Case No: 23-7331

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

CAROL ANN MCBRATNIE

Petitioner

v.

DENIS RICHARD MCDONOUGH, U.S. Secretary of Veterans Affairs

Respondents

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

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pro se Petitioner

QUESTION PRESENTED

Did the 6th Circuit Court of Appeals [Appeals Court] and the US District Court for the Eastern District of Michigan (US District Court) apply the wrong standard to a new job applicant under the Americans with Disabilities Act (ADA), by misapplying case precedents for a: return to work, last known as disabled, former "employee" job applicants ?

Preamble: As regards the Americans with Disabilities Act, as stated in *Grenier v. Cyanamid Plastics, Inc.,* 70 F.3d 667, 677 (1st Cir. 1995), *"neither Congress nor the EEOC took into account the case of a returning employee when formulating the restrictions on pre-offer inquiries"* of job applicants. A worker could simultaneously be covered under two statutes: both as a job applicant and an employee. Thus it is first necessary:

- to determine the subclass of job applicant that the case law precedents applied to, and
- the origination of the statutory authority for making "medical inquiries" of treating physicians for this subclass.

This is necessary in order to determine if the Judge-Made case law applied to McBratnie, or only Statute 42 USC §12112(d)(2) as written.

Simply stated: was the medical inquiry that was allowed in the case precedents, authorized by the job applicant standard 42 USC §12112(d)(2) or the employee standard 42 USC §12112(d)(4) ?

The case precedent of *Grenier,* only identifies that 42 USC §12112(d)(2) is not violated by a medical inquiry of a treating provider. It does not specifically identify where the authority to make the medical inquiry originates, such as under 42 USC §12112(d)(4) the employee standard.

Articulated in *Grenier*, supra p.677: was "*agree[ment] that [Grenier's] case is similar to that of an employee returning from disability leave.*" Also articulated in *Grenier*, supra p.678:

> In sum, an employer **does not violate Section(s) 12112(d)(2)** of the ADA by requiring a former employee with a recent known disability applying for re-employment to provide medical certification as to ability to return to work with or without reasonable accommodation, and as to the type of any reasonable accommodation necessary, as long as it is relevant to the assessment of ability to perform essential job functions.

Additional Questions For the case of McBratnie:

- If the above medical inquiry was authorized by the employee "business necessity" standard of 42 USC §12112(d)(4), and McBratnie was not a former employee but an outside new-hire job applicant, would "medical inquiries of physicians" still be allowed ?
- If the above medical inquiry was authorized based upon employer foreknowledge of disability status and McBratnie's disability status was unknown, would "medical inquiries of physicians" still be allowed ?
- For the case precedents cited, medical inquiries were to be made of "treating providers" who already had knowledge of the former employee job applicant. Can a medical inquiry be made of a physician that is not a treating provider without entailing a medical exam to inform such opinion? Are all inquiries of physicians equal, or dependent on their pre-existing relationship to the job applicant (treating versus non-treating provider) ?

The US Supreme Court has become the Court of last resort for supervisory powers.

PARTIES TO THE PROCEEDINGS

The Petitioner, the plaintiff-appellant in the 6th Circuit Court of Appeals, is

Carol Ann McBratnie, *MSN-RN ANP-BC, pro se.*

The Respondent, the defendant-appellee's in the 6th Circuit Court of Appeals, are:

Denis Richard McDonough, U.S. Secretary of Veterans Affairs

CORPORATE DISCLOSURE STATEMENT

A corporate disclosure statement is not required because McBratnie is not a corporation. *See* Sup. Ct. R.29.6.

STATEMENT OF RELATED CASES

McBratnie is aware of no directly related proceedings arising from the same lower court cases as this case, other than those proceedings appealed here.

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ABBREVIATIONS

ADA:	Americans with Disabilities Act of 1990 (ADA), 42 USC §12111, et seq.
AJ:	Administrative Judge of the EEOC, Andrea Niehoff
Appeals Court:	US Court of Appeals for the 6th Circuit
Lower Court(s)	US Court of Appeals for the 6th Circuit and the US District Court for the Eastern District of Michigan
MSJ	VA Motion for Summary Judgment
Rehabilitation Act	Rehabilitation Act of 1973, 29 USC §791, et seq.
ROI	Report of Investigation
US District Court:	US District Court for the Eastern District of Michigan

OPINIONS

JURISDICTIONAL STATEMENT

The 6th Circuit Court of Appeals [Appeals Court] issued their Order on January 26, 2024. This petition was timely filed April 24, 2024 (28 USC §2101(c)). The Supreme Court has jurisdiction under 28 USC §1254(1). US District Court Jurisdiction was asserted under both the Rehabilitation Act of 1973, 29 USC §791, et seq., and the Americans with Disabilities Act of 1990 (ADA), 42 USC §12111, et seq. The Courts asserted that jurisdiction was not sought under 29 USC §791. The US District Court Jurisdictional page is App.65a. Statute 29 USC §791(f): *Standards used in determining violation of section,* identifies that 42 USC §12111 et seq. is the applicable standard. 29 CFR §1630.13 and §1630.14 also apply.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The relevant Constitutional and statutory provisions are at App.66a-90a.

INTRODUCTION

This is an employment discrimination case under the Americans with Disabilities Act (ADA). This case involves applying a Judge-Made case law standard for a subclass of job applicants: who were also disabled former employees, to all job applicants irregardless of whether they are a former employee or not. For former employee job applicants, last known to the employer as being disabled from their work role, it was deemed acceptable to make a limited inquiry of the former employee's treating provider as to whether the worker was still disabled, and whether accommodations would be required so long as nothing else was sought.

The case precedents did not specifically identify that this Judge-Made standard was authorized under 42 USC §12112(d)(2) the ADA "job applicant" standard, or 42 USC §12112(d)(4) the ADA "Employee" standard. *Grenier*, supra p.677 *"agree[d] that this case is similar to that of an employee returning from disability leave."* and that

> In sum, an employer **does not violate Section(s) 12112(d)(2)** of the ADA by requiring a former employee with a recent known disability applying for re-employment to provide medical certification as to ability to return to work with or without reasonable accommodation, and as to the type of any reasonable accommodation necessary, as long as it is relevant to the assessment of ability to perform essential job functions. Grenier p678.

