No. 22-6016

IN THE

SUPREME COURT OF THE UNITED STATES

SHEILA GRAY -- PETITIONER

vs.

CITY OF DETROIT -- RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SHEILA GRAY

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FARMINGTON MI 48332

313-949-3737

ORIGINAL

QUESTION(S) PRESENTED

1. Whether Appellant presents substantial evidence that the unanimous jury verdict goes against the great weight of the evidence presented at trial and should be overturned.

2. Whether the court erred in admitting the IME report into evidence and allowing witness Dr. Gerald Shiener to testify from that report.

3. Whether the court erred in allowing witness Carlo Dennis to be present during the entire trial proceeding.

4. Whether the court erred in the modification of the jury instructions and the verdict form.

5. Whether the District Court Erred in the "Judgment" Dated, September 23, 2021.

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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EEOC v. Banner Health,
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STATUTES AND RULES

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Federal Rule of Evidence

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at ——or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

[ ] reported at---------- ; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix ---------- to the petition and is

[ ] reported at ---------- ------; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the ---------- court appears at Appendix --------- to the petition and is

[ ] reported at---------- - ---------- ; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was July 27, 2022 .

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____(date) in Application No.___ A _____ .

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[ ] For cases from state courts:

The date on which the highest state court decided my case was_____
A copy of that decision appears at Appendix

[ ] A timely petition for rehearing was thereafter denied on the following date: _____ , and a copy of the order denying rehearing appears at Appendix_____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on (date) in Application No. _____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

NA

Statement of the Case

FACT

The Petitioner was an employee of the Respondent City of Detroit since 1999.

In the course of her employment with the Respondent, she sustained injuries to her knees and psychological injuries. She experience stress, anxiety and depression at work for which she sought medical treatment.

On February 28, 2011 because of her medical disability and restrictions she was assigned to work at Record unit, Summary Judgment RE 31, Page ID # 621, but sgt. Carlos Dennis, placed her at Ident. to work the "Counter" where she often provided services to 150 – 200 peoples a day for a variety of services. The counter was very physical and extremely demanding. She was require to do, excessive walking and standing for a long period of time with little or no sitting in between customers, this went against her well documented medical restrictions.

In the summer of 2015, Ident. move to the DDC 17601 Mound Rd, Detroit MI 48212, she was assigned to do background checks.

June of 2016 the Petitioner suffering with work stress, anxiety and depression was force off work on a stress leave FMLA. She never received worker's compensation during her time off work for her injuries.

On August 2, 2016, the Petitioner requested and accommodation in writing immediately after she returned back to work from her Family Medical Leave (FMLA) not only did the Respondent deny her request for accommodation, sgt. Carlos Dennis moved her work station from the front of the building reassigning her to work the counter that was located in the back of the building

Sgt. Carlos Dennis called her on the office phone and told her to start working at the counter in that was located in the rear of the building. "He said Aloha Dodd is Pregnant and can't do a lot of (walking)" that she needs her trainee in the room next to her.

The same day she returned back to work from her FMLA leave, she submitted a written request for reasonable accommodations and a doctor's note confirming her medical restrictions to the Defendants. "Stating that she could not walk for prolonged distances, could not stand for prolonged periods, could not lift more than 10 pounds, and she was required to stand for 10 -15 minutes after "sitting for one hour or more." The City was well aware of her disabilities, her continued medical restrictions, and her need for accommodations. Amended Joint Final Pretrial Order, RE 103, Page ID # 2658

Petitioner verbally requested accommodations from Sgt. Carlos Dennis and informed him of her continued medical disability and restrictions he said "he was ordering her to work the counter." This assignment required a lot of walking and standing. Sgt. Carlos Dennis knew of Gray disability he knew that ordering her to work the counter would do a greater bodily harm to her ... He gave her a Direst order and forced her to work in an area that wasn't close to material and the essential needed to do her job

"example, the fax machine, printer, live scan computer and other item all which was location in the area in the front of the building.

By ordering her and requiring her to work the service counter, the Defendants failed to accommodate her disability, even after she continued to ask him for reasonable accommodations to a position within the company for which she would be otherwise qualified.

(Quoting Burns v. Coca-Cola Enters., Inc., 222 F.3d247,257(6th Cir. 2000).

Which would not cause her to have to walk and stand more than her medical disability allowed, Petitioner, Gray conditions worsen and escalated over the next few months. Supervisor Dennis (Maliciously and with Malice further violated and went against her known medical disability and known job restrictions.

Gray, supervisor changed her workstation her prior position was not eliminated, and she was able to perform her duties for many years.

