaintiff's supervisor after the restructuring. [Doc. 18-2 at 69-70]. In February 2017, Hernandez wrote to her immediate supervisor, Regional Business Leader Tim Cole ("Cole"), requesting that he either transfer the Plaintiff back into the Greenville territory or allow the Plaintiff to participate in job share because of her health issues. [Doc. 18-17 at 2].

Caitlin Hunt ("Hunt") was transferred to an ESP position in the Greenville territory as part of the restructuring. [Doc. 18-11 at 88]. Hunt thereafter reported to Anderson. [Doc. 28-2 at 74]. The year before the restructuring, Hunt worked as an ESP under a different manager and won the Defendant's Gold Award for her comparatively high sales figures. [Doc. 28-1 at 2].

The Defendant allows its employees to apply for "Flexible Work Arrangements" including "job share." [Doc. 18-4 at 4]. In February 2017, the Plaintiff contacted Hunt about the possibility of applying to job share Hunt's position. [Doc. 18-11 at 88]. The Defendant's policies regarding "Flexible Work Arrangements" are explained in a document titled "Sanofi US Flexible Work Arrangements" (the "FWA Document"). [Id.]. The FWA Document defines "job share" as a "work agreement between two employees who pair up with each handling 50% of the time of a standard position." [Id.]. According to the FWA Document, job share "[i]s not an entitlement" and "[n]ot all positions may be suitable due to the type of work being performed, business needs, or performance concerns." [Id. at 3, 12].

The FWA Document has a "Job Share Checklist," which states that "[e]mployees may be eligible for a Job Share Work Arrangement by applying to their managers and HR Business Partners." [Id. at 11]. The FWA Document also has "Flexible Work Guidelines," which state that "[a]ll Flexible Work Arrangements must be approved in advance of their commencement." [Id. at 5]. They also say that employees must "maintain satisfactory performance prior to applying for a Flexible Work Arrangement" and that "[e]mployees who are not meeting performance expectations may have their request for a Flexible Work Arrangement denied." [Id. at 7]. According to the FWA Document, managers

"consider each request individually" and "approve or deny a request ... based on business conditions and the employee's satisfactory demonstration that his or her job is suitable for the particular Flexible Work Arrangement and that business needs will continue to be met." [Id. at 6].

On March 9, 2017, the Plaintiff and Hunt applied to job share Hunt's ESP position in the Greenville territory. [Doc. 18-31 at 3]. Their job share proposal explicitly stated that the Plaintiff sought the job share "based on her current health issues." [Id.]. Under the proposal, the Plaintiff would work Tuesdays, Thursdays, and every other Friday, while Hunt would work Mondays, Wednesdays, and every other Friday. [Id. at 3]. Before the Plaintiff submitted the proposal, she acknowledged that "[t]he job share possibility will be determined by whether the business unit can support it." [Doc. 18-30 at 2]. Anderson needed to approve the Plaintiff and Hunt's job share proposal because she was the ABL in the region where the job share would occur. [Doc. 18-2 at 104].

On March 24, 2017, a few weeks after the Plaintiff submitted the proposal, Hernandez texted the Plaintiff to tell her that a full-time position may soon be available in Greenville. [Doc. 18-41]. The Plaintiff never responded to Hernandez. [Id.].

Cole, Hernandez, and Anderson discussed the job share proposal several times. [Doc. 18-12 at 88; 18-23, 18-36]. To account for the possibility of the proposal being approved, they sought and obtained a waiver from the Defendant's policy that only allowed job shares to begin at the beginning of each quarter because consideration of the proposal was extending beyond March 31. [Doc. 18-34 at 2]. Although they were discussing the job share proposal and preparing for its approval, they

acknowledged that the final decision on the proposal would depend on "the outcomes of the [Plaintiff and Hunt's] meetings with [Anderson]." [Id.].

On April 19, 2017, Anderson, Hunt, and the Plaintiff held an in-person meeting to discuss the job share proposal. [Doc. 18-2 at 105]. In addition to asking questions about the job share proposal, [Doc. 18-12 at 143-44], Anderson also asked Hunt "tough questions" regarding her performance, competence, and attention to detail. [Doc. 18-2 at 118-122; Doc. 28-2 at 166]. Specifically, Anderson mentioned Hunt's issues regarding the submission of her expense reports for the last few months. [Doc. 18-2 at 118-122; Doc. 18-44; Doc. 28-2 at 166]. Hunt responded that under her previous manager she had received a Gold Award in 2016 for her sales figures and received a positive year-end review in 2016. [Doc. 28-2 at 166]. Anderson told Hunt that she was judging her by what she had seen since the restructuring in 2017 and did not "care what [her previous manager] thinks about you." [Id.].

The Plaintiff testified that during the meeting, Anderson "asked about my health and then made some reference to that not being appropriate for her to ask." [Doc. 18-2 at 123]. Hunt testified that Anderson simply asked the Plaintiff, "[w]hen are you going to be coming back from medical leave?" [Doc. 28-2 at 168]. After Anderson asked, the Plaintiff "very openly explained to [Anderson] about [her] autoimmune disorder." [Doc. 18-2 at 119]. The Plaintiff conceded, however, that Anderson did not ask any extensive follow-up questions about the Plaintiff's health after hearing the Plaintiff's answer. [Id. at 123].

On May 2, 2017, the Plaintiff spoke with Kaitlin Santana ("Santana"), who worked in the Defendant's Human Resources Department. [Doc. 18-18 at 2]. During

that conversation, Santana offered to provide the Plaintiff with hotel stays to limit the distance she needed to travel and a more comfortable car to make her travel more comfortable if she continued to work in the Asheville territory. [Id.].[4] The Plaintiff responded that neither option would help her. [Id.]. Santana also told the Plaintiff that she should look on the Defendant's online portal to see if any jobs in the Greenville area were vacant. [Doc. 18-38 at 175]. By that time, however, there were no vacant positions in upstate South Carolina. [Doc. 25-6 at 231].[5]

On May 3, 2017, Anderson denied the Plaintiff's job share proposal and communicated the denial to the Plaintiff and Hunt by telephone. [Doc. 18-37]. Anderson explained to them that "at this point in time with all the changes happening at Sanofi, this would not be a good business decision." [Doc. 18-2 at 160-61]. Anderson said that she discussed her decision with Cole and the Defendant's Human Resources Department before notifying the Plaintiff and Hunt. [Id. at 85].