So perhaps the real issue is: if the inquiry does not violate 42 USC §12112(d)(2), is that because it was simultaneously allowed under a different section: 42 USC §12112(d)(4) because the "case is similar to that of an employee returning from disability leave." ?

The US Supreme Court needs to articulate what part of the ADA statute allowed for medical inquiries of treating providers, for former disabled employees, now job applicants, for each of the cited case precedents. If the authority was under the employee standard 42 USC §12112(d)(4), then the Judge-Made case law precedents did not apply to McBratnie a new-hire.

The US District Court for the Eastern District of Michigan (US District Court) and the 6th Circuit Court of Appeals (Appeals Court) both agree that the Judge-Made standard for former disabled employees re-applying for employment, is an acceptable standard to apply to "all" job applicants. This directly violates existing legislation of the ADA 42 USC §12112(d)(1 and 2) thus rendering the ADA void in protecting the disabled's right to be judged on their abilities versus their disabilities as regards employment. This interpretation violates the tenets of interpretation: by the Whole-Text Canon, the Presumption Against Ineffectiveness and the Presumption of Validity of the ADA. (see A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* §24 at 167; §4 at 63; §5 at 66; (2012)).

In the job application phase for McBratnie, the Veterans Administration (VA) sought a physician's medical opinion of a new, outside hire, non-former employee, pre-offer candidate from a staffing agency. This Medical Inquiry (App.91a) was the first step and the first data collected on a job applicant. The job applicant had to obtain a Physician Opinion / Confirmation that the job applicant "*[did] not have a physical or mental health condition that would adversely affect [their] abilit[ies] to carry out clinical privileges*". The Declaration of Health labeled the Physicians portion of this form as a "*Confirmation*" and requested the physician sign the statement "*I concur with the Declaration of Health*". The American Heritage Dictionary defines "*concur: to be of the same opinion*". The American Heritage Dictionary defines "*confirm: to support or establish the certainty or validity of; verify*". Missing from this request seeking a medical opinion from a physician, was the modifier "essential" for clinical privileges, and consideration if "accommodations" might mitigate any "adverse affect [on their] abilit[ies]" App.91a.

What the VA wrote is what is on trial. The Supremacy-of-Text Principle applies. see A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* §2 at 56 (2012). The job applicant, without a physician endorsement signature asserting the job applicant had no health limitations, was automatically discarded from the job applicant pool as articulated in the instructions provided for completing the job application (App.92a para. 1). The VA has asserted that "*a provider who cannot sign the Declaration of Health* [or who cannot obtain a physician endorsement of such] *knows that a health condition **might** compromise her clinical care and **is** therefore not qualified to treat VA patients.*" App.93a. This argument is from the specific "might" [as some 'might not'] to the general "is [or all are] therefore not qualified". The word "might" implies some but not all, and conflicts with "**all**" being implied in the conclusory statement: "**is** therefore not qualified".

McBratnie asserts the Declaration of Health was a way of excluding the most significantly disabled applicants: those requiring accommodations, from the job applicant pool. Whether intentional or not, the Declaration of Health had the effect of segregating and excluding disabled job applicants and not provisioning accommodations, for which both violate 42 USC §12112(b)(1-3,5-7) the *Construction* clauses of the ADA App.72a. The Declaration of Health was not an effective way of measuring the true abilities of a Nurse Practitioner:

Statute 42 USC §12112(b) *Construction*

> (7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results **accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure**, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

The Declaration of Health, if it met 42 USC §12112(b)(7) above, should have been able to answer which "**skills, aptitude or whatever other factor"** the Declaration of Health accurately measured or reflected or that the job applicant lacked. The VA has asserted the Declaration of Health determined if the Nurse Practitioner could provide "High-quality care". "*[T]he VA requires the professional to affirm that she is able to provide such high-quality care*" by signing the Declaration of Health (App.93a-App.94a).

The VA treats job applicants missing signatures on their job application paperwork as a clerical error, and disposes of the job application on that basis versus the true significance behind what absent signatures mean (App.92a para. 1). The VA has also granted themselves the right to permanently dispose of job applications where the Declaration of Health is unsigned, from their record archives as an incomplete or abandoned work-in-progress (discovery was withheld that would have confirmed this). This hides the proof of VA discrimination against job applicants, as they only retain the job applications that are "completed" or with signatures. This also eliminates identifying the class-actionable group who were discriminated against in employment at the VA.

The Supremacy of the Text Principle of the Declaration of Health: or "*The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means*" is paramount to proper resolve (Scalia & Garner §2, at 56). Throughout pleadings and Court Opinions, the actual text of the Declaration of Health is paraphrased to obscure what it actually requests of the job applicant. The US Supreme Court needs to interpret *The Supremacy of the Text Principle* of the Declaration of Health by what was actually written and requested.

The Whole-Text Canon requires the ADA statutes to be construed as a whole to identify where the case precedents cited fit in. As stated by Scalia & Garner §24, at 167:

> Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.

The Judge-Made standard by case precedents has either rewritten what Congress clearly stated in 42 USC §12112(d)(1 and 2), or the Lower Court(s) have misapplied the case precedents, as the case precedents or "*provisions [were not] interpreted in a way that renders them compatible [with the ADA, but] rather ... contradictory*" with the wording of the statutes (Scalia & Garner §24, at 168).

The Presumption Against Ineffectiveness requires reviewing the Lower Court(s) interpretation and application of the case precedents, as it hinders the purpose of the ADA in protecting disabled workers from having their disability status considered first, as well as being the basis of rejecting the applicant without considering if accommodations would eliminate disability barriers to equal employment (violates *Construction* clauses: 42 USC §12112(b)(3)(a) and 42 USC §12112(b)(5 and 6)).