Petitioner, Gray had a well documented medical history from her doctors regarding her disabilities and her medical restrictions that continued and never changed.

Supervisor Dennis testified that he had moved Appellant so that a different employee who was pregnant could use her old space and not have to do too much (walking) (Appellant communicated to Hall in a very lengthy email specifically referenced that issue, as well as her informing him that working the "counter" violated her "restrictions." There again she requested an accommodation and help from a supervisor – she wasn't provided with any office equipment or seating and by moving her to the counter went against her disability and medical restrictions and her need for an accommodation - to trigger the City's obligation the interactive process. See Moore v. Hexacomb Corp., 670 F. Supp. 2d 621, 630 (W.D. Mich. 2009.)

The Respondent do not dispute that, Gray is disabled within the meaning of the ADA, nor do Defendants dispute that Appellant was fully qualified for her job with or without accommodation. Petitioner, Gray has produced evidence to show that she was never accommodated. Amended Joint Final Pretrial Order, RE 103, Page ID # 2655-2656

REASONS FOR GRANTING THE PETITION

1. EVIDENCE SHOWS AND PROVES THE UNITED STATES OF APPEALS FOR THE SIXTH CIRCUIT COURT OF APPEALS ERRED WITH ITS ORDERS AND DENIED PLAINTIFF/APPELLANTS – APPEAL.

2. THE RESPONDENT HAVEN'T PROVIDED ANY EVIDENCE ESTABLISHING THAT ACCOMMODATION WAS UNREASONABLE AND TOO COSTLY THAT IT WOULD HAVE CAUSED THE "CITY OF DETROIT" AN "UNDUE HARDSHIP"

3. EVIDENCE SHOWS "APPEDIX D" JUDGE GOLDSMITH'S HELD THAT "PETITIONER, GRAY" POSITION WAS NOT ELIMINATED; (RETURNING HER TO THE PREVIOUS WORKSTATION) WOULD NOT HAVE CAUSED THE RESPONDENT AN UNDUE HARDSHIP. SHE WAS ABLE TO PERFORM THE FUNCTION OF THAT POSITION FOR MANY YEARS. THEREFORE, GRAY HAS MET HER BURDEN.

This case involves a claim of "Failure to Accommodate (herein "ADA") violation of the America with Disability Act, 42 U.S.C. § 12101 et seq. arising out of Gray employment with the City of Detroit. The law requires an employer to provide reasonable accommodation to an employee or job applicant with a disability, unless doing so would cause significant difficulty or expense for the employer ("undue hardship").

Disability discrimination also occurs when a covered employer or other entity treats an applicant or employee less favorably because he or she has a history of a disability (such as a past major depressive episode) or because he or she is believed to have a physical or mental impairment that is not transitory.

On July 9, 2018 Plaintiff (herein "Plaintiff") filed suit against the City of Detroit (herein "Respondent") and on July 27, 2018 Petitioner, Gray filed an Amended complaint of Violation of the Americans with Disabilities Act.

On February 18, 2020 Judge Goldsmith render an order granting the Gray a claim of Failure to Accommodate "ADA" The American with Disabilities Act.

Petitioner, Gray presented evidence that she complained and requested an accommodation to her supervisor right away when she was order to work counter resulting in her having to stand and walk continually.

Gray, testified about the challenges she encountered in being assigned to work the counter. For instance, she explained, that it involved a lot of standing and walking pulling several files, index card and anything else that's was needed to fill the order for each ticket. She had to walk up to the front of the building make copies pull the files and other task, check for and get her emails and faxes that she received daily, send response emails and faxes, she had to do this for each ticket. She also explained that "there was no seating at the counter as shown in the picture. The City did not dispute Petitioner, Gray characterization of the counter work and the frequency of the task.

Report and Recommendation RE 39, PageID # 1503.

Carlos Dennis testified that the Petitioner, Gray had to sit all over the place. That she was never accommodated. Transcript R. 128 Page ID ## 3100 " Line 18-23".

The Petitioner, Gray received inappropriate reassignment for her medical duty restrictions. The pattern of behavior she received from the Petitioner was clearly an "Abuse of Power" that continued to escalate.

"Not making reasonable accommodations" is listed in the ADA's definition of disability discrimination, 42 U.S.C. § 12112(b)(5)(A), "claims premised upon an employer's failure to offer a reasonable accommodation necessarily involve direct evidence (the failure to accommodate) of discrimination."Kleiber v. Honda of Am. Mfg, Inc., 485 F.3d 862, 868 (6th Cir, 2007)."