Later, Anderson elaborated that she denied the proposal because (1) Hunt lacked attention to detail regarding expense reports; (2) Hunt lacked attention to detail regarding oversampling of certain products; (3) Hunt was one of the lowest ESPs in the district in achieving a metric known as Call Plan Adherence; (4) the proposal did not include a day when the Plaintiff and Hunt would work together, which was important for planning; (5) Anderson only recently had begun supervising Hunt and felt uneasy about approving job share for such a new employee; (6) the Greenville territory could not support a job share because it was underperforming at the time of the request; (7) Anderson felt that Hunt and the Plaintiff did not meet the qualifications for a job share; and (8) the recent

restructuring had created a tense environment within the company. [Id. at 85-88, 236, 300; Doc. 18-49 at 2]. It was noted that the first of three of these stated reasons fell squarely within the basis for a denial of job share because of Hunt's performance. [Doc. 18-4 at 7].

Anderson said that she did not take the Plaintiff's disability into account when she denied the job share proposal. [Doc. 18-12 at 295]. Anderson said that she "didn't have a problem with [the Plaintiff]" and "[i]t wasn't [the Plaintiff's] ability that I really had a question about ever." [Id. at 295, 300].

Later that year, Hunt received a mid-year performance review, which included a manager evaluation for Anderson to complete and an employee self-evaluation for Hunt to complete. [Doc. 18-45].[6] In her self-evaluation Hunt wrote that her "[s]trategic planning could be improved for the second half of the year" and that her "[p]lanning and strategizing will be more successful due to more familiarity to new territory." [Doc. 18-45 at 3]. She also wrote that due to changes in the Defendant's sales organization related to the restructuring, "things that are important have perhaps fallen behind." [Id. at 6]. Hunt also said that her "adaptability may have been challenged at the beginning of 2017" after she started working for Anderson. [Id. at 7; see also Doc. 28-2 at 273-74].[7] Anderson's section of the review noted that "[e]arly in the year, [Hunt] had some missteps with appropriate sampling, but quickly corrected her mistakes." [Doc. 18-45 at 8].

Hunt suffered a seizure in May 2017, which she attributed to stress caused by her relationship with Anderson. [Doc. 28-2 at 198-99]. Hunt was placed on medical leave until July 16, 2017. [Id. at 220]. Hunt returned to work on July 17, 2017, although her doctors had been unable to ascertain a physical reason for the

seizure. [Doc. 28-2 at 222-23]. Roughly a month after Hunt returned from leave, she heard rumors that the Defendant was going to restructure again at the end of 2017. [Doc. 28-2 at 224]. On September 25, 2017, Hunt suffered from seizure-like symptoms again. [Doc. 25-9 at 5]. On November 3, 2017, Hunt resigned, saying she said that she "couldn't take working for Debbie Anderson anymore." [Doc. 28-2 at 250].

After the job share with Hunt was denied, the Plaintiff looked for other jobs on the Defendant's online portal that she could perform with her restrictions but did not find one. [Doc. 18-2 at 182]. At that point, it was already rumored that the Defendant would be undergoing another restructuring at the end of 2017. [Doc. 18-20 at 2]. The Plaintiff hoped that she would be reassigned to the Greenville territory as part of the potential restructuring. [Id.].

On August 31, 2017, the Plaintiff informed the Defendant that she was unable to return to her full-time position, with or without accommodations, and did not know when she would be able to do so. [Doc. 18-1 at 2]. The Plaintiff also requested a part-time position but was told that the Defendant could not sustain a part-time position at that time. [Doc. 18-26].

On September 19, 2017, the Defendant terminated the Plaintiff's employment. [Id.].[8] The Defendant explained to the Plaintiff that her short-term disability ended and said it was unable to grant her an "indefinite leave of absence." [Doc. 18-2 at 198; 18-1].

IV. DISCUSSION

The Plaintiff claims that the Defendant violated the ADA in the following ways: (1) by failing to accommodate her disability; (2) by failing to engage in

the interactive process; (3) by terminating her employment; and (4) by retaliating against her for requesting a reasonable accommodation. [Doc. 1 at ¶¶ 55-56]. The Plaintiff also claims that the Defendant wrongfully discharged her in violation of North Carolina public policy. [Id. at ¶¶ 59-68]. The Defendant moves for summary judgment on each of the Plaintiff's claims. [Doc. 16].

A. Failure to Accommodate

The Plaintiff's primary claim is that the Defendant discriminated against her by failing to accommodate her disability. The Defendant moves for summary judgment on the basis that the Plaintiff's forecast of evidence fails to create an issue of fact as to whether any reasonable accommodation was available.

The ADA protects a "qualified individual," which is defined as "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." 42 U.S.C. § 12111(8). To prevail on a failure-to-accommodate claim brought under the ADA, the Plaintiff is required to show that (1) she was a qualified individual; (2) the Defendant had notice of her disability; (3) she could perform the essential functions of the position she held or desired with a reasonable accommodation; and (4) the Defendant refused to make such accommodations. See Wilson v. Dollar Gen. Corp., 717 F.3d 337, 345 (4th Cir. 2013).

The Plaintiff does not claim that she could be accommodated as an ESP in the Asheville territory. Her physician said as much. [Doc. 18-50 at 2-3]. In fact, the Plaintiff declined the accommodations that were offered in that position. [Doc. 18-18 at 2]. Instead, the Plaintiff

specifically requested the job share with Hunt in the Greenville territory as an accommodation.

The employer is "not obligated to provide the accommodation requested or preferred by the employee." Cravens v. Blue Cross & Blue Shield of Kansas City, 214 F.3d 1011, 1019 (8th Cir. 2000). Under the ADA, however, the employer may need to reassign the employee to a vacant position as an accommodation if the employer is unable to identify a reasonable accommodation that will allow a qualified employee to continue performing the essential functions of his or her current job. 42 U.S.C. § 12111(9)(B). Thus, the question before the Court is whether the Plaintiff has presented evidence that the position to be shared with Hunt in Greenville was vacant and therefore was available as an accommodation.