The Presumption of Validity or an "*Interpretation that validates, outweighs one that invalidates*" or in this case, the case precedents as interpreted render the ADA void versus operative, in protecting McBratnie from being rejected as a job applicant based upon her disability status. The VA wrote in their Motion for Summary Judgment (MSJ): "*When McBratnie declined to sign that Declaration, the VA and CRA could only conclude that she might not be able to perform the essential functions of a nurse practitioner.*" App.95a-96a. The Declaration of Health did not verbally restrict the inquiry to only the "essential functions" or address the

positive effect "accommodations" have on actual disabilities (*The Supremacy-of-Text Principle* applies).

Findings of facts pertinent to this case were not directly nor conclusively articulated, nor were case precedents properly differentiated first before being applied to McBratnie. This resulted in incorrect legal analysis, and incorrect application of this Judge-Made standard to McBratnie.

I. INCOMPLETE OR UNARTICULATED FINDING OF FACTS

Scope of Practice Form is Immaterial to These Matters: Mentioned in EEOC Commission paperwork and elsewhere, the Scope of Practice form is immaterial to these matters, due to the VA refusing to provide discovery of comparative data of other job applicants application paperwork that would have demonstrated that other job applicants were held to a different standard than McBratnie. Additionally, McBratnie's Credentialer was credentialing job applicants differently than other credentialers, due to VA failure to provide copies of Credentialing Packets emailed by other Credentialers for comparison, requested and refused in discovery. Simply stated, the Scope of Practice form by the written instructions (App.92a #1 and #14) required the document to be returned with the hiring chiefs signatures already on it making the job applicant pre-approved for hiring before they had even turned in their application paperwork. No job applicant would have been able to obtain the hiring committees approval signatures before applying. All job applications therefore could not meet the written instructions, and all should have been discarded (App.92a). Comparative data was withheld in the Report of Investigation (ROI) and denied in discovery in all courts including the EEOC AJ case. This makes any argument related to the Scope of Practice a pre-textual basis that discrimination did not occur.

Essential Duties of the Role Undefined: If an applicant is asked '*Can you perform the essential duties of the job, with or without accommodations?*' it should be pertinent to identify what those "essential duties" were before an applicant is discarded. The VA in discovery in all courts withheld the job requisition that was applied to. It was not contained in the ROI. This is pertinent as they combined "all duties" labeled as "clinical privileges" into one global inquiry in the

Declaration of Health, instead of querying information regarding "essential duties or essential clinical privileges" only. McBratnie affirmatively answered the standard question elsewhere that she could perform the essential duties of the job, with or without accommodations (App.97 question 15). If this question were not affirmatively answered, the VetPro software would have discarded McBratnie's application in accordance with the ADA (unable to perform the essentials with or without accommodations). This fact is pertinent in that the VA has asserted "*When McBratnie declined to sign that Declaration, the VA and CRA could only conclude that she **might** not be able to perform the essential functions of a nurse practitioner.*" App.95a-96a. If McBratnie made it to the step where the Declaration of Health being missing or missing signatures was being evaluated, it was already known that McBratnie attested to the ability to perform the essential functions of the job with or without accommodations in VetPro. The different wording contained in the Declaration of Health was seeking severity of disability information and the need for accommodations. It does not evaluate the ability of the job applicant to perform specific job functions, essential or otherwise. The Declaration of Health's purpose was a way to discard the most severely disabled job applicants from the candidate pool.

The essential duties of a primary care provider are: diagnostician thinking skills; physical assessment; and in-office procedures depending on generalist versus specialty designation. But again, that job description was withheld in discovery. What the VA deemed to be essential functions of this job remain unknown. McBratnie had just finished working a locum assignment at an internal medicine practice in Minnesota as attested to by question 15.

McBratnie became disabled in 2004, 2008, and additionally in 2009. McBratnie completed her Nurse Practitioner Master's Program 2010-2012, and passed the certifying exam. The only academic accommodations needed were on the amount of typing necessary to log the

number of encounters McBratnie was seeing in clinicals. McBratnie was seeing and treating two to three times more clients than her peers, engendering increased documentation required to be entered into the schools case log. Negotiated accommodation in the academic setting, was printing out the medical clinic's note (typed by McBratnie), de-identifying it, and turning this in instead. Dragon speak (speech to text software) was incompatible with the school's EHR software simulator.

Changing Phraseology: Clinical Care, Clinical Privileges, High-Quality Care and essential duties of the job are not interchangeable terms. The VA paraphrases the actual wording of the Declaration of Health to make it sound more innocuous in what was sought (App.95a-96a "Analysis"). Compared with the actual wording of the Declaration of Health (App.91a), the word "essential" was missing as a modifying term of "Clinical Privileges" thus the Declaration of Health encompassed "all" Clinical Privileges including non-essential ones. Being that the job applicant was discarded due to absence of signatures, the only applicants that should be discarded are those that are unqualified because they cannot perform the essential functions of the job with or without accommodations. Because discarding the job applicant is the end result of the unsigned Declaration of Health, the Declaration of Health should have been restricted to "essential" functions only, and it was not.

To know if the Declaration of Health met the inquiry standard allowed by 42 USC §12112(d)(2)(B):

(B) Acceptable inquiry

> A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions.

by necessity one should know what the essential job-related functions were.

Declaration of Health: The US Supreme Court needs to keep in mind the timing of the requested Declaration of Health, as it was the first data collected on a job applicant, and was used to exclude the job applicant from the pool of candidates before their qualifications for the position were reviewed.