Summary

This Appeal arises from the City of Detroit - Respondent Failure to Accommodate. An employer has a duty under the ADA to consider transferring a disabled employee who can no longer perform his old job even with accommodation to a new position within the company for which that employee is otherwise qualified "kliber v. Honda of Am. Mfg., Inc 485 F.3d 862, 869 (6th Cir. 2007) Quoting Burns v. Coca-Cola Enters.,222 F .3d 247, 257 (6th Cir. 2000).

Petitioner, Gray has presented her physician-imposed walking restriction which are consistent with medical records streching over a decade. The termination of Gray from her position was based upon her disability and violated the forgoing provisions of the Act in one or more ways. including failing to allow her to continue in a position that she performed beyond satisfactory. See (Appedix G).

The City did not engage in an interactive discussion with Gray about the specific issue. She also presents evidence that she raised the issues at least one more time with a different supervisor, Braxton Hall, specifically referencing her "restrictions" in connection with difficulties being at her new "work location" and working at the "counter."

There was no sort of interactive discussion that followed Petitioner, Gray communication with Hall from the Respondent.

Gray provided her employer and supervision with enough information that she had a disability and the desire and need for an accommodation. Taylor v. Phoenixville Sch. Dist., 184 F .3d 296, 313(3d Cir. 1999) see also Thompson v. E.I Dupont denemours & Co., 140 F Supp.2d 764, 774 n. 8 (E.D Mich. 2001)

The City presented no evidence that moving Gray and or providing her the necessary equipment would have caused it any burden or undue hardship.

U.S. Airways v. Barnett, 535 U.S. 391 (2002). The Court of Appeals held that "the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to the employer."

Plaintiff-Appellant is an individual with a disability within the meaning of the Americans with Disability act, 42 USC 12102.

Argument

1. Whether Gray presents substantial evidence that the unanimous jury verdict goes against the great weight of the evidence presented at trial and should be overturned?

The Respondent City of Detroit failed to provide the necessary accommodation.

Although there is "no bright-line test for when the form of an employee's request is sufficiently clear to constitute a request for an accommodation, "*Judge* v. *Landscape Forms, Inc.,* 592 F. App'x 403, 407 (6th Cir. 2014) and "an employee need not use the magic words 'accommodation' or even disability," Leeds v. Potter, 249 F. App'x 442, 449 (6th Cir. 2007). The request does need to make it clear from the context that it is being made in order to conform with existing medical restrictions." *Leeds* **v.** *Potter,* 249 Fed.Appx. 442, 449 (6th Cir. 2007).

a. Gray has presented Evidence to prove and establish her claim of failure to accommodate a disability in violation of the Americans with Disabilities Act.

Petitioner-Gray presented substantial evidence that the City of Detroit failed to accommodate her. She is an individual with a disability within the meaning of sec.3(2) of the ADA. 42 U.S.C. §12102(2). Specifically, Appellant has a physical impairment that substantially limits one or more of her major life activities; she has a record of the impairment, and is regarded by Defendant as having the impairment.

b. Gray has presented evidence that she's an individual with a disability as the term is defined in the ADA. 42 U.S.C. §12111(8).

Gray is an individual who, with reasonable accommodation was able to do her job. The Respondent refused to place Gray in a position that was open at the time of her request but placed her in a position that went against her medical disability and the ADA. The Respondent failure to provide reasonable accommodations to the Petitioner - Gray constitutes discrimination against her in respect to the terms, conditions, or privileges of employment. This conduct constitutes a violation of the ADA 42 U.S.C. §12112(b)(5)(A). She presented evidence that establish a prima facie case for failure to accommodate under the ADA.

(1) She is disabled within the meaning of the Act; (2). She is qualified for the position, with or without reasonable accommodation; (3) Her employer knew or had reason to know about her disability ;(4) She requested an accommodation and (5) The employer failed to provide the necessary accommodations. Johnson v. Cleveland City School District, 443 Fed. Appx. 974, 982-983 (6th Cir. 2001), citing DiCarlo v. Potter, 358 F. 3d 408, 419 (6th Cir. 2004). Gray employer the City of Detroit, knew and was made aware of her disability the same day her injuries occurred on the job.

c. Gray provided factual evidence with witnesses Technician, King and Officer Scott testimonies.