1. Vacancy

" '[A] vacant position' includes not only positions that are at the moment vacant, but also includes positions that the employer reasonably anticipates will become vacant in the fairly immediate future." Smith v. Midland Brake, Inc., 180 F.3d 1154, 1175 (10th Cir. 1999) (citing Monette v. Electronic Data Systems Corp., 90 F.3d 1173, 1187 (6th Cir. 1996)). The employer does not have to remove or reassign an employee to create a vacancy. Pond v. Michelin N. Am., Inc., 183 F.3d 592, 595 (7th Cir. 1999). The employer also does not have to create a new position to create a vacancy, see Bilinsky v. Am. Airlines, Inc., 928 F.3d 565, 572 (7th Cir. 2019), as amended (Aug. 9, 2019).

The Plaintiff argues that "Hunt's position existed both before and after [the] job share request," so the Plaintiff "was not asking for the creation of a new

position." [Doc. 24 at 12]. According to the Plaintiff, Hunt's position became vacant when the Plaintiff and Hunt submitted their job share proposal. [Doc. 20 at 5].

Contrary to the Plaintiff's assertions, however, half of Hunt's position did not instantly become vacant when the Plaintiff and Hunt applied for job share. The Plaintiff's argument ignores the Defendant's policies. It was made clear to the Plaintiff and to Hunt that under those policies, job share "[i]s not an entitlement." [Doc. 18-4 at 12]. Employees must apply to participate in job share and must have their application approved by a manager. [Id. at 5, 10]. Hunt could not unilaterally make half of her position available. She needed Anderson's approval to create such a vacancy. As such, Hunt's position did not become vacant the instant that the Plaintiff and Hunt applied for job share because Anderson had not yet approved the proposal.

The Plaintiff further argues that even if the job share proposal alone did not create a vacancy, the word "vacant" includes positions an "employer reasonably anticipates will become vacant in the immediate future." [Doc. 20 at 18] (citing Smith, 180 F.3d at 1175). According to the Plaintiff, the Defendant should have reasonably anticipated that half of Hunt's position would become available when the Plaintiff and Hunt applied for job share because the creation of that vacancy was entirely within Anderson's control. [Doc. 26 at 2].[9]

The Plaintiff correctly states the law but misapplies it to this case. The mere possibility that half of Hunt's position could become vacant if certain business criteria were met did not mean that the Defendant should have reasonably anticipated that half of Hunt's position would become available. The Plaintiff requesting the job share does not mean that the business considerations at hand would allow for such a job share.

Taking the Plaintiff's evidence in the light most favorable to her, the vacancy was a mere possibility, not something the Defendant should have "reasonably anticipated."

The logical conclusion of the Plaintiff's argument shows its error. If the Plaintiff is correct, and the Defendant should have reasonably anticipated that a job share in the Greenville territory would become available, the Defendant would have been forced to either approve the job share with Hunt despite its concerns about her performance or create a new job share for the Plaintiff with some other unknown employee. The law, however, does not require either of these. An employer does not have to create a new position where no vacancy exists to make a reasonable accommodation for an employee. Lamb v. Qualex, Inc., 33 F. App'x 49, 59 (4th Cir. 2002). Likewise, an employer does not have to reassign a disabled employee to a permanent part-time position when that employee's primary position was full-time. Nartey-Nolan v. Siemens Med. Sols. USA, Inc., 91 F. Supp. 3d 770, 775 (E.D.N.C. 2015). Also, an employer does not have to reassign an employee when the "reassignment would violate ... a legitimate, nondiscriminatory policy of the employer." Cravens, 214 F.3d at 1020.

The Plaintiff argues, however, that Hunt's offer to job share created a vacancy because the law allows an employee to unilaterally "create a vacancy by offering their position to a coworker with a disability." [Doc. 26 at 3-4]. The Plaintiff supports her argument by citing to the Court's statement in Emrick v. Libbey-Owens-Ford Co. that "another employee's offer to voluntarily relinquish their position and accept reassignment ... may be a valid means of attempting a reasonable accommodation." 875 F. Supp. 393, 397 (E.D. Tex. 1995).

In Emrick, however, the Court said that "just because an employee makes known her willingness to be reassigned for the benefit of the disabled employee *does not necessarily mean that the employer is in a position to reassign her to another position.*" Id. at 397 n.1 (emphasis added). As such, an employee's offer to vacate a position is not enough to create a vacancy. The employer also must be "in a position to reassign her to another position." Id.

Here, Hunt made known her willingness to accept job share, but Anderson determined that Hunt was not suitable for a job share based on her performance and because "at this point in time with all the changes happening at Sanofi, [approving the job share] would not be a good business decision." [Doc. 18-2 at 160-61]. As such, Anderson determined that the Defendant was not in a position to reassign the Plaintiff to the job share with Hunt. Emrick supports the Defendant's argument rather than the Plaintiff's.

For these reasons, the Plaintiff has failed to present a forecast of evidence to show that the job share position was vacant and therefore was available as an accommodation.

2. Exception to the Defendant's Policies

The Plaintiff next argues that the Defendant "cannot hide behind" its policies to deny the job share proposal. [Doc. 24 at 16] (citing U.S. Airways, Inc., v. Barnett, 535 U.S. 391 (2002)). In Barnett, the Supreme Court held that "ordinarily," a requested accommodation will not be reasonable if it conflicts with the rules of an employer's policy. 535 U.S. at 406. As such, the employer will be entitled to summary judgment "unless there is more" like "special circumstances" that make an

exception to the policy reasonable under the particular facts of a case. Id. The plaintiff bears the burden of showing that special circumstances exist, and can do so by explaining "why, in the particular case, an exception to the employer's ... policy can constitute a 'reasonable accommodation' even though in the ordinary case it cannot." Id. at 406.

The Plaintiff argues that the Defendant "fails to show whether reassignment to job share would be reasonable" so "it has not met its initial burden and summary judgment must be denied." [Doc. 24 at 18]. The Plaintiff misconstrues Barnett, which only requires the Defendant to show that the requested accommodation conflicts with the rules of its policy. 535 U.S. at 406. If the Defendant does so, the Plaintiff must then show "why, in the particular case, an exception to the employer's ... policy can constitute a 'reasonable accommodation' even though in the ordinary case it cannot." Id. at 406.