The Credentialing Handbook 1100.19 was withheld from the ROI because it speaks to the Civil Rights deprivation / *Mens Rea* of the intentions and timing of the Declaration of Health by the VA. The Credentialing Handbook 1100.19 was not tendered to the job applicant and was not in the purview of the job applicant as a vehicle to interpret the Declaration of Health at the time of requested signing. This impacts how "physician confirmation" could be interpreted at the time of completing the job application. *The Supremacy-of-the-Text* of the Declaration of Health applies. The only information regarding "physician confirmation" or who could sign the Declaration of Health was from the Declaration itself and the Credentialing Checklist, App.92a item 4: "*If you are transferring from another VA please have the Employee Health Unit at your current VA sign off on this before you leave*". Employee Health Unit would be equivalent to Occupational Health Clinics. This begs the issue for employee transfers under the ADA, that the VA was violating 42 USC §12112(d)(4) also, as the Employee Health Unit would not necessarily be a treating provider nor should it be assumed all transferring employees were disabled. Statute 42 USC §12112(d)(4) the ADA standard for employees states:

> (4) Examination and inquiry
>
> > (A) Prohibited examinations and inquiries
> >
> > A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a

> disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

If the transferring VA employee was already fulfilling the role of "Nurse Practitioner" at another VA clinic, then the presumption should be that the transferring Nurse Practitioner "*[did] not have a physical or mental health condition that would adversely affect [their] abilit[ies] to carry out clinical privileges*", so there should be no need to require compliance with the Declaration of Health, unless the VA wanted to know if the employee had acquired unknown disabilities not affecting the work role. The transferring employee remains a continuous employee and continually under the protections of 42 USC §12112(d)(4) to not be subject to inappropriate medical exams or inquiries as there was not a business necessity created simply by transferring from one job to another within the same employer.

With Accommodations, McBratnie is not disabled. Without Accommodations McBratnie might be disabled. The words "with or without accommodations" were also missing in the Declaration of Health, thus ignoring the possibility any job applicant might not be "adversely affected" if accommodations were provided. The Declaration of Health and the Credentialing Handbook do not discuss provisioning accommodations at all. The application is discarded without accommodational discussions, and the Declaration of Health is used in a manner in direct violation of the *Construction* clauses of the ADA at 42 USC §12112(b)(1-3,5-7) App.72a.

The VAs argument in their MSJ, identifies their own prejudice that a disabled job applicant cannot provide "high quality care" to veterans. This is the prejudice the ADA was created to stop. The VA asserted in their MSJ excerpt App.93a-94a "Introduction" paras 3 and 4:

> A provider who does not know of any such condition can sign the Declaration. Conversely, a provider who cannot sign the Declaration knows that **a health condition <u>might</u> compromise her clinical care and <u>is</u> therefore not qualified to treat VA patients**.
>
> > [If the health condition was provisioned accommodations, then it **<u>might not</u>** compromise clinical care.]
>
> Accordingly, the Declaration comports with the requirements of the Americans with Disabilities Act and the Rehabilitation Act, which allow employers to ask prospective employees whether they will be able to perform the **<u>essential functions</u>** of the job they seek.
>
> > [The Declaration did not restrict itself to "essential functions" or "essential clinical privileges". Just "clinical privileges" collectively, connoting "all". The above statement is a conclusion of law, not a fact. The manner of inquiry was couched in terms of disability].

The VA in stating above "*a provider who cannot sign the Declaration knows that **a 'health condition' <u>might</u> compromise her clinical care and <u>is</u> therefore not qualified to treat VA patients***" told the Courts how they make use of the Declaration of Health, not for accommodational discussions, but as a standard to exclude disabled job applicants (those with "health conditions" that would adversely affect their abilities) for which they discard their job applications.

In the VA's Credentialing Handbook 1100.19, the VA granted themselves the right to contact the confirming physician for unlimited additional information regarding the health status of the job applicant, all before extension of a job offer. App.100a (j) health status (1) "*Confirmation, **<u>at a minimum</u>**, is to be in the form of a countersignature by the confirming physician"; and "NOTE: Additional information may be sought from appropriate source(s), if warranted*". In App.100a (j) health status (2): documented that the references of the job applicant

should be queried regarding disabilities before a committed job offer is made. In App.100a (j) health status (3): the VA is not keeping the disability information separate from the employment application file.

The VA in their MSJ asserted they were confused about the timing of making the request of the Declaration of Health, and identified it as an Employment Entrance Exam which is allowed under 42 USC §12112(d)(3) after a conditional offer has been made or all other job qualifications have been reviewed. The most intimately involved person in handling the job applicant's paperwork, the Medical Credentialer, in her deposition asserted that the Declaration of Health represented a Physical Exam for transferring employees or direct hires as performed by the VA.

Pre-Offer Job Applicant: McBratnie was a pre-offer job applicant as articulated in the adopted Magistrates Report and Recommendation App.38a-41a *D. Post-Offer Stage: Requiring a Medical Examination.* The US District Court concurred App.17a-20a section "*B. CRA Never Offered McBratnie the Temporary Nursing Position*". This identifies that 42 USC §12112(d)(1 and 2) would apply to McBratnie, which was not directly memorialized.

Joint Employers Undisputed: The Office of Federal Operations (OFO) articulated their basis for the application of joint employers to this case in App.56a-App.64a. The VA has not challenged this. The OFO only considered the VA and CR Associates as joint employers. There would have ultimately been four joint employers: CR Associates, Wapiti Siouxland Staffing, CompHealth Staffing, and the VA. Only the VA has been pursued legally due to it being too late

to pursue legal action against the other joint employers by the time the OFO rendered their opinion. The EEOC failed to consider "joint employers" and directed filing the Complaint against the VA alone. Acknowledging the joint employers in full would identify that the VA interfered in McBratnie's long-term employment opportunities with the staffing agencies permanently and continuously, and not just for the alleged three months the VA asserted they intended to use McBratnie.

Physician as a Joint Employer by Agency: The US District Court asserted if the Physician signing the Declaration of Health chose to perform a medical exam in order to inform his medical opinion, that was his own choosing and not a requirement of the VA (App.22a). This challenged the issue of Physician as Agent of the VA. The VA delegated the ability to the physician to form a medical opinion as represented by signature or lack thereof on the Declaration of Health. The physician's missing signature excludes a job applicant from the candidate pool. Therefore, the Physician was an agent of the VA and his actions of requiring a medical exam would also be the actions of the VA whether they directly requested a physical exam or not. If any "confirming physician" did not have a treating provider's knowledge of the job applicant, then absent a physical exam they would be falsifying documents.