They provided actual facts from what they observe during their employment with the Respondent, City of Detroit. They provided statement in good faith, the contents of which are a true and accurate account of events which took place during the performance of their duties and personal knowledge

While documents may give you the clearest record of key events, the most revealing information comes from employees. The pivotal element of almost every workplace investigation is the employee interview. Employees are sources of tremendous information. When they cooperate, they can explain relevant facts and interpret relevant documents. They can give insights into management styles and corporate cultures that put specific employee conduct into context from first-hand knowledge of the situation.
Fed. R Evid. §602 provide, "Needed Personal Knowledge". "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony."

2. Whether the court erred in admitting the IME report into evidence and allowing witness Dr. Gerald Shiener to testify from that report.

Petitioner, Gray objected to this report being introduced as substantive evidence as it is not an admissible Dr Shiener testified that his report was done from an IME. Michigan has long held the IME reports are not admissible. Plaintiff-Appellant argues that the trial court erred in its discretion in admitting in evidence the report of witness Dr. Shiener

Gray, expressed concerns with defendant of priviledge, privacy and HIPPA Laws and failure on doctor Shiener behalf to abtain consent from Gray.

Dr. Shiener testified he had discussion with Gray and that he will testified to what she said to him. Defense counsel never obtain prior consent from Grat and failure to abtain a quilified protective order is a breach of her ethical obigations as an an attorney but is required by law under HIPPAA to protect the Appellant personal informantion. The Respondent also breached his ethical and legal obligations as a mental health professional for speaking without consent from the Petitioner, Gray.

Dr. Shiener never had any type of discussion with the Petitioner, Gray about releasing any of her personal information, due to the sensitive nature of the information that may be discuss. Holman v. Rasak, 486 Mich 429, 432; 785 NW2d 98 (2010). Dr. Shiener disregarded his obligation to attempt to obtain a protective order and simply violated Gray rights PHI pursuant to HIPAA.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) intent to protect patient privacy. "Any information, whether oral or recorded in any form or medium that is created and received by a health care provider and relates the past, present, or future physical or mental health or condition of an individual." 42 U.S.C. §1370d.

"The definition of a breach of HIPAA includes .... the unauthorized acquisition, acces, use, or disclosure of PHI which compromises the security or privacy of such information, except where an unauthorized person to whom such information is disclosed would not reasonably have been able to retain such information." Gongwer v. Samaritan Regional Health Sys, 69 F Supp 3d 686, 693 (ND Ohio, 2014)

Striking a witness is an appropriate sanction for the violation in this case as explained in Rodriguez v. City of N.B., 2017 U.S. Dist. LEXIS 192405; 2017 WI. 5598217.

Clearly, Gray mental health and life circumstances surrounding her mental health are PHI, are protected by HIPAA, and should have never been discussed absent a protective order.

In general, a record "prepared for the purpose of litigation" lacks the trustworthiness that is the hallmark of a ducument properly admitted pursuant to MRE 803(6). 29A Am Jur 2d, Evidence, § 1313, pp 720-721. Michigan adheres to this general rule People v Cortez, 131 Mich App. 316, 330, 346 N.W .2d 540 (1984) ("documents prepared for use in litigation are excluded by this qualificaion [i.e., trustworthiness] The trial court error in allowing Dr. Shiener to testify from the IME report because the circumstances surrounding its preparation indicate a lack of trustworthiness. "The Respondent retained Dr. Shiener not to treat Gray, but strictly to utilize his testimony an a witness for the Respondent. Thus, any document that Dr. Shiner prepared that pertained to his examination of Gray necessarily originated solely for purposes of litigation. Because of this, Dr. Shiener report lacks the trustworthiness.

The Petitioner requested that Dr. Shiener testimony be excluded.

The City, as well as Gray's supervisors, were aware of her medical disabilities and needed accommodations.

"In Darrin Rushing v. MDOC, as a result of the Defendants failure to accommodate the Plaintiff and forcing him to have contact with the prisoner who assaulted him, Plaintiff suffered a PTSD episode on July 17, 2015, as a result of his PTSD being trigged by the Defendants failure to accommodate him. Plaintiff's doctor recommended that he take 3 weeks leave as a result of the PTSD.

On July 20, 2015, Plaintiff wrote yet another request to Defendant MDOC in writing requesting an accommodation in the form of a No Contact Order with the violent prisoner. This was the 5th attempted request by Plaintiff for an accommodation in the form of a No

Contact Order. Defendant failed to respond to Plaintiff 5th request for an accommodation. Plaintiff returned back to work from medical leave due to his PTSD episode on August 8, 2015.