As discussed infra, the forecast of evidence shows that Anderson followed the Defendant's job share policy and denied the job share proposal for business reasons related to Hunt's job performance. See Sec. IV.A.2. As such, the Plaintiff's requested accommodation was denied consistent with the Defendant's policy, which made approval of job share proposals conditional based on "business conditions" and other considerations. [Doc. 18-4 at 6]. Therefore, the Defendant's denial will be considered reasonable unless the Plaintiff can show "special circumstances" warranting a finding that, despite the employer's policy, the requested accommodation was reasonable on the particular facts of this case. Barnett, 535 U.S. at 405.

The Plaintiff has failed to present a forecast of evidence to support such a finding. The Plaintiff argues

that job shares had previously been "used as an accommodation" for "employees with medical conditions and family situations." [Doc. 24 at 19]. The issue, however, is not whether a job share can be used as an accommodation for a disabled employee. The question is whether the Defendant's policy of denying a job share based on concerns about a fully-abled employee (Hunt) is unreasonably applied. The Plaintiff offers no forecast of evidence on this point.

The Plaintiff further argues that she had previously participated in job share. [Id.]. The Plaintiff, however, fails to provide a forecast to demonstrate how that the Plaintiff's experience with a job share would affect the Defendant's concerns about Hunt's performance.

Finally, the Plaintiff argues that the Defendant had already made an exception to its policy for the Plaintiff by waiving its requirement that job shares can only begin at the start of a new quarter. [Doc. 24 at 19]. The Plaintiff fails to demonstrate how that exception would make the job share more reasonable. Since the decision regarding the job share was extending into the second quarter, this waiver merely kept the option of the job share open. This was to the Plaintiff's benefit. As such, the Plaintiff's forecast of evidence fails to show the "special circumstances" that Barnett requires to override the Defendant's policy and defeat a motion for summary judgment. Barnett, 535 U.S. at 394.

3. Pretext

The Plaintiff next argues that the Defendant's "purported reason [for denying the job share] was false and that discrimination based on Perdue's disability was the real reason" for denying the job share. [Doc. 24 at

20]. In short, the Plaintiff argues that the Defendant's stated reasons were merely a pretext for discrimination. This invokes the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). See also Ullrich v. CEXEC, Inc., 709 F. App'x 750, 753 (4th Cir. 2017).

Under the McDonnell Douglas test, the Plaintiff has the initial burden of establishing a prima facie case of discrimination. See Perry v. Comput. Scis. Corp., 429 F. App'x 218, 220 (4th Cir. 2011). To establish a prima facie case, the Plaintiff "must show that: (1) she is disabled; (2) she was otherwise qualified for the position; and (3) she suffered an adverse employment action solely on the basis of her disability." See id. (citing Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 498 (4th Cir. 2005)).

Once the Plaintiff establishes her prima facie case,[10] the burden shifts to the Defendant to put forth a legitimate, non-discriminatory reason for the action. See McDonnell Douglas, 411 U.S. at 802. If the Defendant provides such a reason, the Plaintiff "bears the ultimate burden of persuasion" and "must show by a preponderance of the evidence that the proffered reason was a pretext for discrimination." Perry, 429 F. App'x at 220.[11]

As an initial matter, it should be noted that merely asking about an employee's health does not show a discriminatory motive. See Tyndall v. Nat'l Educ. Centers, Inc. of California, 31 F.3d 209, 215 (4th Cir. 1994). "[A]n employer must feel free to explore workplace problems with an employee without fear of making actionable statements at every turn. The civil rights laws prohibit discrimination, not discussion." Id.

Moreover, "it is not the job of this court to decide whether [the Defendant] made the right choice by not

[approving the job share proposal]. Rather, our job is simply to decide whether [the Defendant] made an illegal choice." Hannah P. v. Coats, 916 F.3d 327, 345 (4th Cir. 2019). This Court does not "sit as a kind of super-personnel department weighing the prudence of employment decisions." Feldman v. Law Enf't Assocs. Corp., 752 F.3d 339, 350 (4th Cir. 2014) (citations omitted)

A. The Meeting

The Plaintiff argues that the meeting between Anderson, Hunt, and the Plaintiff regarding the job share proposal shows pretext because Anderson already had all the information regarding Hunt's performance when she requested the meeting. [Doc. 24 at 2]. According to the Plaintiff, Anderson only requested the meeting to investigate the Plaintiff's medical issues and did so during the meeting when she asked the Plaintiff about her health. [Id.].

The forecast of evidence, however, shows that Anderson made limited reference to the Plaintiff's health during the meeting, and only did so in response to the Plaintiff explicitly referencing her health in the job share proposal. [Doc. 18-31 at 3]. The Plaintiff and Hunt only recalled that Anderson asked the Plaintiff, "[w]hen are you going to be coming back from medical leave?" [Doc. 28-2 at 168]. Anderson did not ask any extensive follow-ups after the Plaintiff described her medical status. [Doc. 18-2 at 123].

The Defendant's questions about the Plaintiff's status and when she could return were necessary since the job share proposal would need to begin quickly if it were approved and the Plaintiff was still on medical leave when the meeting occurred. As such, Anderson

had to ask when the Plaintiff could return to work to know when the job share proposal could start. None of this suggests any discrimination or pretext. After all, the Plaintiff's ability to return to work part-time was central to her being able to "perform the essential functions" of the proposed job share. 42 U.S.C. § 12111(8).

The forecast of evidence also shows that the Defendant's standard practice was to hold a meeting when an employee requested a job share. [Doc. 18-5 at 239; Doc. 18-34 at 2]. The meeting explored far more than just the Plaintiff's health. Anderson expressed her concerns about Hunt's performance during the meeting. [Doc. 18-12 at 35]. Anderson also used the meeting to discern whether the job share was viable based on the routes, schedules, and logistical details that the Plaintiff and Hunt had submitted. [Doc. 28-2 at 159-166]. As the Fourth Circuit has said, "an employer must feel free to explore workplace problems with an employee without fear of making actionable statements at every turn. The civil rights laws prohibit discrimination, not discussion." See Tyndall, 31 F.3d at 215.