> In the VAs MSJ they wrote:
>
> The Declaration requires a countersignature by a physician, who must attest that she "concur[s] with the declaration of health presented by" the prospective provider. (Exhibit 3, Declaration.) In other words, **a physician would be required to confirm that to the best of her knowledge,** McBratnie did not have a condition that would adversely affect the exercise of her clinical privileges. (App.98a)

The VA wrote: "a physician would be required to confirm that to the best of her **knowledge**". If the physician has never been a treating provider, upon what are they to base their opinion, or where would they get their "knowledge" to inform a medical opinion as sought, if not by performing some form of medical exam ? McBratnie had no active treating provider, unlike the case precedents of former employees returning from disability as a rehire job applicant. Former disabled employees have a treating provider. But all job applicants may not. The VA's requested Declaration of Health necessitates a medical exam for all job applicants that do not have a treating provider.

Known Disability Status: The VA has asserted they were unaware of McBratnie's disability status at the time for the demand of the Declaration of Health. The four deposed employees testified to this ("*She was not aware of the Complainant's disability*") App.99a.

Former Employee or Not: McBratnie's status regarding being a former employee of any of the joint employers, was not definitively stated. Neither party asserted McBratnie was a former employee which is necessary to determine if the case precedents deemed applicable were not.

Subclass of Job Applicant: *Known Disability Status and Former Employee or Not* (immediately above) are necessary to identify if the: Judge-Made standard, Case Precedents, cited as relevant in this case, were misapplied. The Judge-Made standard, case precedents, were all predicated on the subclass: former disabled employee, now reapplying for employment. Thus it is necessary to

know if McBratnie were of the same subclass as the job applicants in the case precedents, before assigning the case precedents greater weight than that codified in statute 42 USC §12112(d)(1-2). The Judge-Made standard was for the exceptions to the written law not provisioned for, and was not to replace the law.

Thus it is necessary for the US Supreme Court to specifically identify which portion of the ADA allowed Medical Inquiries of Treating Providers of formerly disabled employees who were now also considered job applicants in the case precedents.

Authority for Judge-Made Standard of Case Precedents: *"Medical Inquiries"* of job applicants The case precedents identified the quandary of what to do when a job applicant is also a former employee. *Grenier v. Cyanamid Plastics, Inc.,* 70 F.3d 667, 677 (1st Cir. 1995), "*neither Congress nor the EEOC took into account the case of a returning employee when formulating the restrictions on pre-offer inquiries*" of job applicants. A worker could simultaneously be covered under two statutes: both as a job applicant and an employee.

The case precedent's Judges did not articulate in their opinions which section of 42 USC §12112(d) authorized medical inquiries. If the case precedents provisioned medical inquiries under the "employee" statute 42 USC §12112(d)(4), then the case precedents would not apply to McBratnie who was not a former employee but a new hire job applicant subject to 42 USC §12112(d)(1 and 2). Statute 42 USC §12112(d)(4) allows for medical inquiries if there is a business necessity. Medical Inquiries are forbidden under 42 USC §12112(d)(1 and 2)

McBratnie asserts: All case precedent medical inquiries were regarding former employees under the employee standard consistent with business necessity, for those last known

to be disabled to the employer, presently reapplying for the same or similar work role with the employer, and that the legal basis for allowing the "medical inquiry" was under the Employee standard (42 USC §12112(d)(4)(A)).

The US Supreme Court needs to articulate what portion of 42 USC §12112(d) permitted the employers in those case precedents to make a "narrowly tailored" medical inquiry. This will also require the US Supreme Court to identify if the same "narrowly tailored medical inquiry" would be acceptable under the statute for non-former employees or 42 USC §12112(d)(1 and 2).

The case precedents articulated a Judge-Made standard for a subclass of job applicants. But this would not mean that this "Judge-Made" standard should now apply to the entire class of job applicants, or now override the written statutes 42 USC §12112(d)(1 and 2) and allow medical inquiries of all job applicants. Were this true, the ADA and its protections were just destroyed by the decisions rendered in McBratnie's case. This tenet violated the Presumption Against Ineffectiveness and the Presumption of Validity which are key to resolving McBratnie's case. (Scalia & Garner §4, at 63 and Scalia & Garner §5, at 67-68)

"**Narrowly Tailored**". Narrowly Tailored is a legal concept defined as: *the legal principle that a law be written to specifically fulfill only its intended goals*. One has to consider that McBratnie was not a former employee, her disability status was unknown and she was a pre-offer applicant subject to 42 USC §12112(d)(2). Applicable Code of Federal Regulations are 29 CFR §§1630.13-1630.14 (App.74a-App.90a). US Supreme Court discernment as to how "Narrowly Tailored" is defined by the Interpretive Guidance is required as such relates to the Declaration of Health.

The VA and the Lower Court(s) have blended different terminology that applies to employees, job applicants and post-offer pre-employment individuals, where the stage of worker needs to be foremost in mind. Particularly, there are two concepts where the VA blended the wording used, but twisted it to mean something different. Such is the term "Narrowly Tailored". This term is used to describe how to make inquiries regarding job related functions of job applicants. The VA has twisted it to assert that a medical inquiry seeking a physician opinion: called the Declaration of Health was also "Narrowly Tailored". This glosses over the fact that the seeking of a medical opinion from a physician at the job applicant stage is forbidden unless that job applicant is a returning disabled employee.

The Interpretive Guidance asserts inquiries are to be "narrowly tailored" for the pre-offer job applicant. The next sentence articulates how "Narrowly Tailored" is identified as requests of the job applicant to "describe or demonstrate" how they would perform job function (App.80a) Section 1630.14(a):

> Employers are permitted to make pre-employment inquiries into the ability of an applicant to perform job-related functions. This inquiry must be **narrowly tailored.** The employer may describe or demonstrate the job function and inquire whether or not the applicant can perform that function with or without reasonable accommodation.
>
> ...
>
> An employer may also ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

This implies an interactive session with an employer in order to accomplish. McBratnie was not asked to describe or demonstrate how clinical privileges would be accomplished in the Declaration of Health. There is no statement in the Interpretive Guidance in that the Employer can request a Physician concur or confirm what the job applicant describes or demonstrates.