On August 9, 2015, the Plaintiff reported for assignment and again requested an accommodation (this was at least Plaintiff's 6th request). Defendant denied Plaintiff's reasonable request for accommodation not only did Defendant deny Plaintiff's request for accommodation, it ordered him to Chow Hall assignment where Plaintiff would come into direct contact with the violent prisoner who previously assaulted him and triggered his PTSD. Defendant's failure to accommodate Plaintiff forced him out of work on stress leave and FMLA leave." Darrin Rushing v. Michigan Department of Corrections, 2019-001635-CD.

a. Whether the Court erred in allowing the Respondent to introduce documents in evidence?

Gray objected to this evidence being allowed on the bases that (1) the judge err in allowing it to be admitted (2) It was not previously disclosed during the discovery period, and (3) it is irrelevant to these proceedings (4) Appellant did not have the opportunity to question witnesses or do discovery regarding the report. Fed. R Evid. §402 provide, "evidence which is not relevant is not admissible." Transcript R. 126, Page ID ## 2815-2816 Transcript R. 126, Page ID ## 2828.

Brewer v. Payless Stations, 94 Mich. App 281, 284, 288 N.W.2d .353 (1979). In Brewer the trial judge allowed the jury to receive evidence of the settlement agreement with GM. The Michigan Court of Appeals reversed the trial court and found that it committed error because the settlement agreement with co-defendant GM was not relevant. "Evidence of plaintiff's settlement with General Motors had no bearing on an issue of fact.. "Id. at 284.

The Court went on to state that "there is no need for the jury to know the amount of plaintiff's settlement with General Motors, or in fact, to even know that a settlement occurred.

3. Whether the court erred in allowing witness Carlos Dennis to be present the entire trial proceeding.

Sequestering witnesses is designed to serve two purposes: (i) to prevent a later witness from tailoring his or her testimony to that of a prior witness; and (ii) to assist the finder of fact in detecting unreliable testimony. See *State v. Harrell*, 67 N.C. App. 57 (1984); *State v. Jackson*, 309 N.C. 26 (1983). Sequestration of witnesses until they testify is authorized by both G.S. 15A-1225

1. The Court acknowledged that the state had an interest in ensuring that a witness not shape his testimony to conform it to that of the Petitioner witnesses that testified before them, but it concluded that barring Plaintiff later testimony, if he does not testify as the first defense witness, "is not a constitutionally permissible means of insuring his honesty

2. The trial court may require either that the party testify prior to presenting the testimony of his witnesses or that he be excluded from the courtroom prior to the time he himself chooses to testify.

3. He might have tailored his testimony to match that of witnesses who took the stand first.

4. One would question the credibility of the defendant witness who testifies after hearing prior testimony, you have to keep in mind and weigh in the balance the fact that he heard the testimony of all those who preceded him."

"Defense counsel questioning her witness Carlos Dennis"

a. (quoting defense counsel) "and you heard the testimony earlier"

Transcript, R. 127, Page ID # # 104 "LINE 20"

b. (quoting defense counsel) "'so you heard the testimony of Ms. Gray"

Transcript, R. 127, Page ID ## 3014 "LINE 21"

c. (quoting defense counsel) "Okay. You heard the testimony of Ms. King"

Transcript R. 127, Page ID ## 3029 "LINE 22"

4. Whether the Court erred in the modification of the jury instructions and the verdict form.

During the pretrial order the Petitioner - Gray and the Respondent presented Jury instruction, verdict form and other documents that was required before the trial started. The Court expressed in a lengthy document the order and layout of each documents. The parties went through several corrections that were finally approved by the court. Gray did not find out until the jury had reached a verdict and that the court had made changes that wasn't clear in context.

Gray was under the impression that the documents that the parties had submitted and received approval on would be used during the trial.

The Court made another change to jury instruction no. 37. The Petitioner wasn't aware of that change until after the trial ended and the document wasn't clear in context.

CONCLUSION

Petitioner - Gray requested Reasonable Accommodations to address her medical disabilities; her rights was violated and the City of Detroit never allowed or gave her a chance to heal or successfully perform her job duties with the proper accommodations. "EEOC v. Banner Health, CV-10-01432-SRB, FILED IN U.S. District Court for the District of Arizona in Phoenix, Banner Health." Fladmo had made numerous requests for reasonable accommodation which were ignored. This conduct violates the Americans with Disabilities Act (ADA). Which prohibits discrimination against qualified individuals with disabilities, and requires employers to provide reasonable accommodations to enable their employees to work, absent undue hardship.

Based on the information provided to establish claims of failure to accommodate Petitioner, Gray respectfully request this Honorable Court grant her Appeal.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/Sheila Gray

Date: October 24, 2022