The forecast of evidence associated with the meeting actually demonstrates the Defendant's lack of pretext.[12] Prior to the meeting, both Anderson and the Defendant's Human Resources gave Hunt and the Plaintiff approval to proceed with submitting the job share proposal, rather than denying the proposal at that stage. [Doc. 28-2 at 140-142]. Moreover, the Defendant prepared for the possibility of the job share being approved by seeking a waiver from a policy that would have prevented the job share from beginning immediately if approved. [Doc. 18-34 at 2]. The Plaintiff admits that the forecast of evidence related to the meeting shows that the Defendant considered the job share proposal "very seriously" and "discussed it

extensively." [Doc. 17 at 6-7; Doc. 18-18]. That forecast of evidence shows that the Defendant treated the job proposal as a realistic option, not one that was anticipated to be denied for a pretextual reason.

b. The Defendant's Reasons for Denying Job Share

The Plaintiff claims that the Defendant initially gave no reason for the refusal of the job share proposal and only later claimed it was for business reasons related to Hunt's performance. The Plaintiff further claims that the forecast of evidence shows that Hunt was a strong performer and any concerns about Hunt's performance would have been mitigated by the job share.

The forecast of evidence, however, shows that the concerns about Hunt's performance were well-documented and were not manufactured to create a pretextual reason for denying the job share proposal. According to Anderson, she never had "a problem with [the Plaintiff] for job share" and "[i]t wasn't [the Plaintiff's] ability that I really had a question about ever." [Doc. 18-12 at 285, 295]. Rather, Anderson was concerned about Hunt's performance. [Id. at 85]. Anderson's issues with the job share proposal included that: (1) Hunt lacked attention to detail regarding expense reports; (2) Hunt lacked attention to detail regarding oversampling of certain products; (3) Hunt was one of the lowest ESPs in the district in achieving a Sanofi metric known as Call Plan Adherence; (4) the proposal did not include a day when they would work together, which was important for planning; (5) Anderson only recently had begun supervising Hunt and felt uneasy about approving job share for such a new employee; (6) the Greenville territory could not support a job share because it was underperforming at the time

of the request; (7) Anderson felt that Hunt and the Plaintiff did not meet the qualifications for a job share; and (8) the recent restructuring had created a tense environment within the company. [Id. at 85-88, 236, 300; Doc. 18-49 at 2]. These concerns are well-documented in the forecast of evidence. For instance, Hunt's text messages from when she worked under Anderson show that she felt "like I am not trusted and that I'm seen as an employee that lacks attention to detail." [Doc. 28-2 at 268].

Hunt's 2017 mid-year performance review also documents the numerous issues she had under Anderson's supervision in the beginning of 2017. In her self-evaluation contained in that review, Hunt wrote that her "[s]trategic planning could be improved *for the second half of the year*" and that her "[p]lanning and strategizing will be more successful *due to more familiarity* to new territory." [Doc. 18-45 at 3] (emphasis added). Hunt also wrote that due to changes in the sales organization related to the restructuring, "things that are important have perhaps fallen behind." [Id. at 6]. Anderson wrote in that review that "*[e]arly in the year*, [Hunt] had some missteps with appropriate sampling, but quickly corrected her mistakes." [Id. at 8] (emphasis added). Finally, Hunt admitted in the review that "[t]he beginning of the year was admittedly challenging to adapt to with all of the ... changes." [Id. at 7]. The beginning of 2017 was the only time that Anderson had supervised Hunt before she received the job share proposal.

The Plaintiff argues that her forecast of evidence still presents an issue of fact because Hunt expressed that she adapted to the new role by the time the job share proposal was submitted in March 2017. [Id. at 275]. The Plaintiff, however, points to nothing to overcome

the several other concerns regarding Hunt's performance to show that the Defendant's reasons for denying the job share proposal were pretextual.

The Plaintiff also argues that the Court should look at the forecast of evidence over a broader period of time. She asserts that Hunt received a good performance review and had won an award for her comparatively high sales figures under a previous manager in 2016. [Doc. 28-2 at 166]. At the hearing on the cross-motions for summary judgment, the Plaintiff also pointed out that Hunt's previous manager sent an email to Anderson recommending that she approve the job share request. The Plaintiff claims that Anderson's refusal to consider Hunt's prior employment history further shows the pretextual nature of the Defendant's decision.

Anderson testified, however, that she decided to base her decision solely on her personal experience managing Hunt during the first months of 2017. [Doc. 18-12 at 300]. Hunt had numerous issues during those months. [Doc. 18-45 at 3-7]. Anderson's refusal to consider Hunt's prior work performance may not have been the "right choice[,]" but that does not mean that Anderson's decision was "an illegal choice." Coats, 916 F.3d 327, 345 (4th Cir. 2019). The Court does not "sit as a kind of super-personnel department weighing the prudence of employment decisions." Feldman, 752 F.3d at 350.

Similarly, the Plaintiff argues that the denial was pretextual because the job share would have diminished any purported concerns about Hunt's performance by allowing the Plaintiff to take half of Hunt's responsibilities. [See Doc. 17 at 18]. While Hunt had strong sales figures, Anderson's concerns about Hunt's job performance related to her poor attention to detail and similar procedural issues, not her sales ability.

Hunt's procedural issues included trouble with filing expense reports, adhering to call plans, controlling samples of products, and strategizing and planning. [Doc. 17 at 17; Doc. 18-12 at 236; Doc. 18-45 at 3]. In addition, Hunt's procedural issues were magnified by the changes associated with the restructuring. [Doc. 18-45].

These shortcomings would have been exacerbated by a job share. Strict attention to and documentation of the details is all the more crucial when coordinating with a job share partner. Also, working fewer hours would tend to push Hunt to focus more on sales and less on paperwork and other procedural details. In this way, a job share would have halved Hunt's greatest strength – her sales abilities – by only having her work half of each week. Further, the job share proposal did not include a day when the Plaintiff and Hunt would work together, which would tend to make Hunt's planning and handling procedural issues more problematic. [Doc. 18-12 at 88]. As such, the Plaintiff's argument is unsupported by the forecast of evidence.

c. Anderson's Comment

The Plaintiff claims that Anderson allegedly saying "I bet there's more to that story" regarding the Plaintiff's termination is evidence that the Defendant's stated reason for the Plaintiff's termination was a pretext. [Doc. 24 at 21]. The Plaintiff's argument as to what this statement might mean is simply conjecture and speculation.[13] Moreover, the Plaintiff presents no evidence of the context in which this statement was made. Through discovery, the Plaintiff has obtained numerous communications between the Defendant's

employees regarding the job share proposal, the Plaintiff's return to work, and possible accommodations for the Plaintiff. The Plaintiff can point to nothing in any of those documents to support her assertion regarding Anderson's comment.