There is no statement in the Interpretive Guidance that allows seeking a medical opinion of a physician for pre-offer job applicants of unknown disability status. Only 42 USC 12112(d)(2) stating "shall not conduct a medical examination or make inquiries".

McBratnie asserts that "Narrowly Tailored" got pulled in by the VA as innocent words from the pre-employment acceptable inquiries, into the medical inquiries appropriate under the employee standard by the case precedents. The VA was trying to blend and blur two different sections of the ADA to make the case precedents appear to apply to a new-hire job applicant when they do not. Had "Narrowly Tailored" truly been articulated in the case precedents this would mean "limited in inquiry to the focus or known disability" as determined by another referenced case precedent citation, such as *Farmiloe v. Ford Motor Co.*, 277 F. Supp. 2d 778, 782 (N.D. Ohio 2002), Ford Motor Company sought to acquire more disability or health information and not just a treating provider commentary on the specific known disability. Stated otherwise, an employer cannot exhaustively seek to learn about all disabilities of the worker, but only inquiring as to the one that is already known that has historically impacted employment functions or required accommodations. The Appeals Court acknowledged this at App.33a para 1. The Appeals Court failed to recognize they were citing a case standard applicable under the "employee" standard of the ADA as memorialized in this same paragraph. The expanded textual block of *Farmiloe* is thus:

> Ford argues that its request for Mr. Farmiloe's complete medical records is job-related and consistent with business necessity. [this would be under 42 USC 12112(d)(4)] Although inquiry as to the ability of a pre-offer applicant or an employee to perform job-related functions is allowed under the ADA, such inquiry is not without limits. "[T]he ADA limits an employer's ability to request unfounded examination to prevent `the unwanted exposure of the employee's disability and the stigma it may carry.'" Sullivan v. River Valley School District, 197 F.3d 804, 812 (6th Cir. 1999). **The employer may not request "wide-ranging assessments of mental or physical debilitation that could conceivably affect the quality of an employee's job performance."** Id.

The introduction to *Farmiloe* identified he was also a former employee returning post disability:

> This matter involves whether Ford may request as a prerequisite to employment, the complete medical record of a **former employee who was retired due to disability** and who is seeking to return to work after his disability ceases. (*Farmiloe* p.804)

The VA and the Lower Court(s) have asserted the Declaration of Health was a "narrowly tailored" "medical inquiry" and not a medical examination. Narrowly tailored was not used in the manner that the VA and the Lower Court(s) have used it to make it sound compliant. The issue here is whom the inquiry is made of determines the interpretation of the Declaration of Health. If the Declaration of Health is made of a 'treating provider' who has knowledge of the job applicant, then it might be construed to be a medical inquiry. But if the Declaration of Health is made of a 'non-treating provider' who doesn't have knowledge of the job applicant, then it becomes a request for a medical exam to inform the physician's medical opinion. The relationship of the physician to the job applicant determines the meaning of the Declaration of Health. This is acknowledged in *Harris v. Harris & Hart, Inc.*, 206 F.3d 838, 843 n.5 (9th Cir. 2000):

> Defendant's required medical release is more akin to a progress report from a specialist treating a particular injury, than a comprehensive evaluation from a general practitioner testing a worker for physical or mental impairments.

If there is no treating physician to make a medical inquiry 'progress report' of, then the Declaration of Health becomes that "comprehensive evaluation from a general practitioner testing a worker for physical or mental impairments". This is caused by the lack of foreknowledge of the job applicant. The Appeals Court wrote: "*The physician confirmation contained in the Declaration of Health likewise was a narrowly tailored inquiry, see id., and not*

a medical examination" (App.4a). Yet *Harris* quoted above recognized that the type of medical inquiry is determined by the existing relationship between the physician and the job applicant.

The Courts both agree that the Declaration of Health was "Narrowly Tailored". But were this true, it would not be possible to make the exact same inquiry of every job applicant. "Narrowly Tailored" would be a unique "medical inquiry" that applies to only one job applicant, and their specific disabilities, and not all job applicants. The Declaration of Health is "broadly tailored" as a fishing trip seeking to know that the job applicant has a disability of some form, so as to exclude them from the job applicant pool. In the VA Credentialing Handbook 1100.19, the VA granted themselves additional authority to contact the Confirming Physician and make detailed further inquiries regarding the applicant's disabilities, all before a job offer was extended (App.100a (j) health status (1)).

If the Declaration of Health were indeed "Narrowly Tailored" then one would be able to answer the question which "essential function" the job applicant would be unable to perform or would require accommodations. The EEOC asserts that an appropriate inquiry is to request the job applicant to demonstrate or describe how they would perform a given task. This is not what the Declaration of Health asked.

II. Statutory Text in Context

EEOC Commission and Office of Federal Operations

The basis of the EEOC Commission Magistrate Administrative Judge (AJ) granting of Summary Judgment to the VA, and the Office of Federal Operations upholding such, involve the following text in context issues.

42 USC §12112:

(d) Medical examinations and inquiries

(1) In general The prohibition against discrimination as referred to in subsection (a) shall include **medical examinations and inquiries**.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is **an individual with a disability or as to the nature or severity of such disability**.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform **job-related functions**.

The US Supreme Court needs to interpret under the Series-Qualifier Canon (Scalia & Garner §19, at 147), what was intended 42 USC §12112(d)(1)?

> (Medical examinations) and (medical inquiries)
>
> or
>
> (Medical examinations) and (inquiries).

The EEOC Magistrate (AJ) decision (App.50a-App.55a) regarding the Declaration of Health wrote:

> *This form does not require a medical examination, ... nor does it* ***inquire as to any medical condition***. App.53a para 2.

The EEOC Magistrate interpreted "inquiries" from 42 USC §12112(d)(1) restricted to inquiries of "medical conditions", versus "medical inquiries" generally of anyone, or an inquiry seeking the "medical opinions" of physicians. The EEOC Magistrate excluded general medical inquiry fishing expeditions, as not covered by this ADA prohibition, as long as the VA did not inquire about a specific "medical condition". The US Supreme Court will need to interpret "medical exams and **inquiries**" and particularly if seeking a medical opinion from a physician is a prohibited medical inquiry of a job applicant under 42 USC §12112(d)(1 and 2).

The Denied Appeal to the Office of Federal Operations (OFO) App.44a-App.49a, identified concurrence with the EEOC Magistrate's decision:

> Based on this evidence, the AJ concluded that Complainant failed to show that there was any intent on behalf of the Agency to cease processing her credentialing due to her disabilities because no one had any knowledge of a disability. (App.47a para 1)

Knowledge that a job applicant has disabilities is not the basis of the alleged discrimination nor is foreknowledge necessary to discriminate against a disabled person. Intentional disability discrimination by an individual employee is not what is alleged. It is the written standard for Credentialing as written by the VA executives that engendered the discrimination by having an

exclusionary standard, to remove disabled applicants who would need accommodations from the candidate pool, called the Declaration of Health.

The Denied Appeal to the OFO on App.47a para 3 stated agreement in that two forms were missing from the returned Credentialing Packet.

> The AJ further noted that all applicants requesting VA credentialing and privileges are required to submit all of the required documentation as stated above. The AJ stated that if any applicant refuses to provide the required documentation, the credentialing and privileging process ceased as incomplete. Finally, the AJ determined "it is undisputed that Complainant **failed to submit two of the requested documents, a scope of practice form and a declaration of health form**.

However, the VA withheld comparative data from the ROI and discovery from all courts regarding the returned application packets of other job applicants, to identify that in regard to the Scope of Practice Form, and the written instructions, it was not possible for any job applicant to properly return this form with all required signatures, as the other signatures required to be on this form were the signatures of approval of the hiring committee, before the job applicants application had even been submitted. See *Scope of Practice Form is Immaterial to These Matters* under *I. Incomplete or Unarticulated Finding of Facts.* The Scope of Practice Form in this case is a pretextual basis for discarding the EEOC Discrimination Charge by the AJ

42 USC §12112(b) Construction

42 USC §12112(b) **Construction: "discriminate against a qualified individual on the basis of disability" includes—** [all but #4 were violated]

(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**. The Declaration of Health segregated job applicants into two groups: those with a physician confirmation and those without. The absence of a physician confirmation signature implies the worker DOES HAVE A "physical or mental health condition that would adversely affect my abilit(ies)" and thereafter removes the job applicant from the pool of candidates for their application missing a required signature

(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)**. Multiple staffing agencies were involved, all with their job applicants subject to the VA's Declaration of Health before VA selection or commitment on hiring the job applicant. McBratnie's pool of job applicants was four persons to fill one open position.

(3) **utilizing standards, criteria, or methods of administration—(A) that have the effect of discrimination on the basis of disability**. The Declaration of Health disposes of

disabled job applicants applications that would require accommodations without provisioning for accommodational discussions before the job applicant is discarded.

(4) N/A

(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.** Repeatedly identified, only disabled applicants requiring accommodations are to be discarded based upon the lack of wording of the Declaration of Health. No Accommodational discussions to ameliorate disability issues was planned for (accommodations are not discussed in the Credentialing Handbook at all), only automatic exclusion of the job applicant without signatures on the Declaration of Health.

(6) **using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity**. The VA pronounced that disabled job applicants could not provide "quality care" if they themselves could not sign the Declaration of Health or a confirming physician refused to sign such. ("*[A] provider who*

cannot sign the Declaration of Health (or who cannot obtain a physician endorsement of such) knows that a health condition ***might*** *compromise her clinical care and is therefore not qualified to treat VA patients.*" App.93a). The VA further asserted: "*When McBratnie declined to sign that Declaration, the VA and CRA could only conclude that she might not be able to perform the essential functions of a nurse practitioner.*" App.95a-96a. What the VA meant was that in the absence of the job applicant denying they were disabled, the VA could only conclude they were disabled enough to affect their work role, which implies accommodations would be required. This was not the only conclusion that could have been drawn, with McBratnie's affirmative assertion in the VetPro online application, in that she could perform the essential duties with or without accommodations. (App.97a #15).

(7) **failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure)**. The Declaration of Health does not accurately measure abilities at all, for if it did, the end result would be identification of worker limitations that should open up discussions of accommodations.

Summary

Congress created the American with Disabilities Act (ADA or The Act) to ensure Civil Rights protections of individuals with physical and mental disabilities, and to guarantee them equal opportunity in public accommodations, **employment**, transportation, state and local government services and telecommunications. The Act **defines disability as a "physical or mental impairment that substantially limits one or more of the major life activities"** (42 USC §12102(1)(a)). The Act is codified in Title 42: The Public Health and Welfare, in Chapter 126 - Equal Opportunity for Individuals with Disabilities (§§12101-12213). The Act is integrated as a part of the Rehabilitation Act of 1973, which is codified at 29 USC §791(f): Standards Used in Determining Violation of Section citing 42 USC §12111, et seq.

The Veterans Administration has asserted it is acceptable to discard a job applicant who cannot obtain a physician confirmation signature asserting the job applicant DOES NOT HAVE a "physical or mental health condition that would adversely affect my abilit(ies)". An absent physician confirmation signature asserts that the job applicant DOES HAVE a "physical or mental health condition that would adversely affect my abilit(ies)". Which means the disability "limits one or more of the major life activities" or working.

The US Supreme Court is asked to identify if the Judge-Made case law standards were misapplied, grouping all job applicants into the "former employee, now job applicant" subclass, where "medical inquiries" are allowed under 42 USC §12112(d)(4), but are not allowed under 42 USC §12112(d)(2) for non-former employee, job applicants. McBratnie's court decision nullified

the protections the ADA was intended to protect, in that a job applicant should first be evaluated on their abilities, before disability status is invaded.