. Failure to Reconsider After Hunt's Review

The Plaintiff also argues that the Defendant's refusal to reconsider the job share proposal after Hunt received her 2017 mid-year performance review from Anderson is evidence of discrimination. The forecast of evidence does not show, however, that Hunt or Perdue ever submitted a new job share proposal or requested another review of their original proposal. Further, a job share involving Hunt was not realistic during that time because of *Hunt's* health troubles, leave of absence, continued problems with Anderson, and the Defendant's pending restructuring.[14]

The Plaintiff's forecast of evidence is insufficient for a jury to find pretext in this case. That evidence, even taken in the light most favorable to the Plaintiff, shows that the Defendant rejected the job share proposal for a legitimate business reason after seriously considering its viability and attempting to find alternative accommodations that would enable the Plaintiff to remain employed by the Defendant. [Doc. 17 at 6-7]. After those efforts failed, the Plaintiff was terminated because the Defendant "could not grant what amounted to an indefinite leave." [Id. at 11].

The Defendant has articulated a non-discriminatory reason for denying the job share proposal and the forecast of evidence shows that the Defendant's reason was not merely a pretext for discrimination. Therefore, the Plaintiff has failed to show that the

Defendant's proffered reason for denying the job share was pretextual and summary judgment will be granted for the Defendant.

The Plaintiff's forecast of evidence has failed to present a triable issue of fact regarding whether the job share proposal was ever available as a reasonable accommodation because the job share position was never vacant and the Defendant's explanation for denying the job share proposal was not pretextual. The Plaintiff has failed to offer any evidence of any other reasonable accommodation that would have enabled her to perform the essential functions of the position that she held or a vacant position that she desired.[15] See 42 U.S.C. § 12111(8). As such, the Plaintiff's forecast of evidence is insufficient to raise an issue of fact as to whether the Defendant failed to reasonably accommodate the Plaintiff in violation of the ADA.

B. Failure to Engage in the Interactive Process

The Plaintiff's second claim is that the Defendant failed to engage in the interactive process required by the ADA. [Doc. 1 at ¶ 55; Doc. 20 at 23].

The ADA imposes a good-faith duty on employers and employees "to engage in an interactive process to identify a reasonable accommodation" once an employee communicates her disability and a desire for accommodation. Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562, 581 (4th Cir. 2015) (citing Wilson, 717 F.3d at 346). "[B]oth parties have an obligation to proceed in a reasonably interactive manner to determine whether the employee would be qualified, with or without reasonable accommodations, for another job within the company and, if so, to identify an appropriate reassignment opportunity if any is reasonably

available." Smith, 180 F.3d at 1172. The interactive process "is not an end in itself; rather it is a means for determining what reasonable accommodations are available to allow a disabled individual to perform the essential functions of the position sought." Wilson, 717 F.3d at 347 (quoting Rehling v. City of Chicago, 207 F.3d 1009, 1015 (7th Cir. 2000)).

"[A]n employer will not be liable for failure to engage in the interactive process if the employee ultimately fails to demonstrate the existence of a reasonable accommodation that would allow her to perform the essential functions of the position." Jacobs, 780 F.3d at 581; see also Wilson, 717 F.3d at 347 ("[A]n employer who fails to engage in the interactive process will not be held liable if the employee cannot identify a reasonable accommodation that would have been possible."). The Plaintiff "bears the burden of identifying an accommodation that would allow a qualified individual to perform the job." Shin v. Univ. of Maryland Med. Sys. Corp., 369 F. App'x 472, 481 (4th Cir. 2010).

First, the Plaintiff argues that the Defendant's failure to engage in the interactive process is shown by the Defendant taking "many months to simply deny" the Plaintiff's job share proposal. [Doc. 20 at 21]. It is undisputed that the Defendant received the job share proposal on or about March 9, 2017, and denied the proposal on or about May 3, 2017. Therefore, contrary to the Plaintiff's argument, the Defendant did not take "many months to simply deny" the Plaintiff's job share proposal. [Doc. 20 at 21]. Instead, as the Plaintiff admits, the Defendant took less than two months to "very seriously" and "extensively" review the proposal. [Doc. 17 at 6-7]. In fact, the Plaintiff's conceding that the Defendant's review of the job share proposal was serious and extensive undermines her argument that the

Defendant failed to participate in the interactive process to find a reasonable accommodation for her.

Second, the Plaintiff argues that the Defendant's failure to engage in the interactive process is shown by the Defendant not revisiting "the job share issue" after denying the Plaintiff's job share proposal. [Doc. 20 at 22]. The Defendant, however, never revisited the job share proposal during the Plaintiff's leave for several reasons. The job share proposal became untenable shortly after it was denied because Hunt suffered a seizure that caused her to take a two-month leave of absence. [Doc. 28-2 at 198-99, 222]. Hunt returned to work on July 17, 2017, but the cause of her seizures was still undetermined. [Id. at 222-23]. Hunt's health would have lent complete uncertainty to any such job share proposal.

Hunt also continued to have issues with Anderson even after returning from her medical leave, which ultimately led her to resign in November of 2017. [Id. at 50]. There is no evidence that Hunt was willing to go along with a job share under Anderson after returning from her leave of absence.

Roughly a month after Hunt returned from leave, the Defendant announced that it was going to restructure again at the end of 2017. [Id. at 224]. While the law allows for accommodations by moving an employee to a "vacancy," there would not be any vacancies until the new structure had been determined. Even if the job share proposal had been reconsidered and approved, its future would have been most uncertain given the restructuring.

Moreover, it is undisputed that the Defendant's neutral, nondiscriminatory policy required employees to request a job share before a manager will review their proposal. [See Doc. 18-4]. As such, it was up to the Plaintiff and Hunt to submit a new job share proposal or

to request reconsideration of their original job share proposal. Neither the Plaintiff nor Hunt submitted a new job share proposal or asked Anderson to reconsider their original proposal.[16]

Even if the Plaintiff had resubmitted the job share proposal, the Plaintiff fails to articulate how the Defendant could reasonably have made a cogent business decision in reassessing the job share proposal given Hunt's medical issues, Hunt's recent two-month absence, Hunt's continued issues with Anderson, and the Defendant's pending restructuring.