Scalia & Garner §2, at 56 Supremacy-of-Text Principle stated: "that the resolution of an ambiguity or vagueness that achieves a statute's purpose should be favored over the resolution that frustrates its purpose." (Scalia & Garner §2, at 56). Additionally Scalia & Garner §4, at 63, the *Presumption Against Ineffectivemess*:

> A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored.
>
> This canon follows inevitably from the facts that (1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness.

The purpose of the ADA was to ensure that job applicants were not excluded based upon their disabilities without first considering their abilities. Statute 42 USC §12112(d)(1-2(A+B)) focuses on when medical examinations and inquiries are forbidden. Perhaps there is a failure to define what a medical examination is or when it occurs. Perhaps in this instant case it is the making of an abilities inquiry couched in terms of disabilities that is at issue. Perhaps there is lack of clarity in 42 USC §12112(2)(A) "... *a covered entity shall not conduct medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of a disability.*" to distinguish that seeking a medical opinion of a physician is a medical "inquiry".

Returning to 42 USC §12101(a) *Findings and purpose*, defines historically:

> (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, ... failure to make modifications to existing

facilities and practices, exclusionary qualification standards and criteria, segregation and relegation to lesser services, programs, activities, benefits, JOBS, or other opportunities;

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

42 USC §12101 (b) purpose

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 USC §12102 *Definitions*

(1) Disability

The term "disability" means, with respect to an individual—
(A) **a physical or mental impairment** that substantially limits one or more major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment

The words used in the Declaration of Health:

"physical or mental health **condition that would adversely affect my abilit(ies)**"

A "condition that would adversely affect my abilities" is the definition of disability (The American Heritage Dictionary of the English Language, 5th edition: "*A disadvantage or deficiency, especially a physical or mental impairment that interferes with or prevents normal achievement in a particular area*".) Is not a "condition [that] adversely affects one's abilities",

also an "adverse condition that affects one's abilities" ? Is an adverse condition an impairment [or disability] that "interferes with or prevents normal achievement" ?

REASONS FOR GRANTING THE PETITION

I The Opinion and Orders of the Courts Nullified the American with Disabilities Act

The US Supreme Court should reject case interpretations of statutes that seek to circumvent those statutes. These are the principles of the Presumption Against Ineffectiveness and the Presumption of Validity Scalia & Garner §4, at 63 and §5, at 66.

The VA was seeking to cover their misstep caused by the Declaration of Health, and sought to evade the actual text of the statute prohibiting "medical exams and inquiries". This was accomplished by citing case precedents that were applicable to a subclass of job applicants where both the employee and job applicant standard could simultaneously apply. The VA then applied the case precedent law to all job applicants failing to identify which subpart of the ADA authorized "medical inquiries". This effect removed the ADA protections statutorily created for job applicants allowing the returning employee medical inquiries standard under 42 USC §12112(d)(4) to apply to new-hire job applicants.

The decision rendered in McBratnie's case just made the protections of the ADA for job applicants null and void.

The US Supreme Court needs to overrule this decision for the protection of all job applicants and return statute 42 USC §12112(d)(2) to its operative status. This requires identifying which statute authorized "medical inquiries" of former disabled employees, who were re-employment job applicants in the case precedents.

This step was ignored by the Lower Court(s). This allowed the VA to elude the written law. This is why the Presumption of Validity Scalia & Garner §5, at 66 applies. Applying the wrong subpart statute, or applying the employee standard to all job applicants circumvents the law. In general, a court should avoid interpretations of a statute that would facilitate "evasion of

the law" or "enable offenders to elude its provisions in the most easy manner." *The Emily*, 9 Wheat. 381, 389, 390 (1824). That principle, known as the "Presumption Against Ineffectiveness," "follows inevitably from the facts that (1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness." Scalia & Garner §4, at 63

The VA and the Lower Court(s), by misconstruing what portion of the ADA grants an employer the right to make a limited "medical inquiry" or 42 USC §12112(d)(4) of a returning employee, remains active as a standard for former employees also returning from a much longer lapse of absence, in that the employer retains the right to require medical confirmation on fitness for duty or the ability to return to their former occupation. The case precedents challenged how long they would be a former employee subject to medical clearance to return to work for the same employer. The case precedents indicate until their disability is recovered.

While some employees may be off work due to no weight bearing allowed for 6 weeks, and their employer holds open their work position, the employer is entitled to request the treating provider articulate as to whether full or partial recovery has occurred, and what work place limitations need to be accommodated as a business necessity. For some disabilities the durational lapse may be years as in the cases of *Grenier*, *Farmiloe* and *Harris* where the workers former position was not held open due to expectations at the time that the worker would not be returning. When the worker is returning to the employer and his position has not been left open, the worker then has to reapply to work with the employer. This sequence did not change the fact that the former employee seeking return to the same employer was still subject to 42 USC §12112(d)(4) and a limited "medical inquiry".

Since the case precedents cited did not directly and specifically articulate that it was 42 USC §12112(d)(4) that authorized this "medical inquiry" for a worker that was both a re-employment or rehire job applicant and a former employee, the VA and the Lower Court(s) have both agreed that these case precedent Judge-Made law now circumvent the statutes for job applicants as created by Congress. The Courts are to interpret and apply law, not make new laws or change written laws. The case precedents themselves did not do this. However, the VA and the Lower Court(s) have formulated their opinions and orders exactly on these premises. This violates the Presumption Against Ineffectiveness.

McBratnie is seeking for the US Supreme Court to consider the effect of McBratnie's case setting a bad precedent that violates the Presumption of Validity in that the Lower Court(s) have invalidated the protections of the ADA.

If McBratnie's case stands, every employer will now be able to request every worker to sign a similar occupational Declaration of Health, allowing employers to routinely discard disabled applicants from the applicant pool so as to avoid provisioning accommodations to disabled job applicants.

For this reason alone, the *writ of certiorari* should be granted

CONCLUSION

The petition for *writ of certiorari* should be granted and the decision of the 6th Circuit Court of Appeals and US District Court summarily reversed for settlement.

Respectfully submitted.

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APPENDIX

APPENDIX

Case Opinions

Statutes

Code of Federal Regulations

Case Precedents

US District Court Select Exhibits