Third, the Plaintiff argues that the Defendant's failure to engage in the interactive process is shown by it keeping the Plaintiff "on medical leave ... after job share was denied, even though her physician updated her condition every three weeks indicat[ing] she could work part-time near Greenville." [Doc. 20 at 22]. The Defendant extended the Plaintiff's medical leave of absence three times, for a total of six months, while it tried to identify a reasonable accommodation. [Doc. 18-16]. During that leave of absence, several of the Defendant's employees discussed options to accommodate the Plaintiff, including the Plaintiff's job share proposal. [Docs. 18-18; 18-19; 18-20; 18-25; 18-26]. Despite those efforts, the Plaintiff never identified a reasonable accommodation that would have allowed her to perform the essential functions of her position or another vacant position. [Doc. 18-1]. The Plaintiff also requested a part-time position during her leave of absence, but the Defendant responded that no part-time position was available at that time. [Doc. 18-26]. As addressed supra, reassignment to a permanent part-time position from a full-time position and the creation of an entirely new position are not reasonable accommodations. See Nartey-Nolan, 91 F. Supp. 3d at

775 (stating that assigning an employee to a permanent part-time position when the employee's primary position is full-time is not a reasonable accommodation); Bilinsky, 928 F.3d at 572 (stating that the ADA does not require an employer to create a new position as an accommodation to a disabled employee).

Finally, the Plaintiff argues that the Defendant's failure to engage in the interactive process is shown by the fact that it did nothing after denying the job share proposal. [Doc. 20 at 9]. During that same period, however, the Plaintiff never identified a reasonable accommodation. Jacobs, 780 F.3d at 581. The Plaintiff only requested the job share and thereafter a part-time position in Greenville as accommodations. Neither of those, however, could serve as a reasonable accommodation. Because the Plaintiff never identified a workable reasonable accommodation, the Defendant has no liability to the Plaintiff for failure to engage in the interactive process.

C. Termination of Employment

The Plaintiff argues that the Defendant violated the ADA by "terminating her employment." [Doc. 1 at ¶¶ 55-56]. The Plaintiff's own forecast of evidence, including her own physician's opinions, shows that the Plaintiff was unable to perform the functions of her position as an ESP in the Asheville territory. Thus, unless the Plaintiff could be accommodated by transfer to some vacant position that she was capable of performing, her termination did not violate the ADA. See 42 U.S.C. § 12111(8).

As stated above, the job share position was not a reasonable accommodation because it was not a reassignment to a vacant position. That fact, taken with

the Plaintiff's having never requested or identified a reasonable accommodation that would enable her to perform the essential functions of her position or another position she desired, allows for termination. 42 U.S.C. § 12111(8). "[E]mployers are not obligated to retain a disabled employee on unpaid leave indefinitely or for an excessive amount of time." See Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995).

D. Retaliation for Requesting a Reasonable Accommodation

The Plaintiff claims that the Defendant retaliated against her because she requested a reasonable accommodation. [Doc. 1 at ¶ 56]. To prevail on an ADA retaliation claim, "a plaintiff must show that: (1) [s]he engaged in protected conduct; (2) an adverse action was taken against [her] by the employer; and (3) there was a causal connection between the first two elements." Ullrich, 709 F. App'x at 753. "If this burden is met, the plaintiff must then show by a preponderance of the evidence that the proffered reason [for the adverse action] is pretextual or [her] claim will fail." Id. Therefore, to prevail on her claim, the Plaintiff must show that the Defendant's reasons for terminating her employment were pretextual. As addressed above, however, the forecast of evidence shows that the Plaintiff was terminated because she was unable to identify a reasonable accommodation that would enable her to remain employed by the Defendant. As such, the Defendant was unable to keep her on "unpaid leave indefinitely or for an excessive amount of time." See Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995); see also 42 U.S.C. § 12111(8). Therefore, the Plaintiff has failed to establish that the Defendant's proffered reason for

terminating her was pretextual and summary judgment will be granted for the Defendant.

E. Discharge in Violation of North Carolina Public Policy

Finally, the Plaintiff claims that the Defendant's decision to terminate her employment violates North Carolina public policy. [Doc. 1 at ¶¶ 59-68]. The North Carolina Equal Employment Practices Act states that

> [i]t is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.

N.C. Gen. Stat. § 143–422.2. North Carolina courts "look to federal decisions for guidance in establishing evidentiary standards and principles to be applied in discrimination cases." Johnson v. Crossroads Ford, Inc., 230 N.C. App. 103, 110, 749 S.E.2d 102, 107 (2013). Therefore, the Plaintiff's state law claim for wrongful discharge may also be analyzed under the federal-law framework. See, e.g., id. For the reasons previously stated, the Plaintiff is not entitled to relief under the ADA, so her state law claim for wrongful discharge also must fail.

F. Plaintiff's Partial Motion for Summary Judgment

The Plaintiff moved for summary judgment regarding the Defendant's liability and certain affirmative

defenses. [Doc. 19]. The Court having determined that the Defendant's Motion for Summary Judgment should be granted, for the same reasons the Plaintiff's motion is denied.

V. CONCLUSION

The Plaintiff claims that the Defendant violated the ADA by failing to accommodate her disability and terminating her employment. [Doc. 1 at ¶¶ 55-56]. The Plaintiff preferred a job share as an accommodation, but the ADA did not require the Defendant to grant the job share proposal because the job share was not a reassignment to a vacant position. The Defendant, however, seriously and extensively considered the job share proposal and denied the job share proposal in accordance with its policy due to concerns about the performance of the other employee involved in the proposed job share. After the proposal was denied, the Defendant kept the Plaintiff on leave while it continued to seek an accommodation that would allow the Plaintiff to remain employed. After those efforts failed, the Defendant terminated the Plaintiff's employment because the Plaintiff was unable to identify an accommodation that would enable her to continue her employment. In light of this forecast of evidence, no reasonable jury could conclude that the Defendant's actions constituted discrimination against the Plaintiff under the ADA.

ORDER

IT IS, THEREFORE, ORDERED that the Defendant's Motion for Summary Judgment [Doc. 16] is hereby **GRANTED** and this action is

hereby dismissed. **IT IS FURTHER ORDERED** that the Plaintiff's Motion for Partial Summary Judgment [Doc. 19] is hereby **DENIED**. A judgment shall be entered simultaneously herewith.

IT IS SO ORDERED.

Footnotes

1The Defendant's Twelfth Defense is that it took affirmative steps to engage the Plaintiff in the interactive process so it could determine what, if any, accommodations could be made to assist the Plaintiff in performing the essential functions of her job. [Doc. 6 at 11]. The Defendant's Fourteenth Defense is that it provided a reasonable accommodation by offering the Plaintiff nights in a hotel, but the Plaintiff refused that accommodation. [Id. at 12]. The Defendant's Fifteenth Defense is that it provided a reasonable accommodation by offering the Plaintiff a more comfortable car, but the Plaintiff refused that accommodation as well. [Id.]. The Defendant's Sixteenth Defense is that it approached the Plaintiff about an open position in Greenville, South Carolina, but the Plaintiff refused that accommodation too. [Id.].

2"At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party." Scott v. Harris, 550 U.S. 372, 380 (2007). This summary of facts is presented for the analysis of the Defendant's motion for summary judgment, so the facts are viewed in the light most favorable to the Plaintiff.

3On March 9, 2017, the Plaintiff's doctor notified the Defendant that the Plaintiff was "medically unable to work" and would "need to be completely out of work for the next several weeks." [Doc. 18-13 at 7]. The Defendant approved a leave of absence for the Plaintiff until April 3, 2017. [Doc. 18-16 at 1]. On April 3, 2017, the Plaintiff's doctor advised the Defendant that the Plaintiff would need to extend her medical leave another month. [Doc. 18-28 at 4-5]. The Defendant extended the Plaintiff's paid leave of absence through May 14, 2017. [Doc. 23-6 at 2]. On April 25, 2017, the Plaintiff's doctor notified the Defendant's third-party leave administrator that the Plaintiff could work 20-30 hours per week but was permanently restricted from travel outside of upstate South Carolina. [Doc. 18-50 at 2-3].

4The Plaintiff testified that the Defendant only offered one hotel night per week or every other week. [Doc. 18-2 at 173-74]. On a motion for summary judgment, the Court draws reasonable inferences in the light most favorable to the non-moving party. See Hooven-Lewis v. Caldera, 249 F.3d 259, 265 (4th Cir. 2001). As such, the Court views the proposed accommodation in the light most favorable to the Plaintiff here.

5Santana admitted that she was unaware that the Plaintiff had a disability at that time. [Doc. 21-15 at 47]. Santana believed that the Plaintiff needed accommodations because she was struggling to adapt to the new job in the larger Asheville territory, not dealing with a disability. [Id.].

6Based on the record, the precise date of the performance review is unclear because the document only states that it occurred sometime between May 1,

2017 and August 31, 2017. [Doc. 18-45; see also Doc. 28-2 at 271] (stating that Hunt remembers only that the performance review occurred in 2017].

7Hunt later claimed that she adapted to her new role by March 2017. [Doc. 28-2 at 275].

8On May 12, 2017, the Defendant extended the Plaintiff's paid leave of absence until July 9, 2017. [Doc. 23-7]. On July 27, 2017, the Defendant extended the Plaintiff's paid leave of absence until September 6, 2017, retroactive to July 9, 2017. [Doc. 23-8].

9Notably, the Plaintiff does not cite, and the Court did not find, a single case under the ADA where a Court required an employer to reassign an employee to a position that never actually became vacant, regardless of whether the employer ever reasonably anticipated that the position would become vacant or not.

10The Defendant argues that the Plaintiff has not met the third element of this initial burden because she does not claim that there was an available accommodation for the position she held in Asheville, and has presented no evidence that the jobs share position in Greeneville was ever vacant.

11The Plaintiff claims that the following forecast of evidence shows the pretextual nature of the Defendant's decision: (1) Anderson knew about Hunt's performance issues but still sought a meeting so that she could ask questions about the Plaintiff's health; (2) Anderson originally failed to give an explanation for the denial before later explaining that it was for business reasons related to Hunt's performance; (3) Anderson allegedly

told people "I bet there's more to that story" regarding the Plaintiff's termination; and (4) the Defendant refused to reconsider the job share after Hunt received a good performance review from Anderson in her 2017 mid-year review. [Doc. 24 at 20-21; see Doc. 17 at 12, 18]. At the hearing held regarding the cross-motions for summary judgment in this case, the Plaintiff argued that the Defendant's pretext is further demonstrated by Anderson's refusal to consider Hunt's previous performance under a different manager and the juxtaposition between Hunt's excellent sales record and the Defendant's purported concerns about her ability to job share.

12The lack of pretext is also shown by other parts of the forecast of evidence. The Defendant provided the Plaintiff with six months of paid leave so she could recover, offered her other accommodations, and notified her about other open positions. [Doc. 18-1; Doc. 18-2 at 31-33; Doc. 18-41].

13Notably, there is no discussion of this quote in the excerpts of the Anderson deposition that were filed on the record in this case.

14Moreover, even though the Plaintiff characterizes Hunt's review as "good," the document itself reflects that Anderson continued to have reservations regarding Hunt. [Doc. 18-45]. Cole described that Hunt's 2017 mid-year performance review as simply "okay." [Doc. 23-5 at 211].

15According to the Plaintiff, she is a qualified individual because she has "the ability to do other jobs within the company that [she] desires." [Doc. 24 at 5 (citing Smith,

180 F.3d at 1160-1161]. The Plaintiff, however, fails to acknowledge that the Court in Smith said that the "desires" language only applies to "*available* reassignment job[s]." Smith, 180 F.3d at 1161 (emphasis added). The Plaintiff failed to identify an *available* reassignment job that she could perform with or without reasonable accommodation.

16Even before the second restructuring was announced, the Defendant was rumored to be preparing for such. [Doc. 18-20 at 2]. The Plaintiff testified that she hoped that she would be reassigned to the Greenville territory as part of the potential restructuring. [Id.]. But she never submitted a new job share proposal.

FILED: August 3, 2021

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 19-2094 (1:18-cv-00221-MR-WCM)

JANET PERDUE Plaintiff - Appellant

v.

SANOFI-AVENTIS U.S., LLC Defendant – Appellee

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION Amicus Supporting Appellant

---

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk