No. 24-179

In The
Supreme Court of the United States

ORIGINAL

ERIC KATZ,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court erred in upholding the ruling that there was no genuine issue of material fact with regard to Mr. Katz's claim that the DOJ violated the reasonable accommodation requirement of the Rehabilitation Act?

2. Whether the court erred in upholding the ruling that there was no genuine issue of material fact with regard to Mr. Katz's claim that the DOJ retaliated against Mr. Katz after he made complaints to the EEOC and the DOJ OIG?

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

Petitioner Eric Katz ("Petitioner") or ("Mr. Katz") petitions this Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit affirming the order granting summary judgment from the District Court.

OPINIONS BELOW

The decision of the Court of Appeals for the Fourth Circuit, Katz v. Garland, 2024 U.S.App.LEXIS 2392 (4th Cir. Feb. 2, 2024), is at App.1 to this petition. Furthermore, the decision for the Fourth Circuit to deny a rehearing en banc, Katz v. Garland, 2024 U.S.App.LEXIS 9043 (Apr. 15, 2024), is at App.34 to this petition. Both decisions are unpublished. The judgment of the U.S. District Court for the Eastern District of Virginia, dated March 16, 2023, is at App.3 to this petition.

JURISDICTION

The Judgment of the U.S. Court of Appeals for the Fourth Circuit was entered on February 2, 2024 and the rehearing was denied on April 15, 2024. This Court's jurisdiction is invoke under 28 U.S.C. §1254(1). The Fourth Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. §1291 (authorizing jurisdiction over appeals from final orders of district courts) and Fed. R. Civ. P. §56, based upon the

decision that the Motion for Summary Judgment granted on March 16, 2023.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. §12111(8)

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

Executive Order 13164

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.), as amended, and in order to promote a model Federal workplace that provides reasonable accommodation for (1) individuals with disabilities in the application process for Federal employment; (2) Federal employees with disabilities to perform the essential functions of a position; and (3) Federal employees with disabilities to enjoy benefits and privileges of employment equal to those

enjoyed by employees without disabilities, it is hereby ordered as follows:

Section 1. Establishment of Effective Written Procedures to Facilitate the Provision of Reasonable Accommodation. (a) Each Federal agency shall establish effective written procedures for processing requests for reasonable accommodation by employees and applicants with disabilities. The written procedures may allow different components of an agency to tailor their procedures as necessary to ensure the expeditious processing of requests.

(b) As set forth in Re-charting the Course: The First Report of the Presidential Task Force on Employment of Adults with Disabilities (1998), effective written procedures for processing requests for reasonable accommodation should include the following:

(1) Explain that an employee or job applicant may initiate a request for reasonable accommodation orally or in writing the agency requires an applicant or employee to complete a reasonable accommodation request form for recordkeeping purposes, the form must be provided as an attachment to the agency's written procedures;

(2) Explain how the agency will process a request for reasonable accommodation, and from whom the individual will receive a final decision;

...

STATEMENT OF THE CASE

This case arises from the appeal of the granting of a motion for summary judgment, under the case of *Katz v. United States Department of Justice*, Docket #1:20-CV-00554-TSE-JFA, from the District Court in the Eastern District of Virginia. This case arises from a statute and policy guideline that make providing a DOJ Form 100C mandatory whenever the Department of Justice wishes to rescind an accommodation, and citing "undue burden" without providing any written explanation as required and such as that originally afforded to Mr. Katz. See The Rehabilitation Act of 1973, as amended, 29 U.S.C. §791; Executive Order 13164, dated July 26, 2000, Section 1(b)(9); and Equal Employment Opportunity Commission's Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation, Directives Transmittal Number 915.003, October 20, 2000. Additionally, as directed by this court in *Groff v. Dejoy,* and not addressed by the Fourth Circuit, Defendant failed to provide any justification for the removal of an existing reasonable accommodation by simply citing "undue burden."

This case stems from incidents occurring through Mr. Katz's work as a Supervisory Special Agent with the Drug Enforcement Administration ("DEA"). Mr. Katz began working as a Special Agent in 1996. Through his work with the DEA, in 2011, Mr. Katz conceived of the concept and created the Cellular Abduction Tracking System ("CATS") Program. The system was designed to track and find agents or witnesses who have been abducted.

In 2017, Mr. Katz was diagnosed with having a brain tumor after experiencing hearing loss, tinnitus, and vertigo. Due to the size, location, and type of tumor, Mr. Katz needed specialized care for this tumor. He first sought treatment at Stanford University. The doctors there recommended that Mr. Katz seek continuing care from Duke University's Skull Based Brain Tumor Center in North Carolina. This tumor qualified as a medical disability under the ADA, and Mr. Katz was told by his superiors to submit a request for reasonable accommodation to allow him to be transferred near Duke University. Mr. Katz was also told to submit a hardship memorandum, explaining the situation and why he needed to be located near Duke.

Mr. Katz was eventually transferred to Fort Bragg and given the position of Staff Coordinator for the CATS Program, which had been moved to Fort Bragg in North Carolina. Mr. Katz also requested permission to work from home as needed, and such request was granted. At that same time, the DEA issued an advisory that Mr. Katz did not meet the physical standard for law enforcement positions as a DEA agent, which is why he was given a non-enforcement position as a Staff Coordinator. In the meantime, Mr. Katz began working in Fort Bragg, and from home occasionally, which placed him in close proximity to his continuing care at Duke University.

Towards the end of 2017, Mr. Katz began noticing that DEA contracts were being awarded to former employees of the DEA and to Mr. Katz' second-line supervisor, Michael DellaCorte, in violation of a policy in the DEA and 18 U.S.C §207. Furthermore, Mr. Katz believed this was also in

violation of the internal policy of the DEA that outlined the prohibition against the Agency entering into personal services contracts under Section 37.104 of the Federal Acquisition Regulation.

The award of these contracts to former employees was misusing a Native American 8A contract in order to avoid the bidding process. One contract went to Cloud Lake Technologies, where a former high ranking DEA official worked and had a personal relationship with the current DEA Deputy Administrator Preston Grubbs. The contracts for the CATS Program were then subcontracted to a company consisting almost entirely of former DEA senior officials, all of whom were the former bosses and professional mentors of Michael DellaCorte and not technically qualified to support the CATS program. DellaCorte then unilaterally hired a former DEA agent, with whom he had a history, to fill a position he was not qualified to hold, having no experience as a geospatial analyst, despite Mr. Katz' concerns. Mr. Katz complained internally to his supervisor in 2017[2]. After Mr. Katz was awarded his reasonable accommodation and transferred to Fort Bragg, no other questions were asked about these contracts, as the decisions for medical accommodations were made above Michael DellaCorte and Preston Grubb's positions.

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[2] Mr. Katz made these complaints internally shortly after he was transferred to position in Charlotte. This was a position he did not request and had occurred just as Mr. Katz was diagnosed and was undergoing radiation treatments. The transfer was reversed, due to the recent diagnosis and medical recommendation from Dr. Chang, and Mr. Katz received his medical accommodations to be near Duke by the DEA Administrator.

After receiving the position near Duke, Michael DellaCorte then denied Mr. Katz's use of a government vehicle despite this being DEA policy and over the protests of Ferdinand Large, Mr. Katz' first-line supervisor. DellaCorte (whom Katz had raised the concerns about related to the contracting) offered no valid explanation to Large. Mr. Katz, again, raised his concerns to his Acting Supervisor, Homer McBrayer, after Large retired and the Contracting Officer's Representative (COR), Mina Hunter, in 2018 and then spoke to the FBI about these contract awards in January 2019. Mr. Katz's Program Manager, Thomas Bordonaro, made a formal complaint to the FBI based on that conversation between Mr. Katz and the FBI on February 6, 2019 and was then fired by order of the DEA, specifically Luke McGuire, on February 12, 2019. Following Mr. Bordonaro's termination, Mr. Katz raised his concern with his new supervisor, Luke McGuire, on March 5, 2019 about the legality of the contract to the former employees. Mr. Katz asked McGuire for guidance and asked if there was a duty to report this contract. McGuire told Mr. Katz that he would advise him in approximately two weeks. Then nine days later, McGuire made an unannounced surprise inspection of Mr. Katz' office space in North Carolina and seized DEA equipment. McGuire accused Mr. Katz of being AWOL, despite having been informed of Mr. Katz' medical accommodations to work from home by the outgoing supervisor Homer McBrayer.

At approximately the same time as the making of that complaint, Mr. Katz's immediate supervisor, McGuire, alleged that he began pondering whether to move the CATS Program away from Fort Bragg

and back to headquarters located in Arlington, Virginia. McGuire tried to justify these actions by stating he had concerns with how Mr. Katz was monitoring the contractors on the CATS Program. Mr. Katz made a complaint against McGuire in early March 2019 with the EEOC regarding McGuire's treatment of Mr. Katz and his treatment of Mr. Katz's medical information. Mr. Katz had also complained that McGuire removed all of Mr. Katz' responsibilities and refused to allow him to assist in any way with the CATS Program, despite the newly assigned contractors repeatedly asking to speak with him. Mr. Katz spent five months sitting at home watching online training and podcasts of his choosing because McGuire refused to give him any work to complete, and while the DEA worked to find a way to remove Mr. Katz's reasonable accommodations.

On March 14, 2019, McGuire made a surprise visit to Fort Bragg coordinating the visit with a private contractor Edward Wezain who had already tendered his resignation on February 27, 2019, because he had been informed of the decision to move the CATS program to Arlington. This was done by design by McGuire, as Mr. Katz was the only DEA employee on the base and McGuire wanted to be there on a day Mr. Katz was working from home in accordance with his previously granted medical accommodations. Thus, McGuire arranged this visit outside of Mr. Katz' knowledge specifically on one of the days in which Mr. Katz was working from home. McGuire could never offer a reason why he did not coordinate with his only direct employee to coordinate this visit, despite numerous opportunities to explain, but always insisting it was

not "a surprise inspection" designed to catch Mr. Katz out of the office. While in Fort Bragg, McGuire removed equipment from that location to bring with him back to Arlington claiming the equipment on a Top Secret military installation inside a secure military base was not secure enough, thus making it impossible for any work to be done at this office location, which supported McGuire's claim that the office was not functional and could be shut down. As a result of this action, the lead analyst for the CATS Program resigned the same day, citing her inability to work without the equipment and clear hostility from the DEA directed at Mr. Katz.

After that visit, McGuire was unhappy that Mr. Katz was not physically on site, even though he had permission to work from home, and McGuire claims the decision was then made to move the CATS Program back to Arlington. This statement is contradicted by McGuire having informed the contract company Compass Strategies who in turn notified contractor Wezain on February 27, 2019 that his position was being moved to headquarters. Wezain contacted DEA HQ via email on that date and began the process for turning in his government property.

After this decision was made, McGuire began questioning Mr. Katz as to the reasoning behind his reasonable accommodation and why Mr. Katz needed to be located in North Carolina. McGuire denied he had any knowledge of the medical accommodations, despite later admitting during his deposition that he had been told by the outgoing supervisor of the accommodations. Though despite "knowing" about it (even if he did not see these accommodations in writing), McGuire never asked

Mr. Katz for any documentation until that day, which was then provided immediately. McGuire and others from the DEA were demanding Mr. Katz to justify his continued accommodation. When Mr. Katz asked why he needed to provide this information again and if the DEA was revoking his accommodation, McGuire and the DEA would not cooperate with Mr. Katz's inquiries.

The DEA tried to argue that Mr. Katz did not cooperate with the "interactive process" of obtaining medical information for his reasonable accommodation, but this is far from the truth. First, Mr. Katz asked to know the reason he had to provide this information, considering he had already been granted the accommodation and considering he was not notified that such accommodation was being revoked. Nonetheless, Mr. Katz complied by providing the DEA with a letter from Dr. Chang from Stanford University and multiple letters from Dr. Gertner & Cunningham. Although, it should be noted that the District Court chose to classify Dr. Gertner simply as a family friend of Mr. Katz and apparently call into question his medical integrity that he was simply writing what Mr. Katz wanted[3].

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[3] Despite having a "friendly" relationship with Mr. Katz, Dr. Gertner has accomplished a few other things in his medical career. Dr. Gertner is an ivy league educated board certified surgeon and physician who specializes in medical research. He teaches medicine at Stanford as a consulting Associate Professor and started the Surgical Innovation program there. He also holds over 100 first author patents, many of them related to radiosurgery and radiotherapy. He continues to serve as a medical consultant and advisor to Mr. Katz. The court and the government's attempts to disparage him boils down to a friendly relationship between a physician and a patient.

Nonetheless, Dr. Gertner's professional medical opinion was supported by Dr. Chang, a Professor and Vice Chairman of Strategic Development and Innovation in the Department of Neurosurgery at Stanford and by Dr. Calhoun Cunningham, a Neurotology and Skull Based Surgery specialist at Duke University who has physically removed over 1,000 of this type of tumor particularly in a post irradiated field. Additionally, the DEA was aware that Dr. Chang had informed them that Dr. Gertner was the primary point of contact for all of Mr. Katz's medical questions and responses, and Dr. Chang concurred with this decision, notifying the DEA in writing. Even though Dr. Gertner did not personally examine Mr. Katz, he was present in the room when Mr. Katz was examined during the initial consultation with Dr. Chang. Coincidentally, Dr. Chang did not perform the physical examination either, as it was left to a resident physician and a nurse. Dr. Gertner was intimately familiar with Mr. Katz's medical history and condition, reviewing all necessary films and scans and directly consulting with the treatment physicians. Additionally, Dr. Gertner arranged for a medical consultation with Dr. John Adler, Emeritus faculty in Neurosurgery at Stanford who pioneered the CyberKnife system that Mr. Katz would ultimately use to attack his tumor. Dr. Adler did not physically examine Mr. Katz either, as the problem was located underneath his brain within millimeters of his brain stem. Dr. Adler did review the MRIs and come to the same conclusion as Dr. Gertner. Thus, despite the court and government's flippant disregard for Dr. Gertner's credentials and expertise or claims he did not answer their questions. Dr. Gertner did provide

answers to the DEA, and the court need only read Dr. Gertner's multiple letters and medical requests that went unanswered by the DEA. Dr. Gertner is only guilty of not using the format the DEA used in their requests when he responded.

On July 22, 2019, Dr. Gertner advised DEA that he was a physician for Mr. Katz. Dr. Gertner stated that Mr. Katz was diagnosed with a rare brain tumor. Dr. Gertner stated that, in order to maintain continuity of care, Mr. Katz should continue to have access to the Duke University Health Skull Base Tumor Treatment Center. Dr. Gertner stated that it was his medical opinion that removing Mr. Katz's accommodation is medically ill advised and irresponsible, as Mr. Katz needs specialists who understand the disease process. This letter clearly explains Dr. Gertner's medical reasoning and why Mr. Katz needed to stay within proximity of the Duke Skull Based Tumor Treatment Center. He then reiterated the need a month later in August of 2020 when the DEA asked again why Mr. Katz needed to stay in North Carolina.

Dr. Gertner also asked the DEA to contact him directly with any further questions and gave them clear directions so that he could answer with urgency. In a subsequent letter, Dr. Gertner explicitly addressed the agency's questions, reaffirming the necessity for both types of accommodation. Despite his esteemed credentials, the DOJ attempted to discredit him by reclassifying him as merely a friend of Mr. Katz. During the proceedings, the District Court seemed preoccupied with questioning Dr. Gertner's integrity, likely due to Mr. Katz's acknowledgment that Dr. Gertner was both a family resource and trusted friend, relied

upon for sound medical advice. The court, however, failed to present any evidence supporting the notion that Dr. Gertner was exaggerating on behalf of Mr. Katz. Moreover, it is noteworthy that both Dr. Chang and Dr. Cunningham concurred with the need for the accommodation, emphasizing the importance of considering the expertise and unanimous agreement among these highly qualified medical professionals. The letter stated the following:

> Frankly, I am concerned that the Agency has all but declared Mr. Katz symptom free and appears to be demanding that he reapply for accommodations he is already receiving. Nothing in my professional experience has prepared me for an agency nurse or agency attorney contesting the very existence of a medical condition: acoustic neuroma. That condition involves a brain tumor in the lower skull that can impact balance, hearing and facial expressions and which also produces fatigue and headaches. None of these symptoms, in my professional opinion, limit the ability of Mr. Katz to serve as a GS-1811 Series Law Enforcement Agent, as I previously have stated. What Mr. Katz requires are continuation of existing accommodations that include a flexible work schedule, telecommuting and the ability to attend Duke's Skull Based Medical Treatment Program.

He goes on later in the letter to state his and Dr. Chang's position again:

> Dr. Chang and I repeatedly and clearly stated that Mr. Katz is fit for duty and, at the same time, should continue to retain his current medical accommodations, which assist him in his ability to perform the essential functions of his assignment. Mr. Katz' is not symptom free, as the Agency oddly seems to suggest and his condition has not resolved. In addition to the above listed symptoms, Mr. Katz suffers from vertigo, pressure in the ears/and or head, nausea and headaches. These symptoms are attributable to the location of his brain tumor. Due to the tumor position in Mr. Katz's brain, surgery would have been a very risky proposition and Mr. Katz underwent radiosurgery treatment at Stanford University in September 2017 instead. Therefore, as I am sure you are aware, the tumor remains inside Mr. Katz's brain and its resolution via this treatment pathway may take a decade or more. Only at that time, might the disability have stabilized or perhaps resolved. And, as I am sure you are aware, the effects to surrounding structures (also known as side effects), might not evolve or stabilize for years either. And, ultimately, if the tumor is not responsive to treatment, Mr. Katz's only option will be surgery on his brain and this surgery must be performed at Duke University Skull Based Tumor Treatment Center. Mr. Katz'

> otolaryngologist, who has extensive experience in retrosigmoid/suboccipital skull base surgery Mr. Katz is due for his next surgical review, appointments, scans and diagnostic testing at Duke within the next 50 days.

In these letters, Dr. Gertner provides further insight into his advice to Mr. Katz, stressing the imperative for Mr. Katz to remain in North Carolina for his treatment. Disregarding these direct medical orders and opting for a potentially life-threatening surgery to comply with his employer's demands placed Mr. Katz in an incredibly arduous and unnecessarily stressful situation. By choosing to ignore the professional medical guidance of his physician, Mr. Katz was put in a precarious position that could have serious consequences for his well-being. The letter stated the following:

> As described above, the tumor resolution and attendant side effects evolve over at least a ten year period and Mr. Katz's conditions therefore require consistent monitoring and treatment by skilled personnel. It is my professional medical opinion, which I state with medical certainty, that continued care at Duke is heavily indicated and it would be medically inappropriate and potentially harmful to Mr. Katz's physical and mental well-being, to force him to relocate from the area, so long as he is continuing in his medical care. I state this again as the licensed physician and board-certified surgeon who has

> participated in his treatment planning and followed Mr. Katz's case since his onset of symptoms. In my experience with employers, describing in detail the very private and personal medical information of a patient is unnecessary. Generally, I provide them with a basic diagnosis, prognosis and treatment plan, which will include work-based accommodations. Most of the time, I share this information with authorized medical professionals, working for the employer. It is unusual for me to write to an administrative staff member, as appears to be the case here. As a medical doctor, I am concerned about the release and use of medical information to any person, including an employer and provide this information to you solely because Mr. Katz contends you are demanding it for some purpose.

In closing Dr. Gertner requests a physician-to-physician conversation so that this situation can be rectified.

This marks Dr. Gertner's second attempt to establish direct communication with the agency regarding their concerns. The DEA, however, claimed to have made two prior attempts to contact him, but during the discovery phase of this case, they failed to produce any telephone records or emails supporting this claim. The lack of evidence raises doubts about the DEA's assertions. In addition to his repeated attempts to reach out, Dr. Gertner provided a statement, which was duly furnished to the DEA, letting the DEA know how to

contact Dr. Gertner with any further questions. Despite these efforts, the DEA's failure to demonstrate any concrete attempts to contact Dr. Gertner further raises questions about the commitment to engaging in a productive and collaborative interactive process.

The DEA's failure to communicate directly with Mr. Katz's physicians and the persistent questioning without regard for the answers demonstrates a lack of cooperation in the interactive process by the DEA. Mr. Katz was presented with numerous opportunities for the DEA to engage with his medical team, yet the DEA neglected to do so. This behavior cannot be attributed to Mr. Katz's unwillingness to cooperate, as his physicians were readily available for consultation.

Even if Mr. Katz had considered accepting the transfer, it would have directly contradicted the advice of his highly skilled medical team. Mr. Katz, as a layperson, does not possess the medical expertise to challenge the medical decision made by his team of board-certified physicians, and nor does the DEA or the District Court without contrary medical information. Remarkably, the DEA failed to produce a single medical fact from any board-certified physician that opposed the medical assessment provided by doctors Chang, Gertner, and Cunningham.

Despite the District Court's insistence on presenting alternative medical options, it is essential to acknowledge and reiterate that the Court itself lacks the expertise of a board-certified physician and surgeon. The Court's posturing regarding viable medical options elsewhere does not outweigh the

expertise and professional judgment of Mr. Katz's medical team.

In light of the DEA's failure to communicate directly with Mr. Katz's physicians, the insistence on repetitive questioning, and the inability to produce credible medical evidence to challenge the expert medical determinations made by Mr. Katz's physicians, it is clear that the DEA has not acted in good faith in the interactive process. As a result, Mr. Katz's position and reliance on his medical team's advice were entirely justified. The District Court's lack of medical expertise further emphasizes the need to uphold Mr. Katz's rights and support his reliance on the medical assessments provided by his qualified physicians.

Thus, the DEA eventually engineered the opinion that Mr. Katz was not participating in this interactive process and ruled that he was no longer in need of his reasonable accommodation without providing him a written explanation on form DOJ 100c, despite multiple requests throughout this process to produce one. Without knowing the DEA's justification for the removal, Mr. Katz was unable to formulate an effective response to unknown opinions and possible facts, which is why there is a requirement to provide a 100c to an individual. Therefore, despite being afforded access to the EEOC without all the relevant medical information and justifications used by DEA management, Mr. Katz was placed at a significant disadvantage in attempting to respond. It is the equivalent of being charged with a crime but not being told which one and having to mount a defense.

Because the DEA ruled Mr. Katz was no longer in need of such accommodation, the DEA ordered

Mr. Katz to report to a new position in Arlington, Virginia. Thus, Mr. Katz had to choose between his employment and staying closing to Duke University for his continuing care. In the interim, Mr. Katz had no responsibilities in North Carolina and he barely had any work to perform while waiting to be transferred, other than reporting to McGuire daily about what he had watched on YouTube. Prior to this disparate treatment, Mr. Katz was a highly educated, decorated 23-year veteran of the DEA, with multiple performance awards and promotions. He was now reduced to sitting at home watching videos and being scrutinized.

Mr. Katz never reported to his new position in Arlington. Instead, in the fall of 2019, he requested leave through the Family Medical Leave Act to care for his mother, and such leave was granted through March 31, 2020[4]. On April 1, 2020, Mr. Katz retired from the DEA. He subsequently filed this suit.

Defendants filed a motion for summary judgment, arguing that no genuine issue of material fact was in dispute. Defendant argued that the employer decides the reasonableness of the accommodation, and Mr. Katz would not be entitled to that accommodation in perpetuity. Defendant claimed that Mr. Katz did not cooperate with the process of assessing his need for an accommodation

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[4] During the hearing on the Motion for Summary Judgment, Mr. Katz was accused by the trial judge of attempting to manipulate the system to stay in North Carolina because his mother was there. Mr. Katz's mother actually resides and New Jersey, and his attorney did advise the judge that this was an issue for a jury to decide. This is just another example of the lack of facts and blatant hostility towards Mr. Katz during the hearing.

and the DEA had a legitimate reason for moving the CATS Program back to Arlington.

The Court held a hearing on such motion on January 19, 2023. It was evident at the hearing that the judge did not accept Mr. Katz's arguments. The judge stated, on many occasions, that Mr. Katz's tumor was benign, and at one point evening advising that Mr. Katz would be dead if it was malignant. The judge stated that he did not understand why Mr. Katz needed to be located near Duke University rather than any other doctor near headquarters in Arlington, Virgnia. This is the very danger that exists when an uninformed non-specialist, like the district judge, imports into this argument that he did his own "research" on the tumor and wants to play doctor, stating that he did not understand why the tumor could not be treated elsewhere. The trial court was ignoring the learned expert opinions of those who do understand.

Dr. Gertner and Dr. Cunningham made it very clear in their letters as to why remaining near Duke was necessary, in their professional medical opinion. Simply because one *can* receive medical treatment elsewhere does not mean the patient *should* forgo better options simply to satisfy others that is not in the patient's best medical interests and against the opinion of the treating physician. Mr. Katz also explained in his emails to the DEA EEO Disability Program Manager. Derek Orr. why he needed to remain in North Carolina, but Mr. Orr acknowledged in his deposition he never read the letters from Dr. Gertner nor understands the medicine surrounding Mr. Katz's condition. Making a medical decision for Mr. Katz is not the purview of the DEA, especially unqualified personnel based on

medical facts. Neither the judge nor the DEA is qualified to interpret these medical facts.

The judge's personal opinion affected his legal and factual view in the case. Mr. Katz argued in seeking his initial accommodations that Duke Medical Center has a specific form of care for his tumor. The agency never countered that or objected to what the Mr. Katz was seeking from Duke. The judge, based on nothing more than his speculation, determined that Mr. Katz's request was not legitimate because he could obtain similar care elsewhere. This caused the judge to view Mr. Katz's entire request as suspect.

As further indication of the court's hostility, the court determined on its own that Mr. Katz's tumor was "benign". A discussion ensued in court where the judge questioned counsel on whether or not the tumor was benign. Mr. Katz's counsel expressing some exasperation, commenting that he did not know because "he was not a doctor". The issue of the nature of the tumor was not a basis for any argument or fact-based statement by either party. Indeed, Mr. Katz (and his family who was present in the courtroom) found the comment insensitive and demeaning, as it reduced a tumor sitting next to his brain stem as something innocuous.

The District Court granted the Motion for Summary Judgment on March 16, 2023. The Fourth Circuit denied the appeal based upon the Informal Briefs submitted in support of Mr. Katz's claim. Although Mr. Katz moved for a rehearing *en banc*, the Fourth Circuit denied that request as well. Mr. Katz now asks this Court to grant certiorari. This case raises substantial federal questions regarding the proper application of the Rehabilitation Act and

the protection of federal employees from retaliation after whistleblowing. The Defendant's actions, if left unreviewed, could undermine critical legal protections for disabled workers and whistleblowers, setting a dangerous precedent for other employers. This Court's intervention is necessary to ensure that the rights of employees are safeguarded and that federal agencies are held accountable to the standards they are meant to uphold. The implications of this case extend beyond Mr. Katz and have the potential to impact countless employees who rely on these protections for fair treatment and safe working conditions. Granting certiorari will reaffirm the importance of adhering to established legal frameworks designed to protect vulnerable workers and maintain integrity in the workplace.

REASONS FOR GRANTING THE PETITION

I. THE COURT NEEDS TO ADDRESS THE IMPORTANT FEDERAL QUESTION OF WHETHER THE DISTRICT COURT ALLOWED THE DEPARTMENT OF JUSTICE TO VIOLATE MR. KATZ'S RIGHT TO A REASONABLE ACCOMMODATION UNDER THE REHABILITATION ACT

The district court erred in granting the motion for summary judgment and the appellate court erred in dismissing this appeal without a formal brief. A reasonable finder of fact could have found in favor of Mr. Katz regarding the DEA's failure to reasonably accommodate his medical condition, in violation of the Rehabilitation Act. Mr. Katz asks this Court to review these decisions.

Mr. Katz maintains that he has established a prima facie case for proving a failure to accommodate under the Rehabilitation Act.

> To establish a prima facie case on her failure-to accommodate claim, [plaintiff] must show that (1) [plaintiff] qualifies as an 'individual with a disability' as defined in 29 U.S.C.A. §705(20); (2) the [defendant] had notice of [the] disability; (3) [plaintiff] could perform the essential functions of [the] job with a reasonable accommodation; and (4) the [defendant] refused to make any reasonable accommodation.

Reyazaddin v. Montgomery Cnty, 789 F.3d 407, 414 (4th Cir. 2015) (denying summary judgment and holding a genuine issue of fact remained to determine if plaintiff could perform the essential functions of her job); Jacobs v. N.C. Admin. Office of the Cts., 780 F.3d 562, 581 (4th Cir. 2015) (Courts should consider the particular disability in question and the nature of the requested accommodation). To survive a motion for summary judgment, a plaintiff need only show that the accommodation seems reasonable on its face. Reyazaddin, supra, 789 F.3d at 414. In Reyazaddin, the appellate court reversed the trial court, holding that trial court improperly engaged in fact finding instead of viewing the evidence in the light most favorable to the plaintiff. Id. at 415. "At the summary judgment stage the judge's function is not... to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 417. In that case, the appellate court saw that there

would be a battle of experts at trial, and, therefore, the case was not appropriate for summary judgment. Because the evidence should be viewed in the light most favorable to the non-moving party, the appellate court reverse the granting of the motion for summary judgment.

In this case, the district court held that Mr. Katz did not satisfy the third and fourth elements of a prima facie case. Namely, the court held that Mr. Katz did not show he could perform the essential functions of his job with reasonable accommodation or that DEA refused to provide a reasonable accommodation. The district court erred in substituting its own judgment for that of the jury.

Just as in Reyazaddin, the third element, regarding whether Mr. Katz could perform the essential functions of his job, could easily come down to a battle of the experts at trial. Pursuant to the holding in Reyazaddin, any issue of fact that would be disputed among experts should not be decided on summary judgment.

Here, the trial court accepted the alleged "facts" as presented by the Defendant, holding that Mr. Katz did not actively participate in the interactive process of proving his disability to the DEA. There are several things wrong with this holding. First, Mr. Katz did participate in the process by providing letters from both Dr. Chang and Dr. Gertner. Apparently, however, this was not sufficient for the DEA. To hold that Mr. Katz was not actively participating, however, is simply not accurate. Mr. Katz was apparently not participating *enough*, according to the DEA, and the trial court merely accepted that conclusion from the DEA as fact. Under the Rehabilitation Act, the interactive process

requires communication and good faith exploration of potential accommodations between *both* employer and employee. Jacobs, supra 780 F.3d at 581. An employer should not and cannot prevail at summary judgment if there are disputed facts over whether the employer participated in good faith. Id. The question remains as to how much participation by Mr. Katz would have been enough for the DEA to state that he was actively participating and how much the DEA was also participating. Mr. Katz did provide medical evidence of his disability to the DEA, both in 2017 and in 2019. The quantity and quality of the information provided to the Defendant, however, should be sufficient to sustain a question of material fact for the jury to decide. As the court stated in Reyazaddin, the trial court should have been viewing this evidence in the light most favorable to Mr. Katz, but, instead, the trial court viewed this evidence in the light most favorable to the Defendant, holding that Mr. Katz failed to show enough evidence to support his claim of the necessity of a reasonable accommodation.

Furthermore, even though Mr. Katz asked for a reasoning as to why he needed to provide this medical information, he was never given a reason by the DEA. He already had the accommodation approved in 2017. He felt he should not have had to justify such accommodation again, as he was not told that the accommodation was being revoked and the DEA was not following the proper procedure to revoke such accommodation.

Regarding the fourth element, the trial court accepted that Mr. Katz failed to show the DEA refused to make a reasonable accommodation. The holding in Wirtes v. City of Newport News, 996 F.3d

234 (4th Cir. 2021) is instructive. That court held that transferring a disabled employee when that employee *can* stay in the current position can be considered a refusal to accommodate. The court stated:

> Thus, the practical effect of our ruling in this case will be that when an employer purports to accommodate an employee by reassigning them, district courts will need to consider whether other reasonable accommodations exist that permit the employee to perform the essential functions of their current position. Inherently, this inquiry will require district courts to consider what the essential functions of the position are before jumping to whether the employee was properly accommodated.

Id. at 239. The court in Wirtes held that reassignment should be the last resort. The court stated that the employer should first show that all other reasonable accommodations would impose an undue hardship on the employer prior to the transfer. Id. at 241.

This appeal raises the issue of whether an agency such as the DOJ can proceed as it wishes and refuse to comply with the procedures that Congress prescribed to be mandatory in these circumstances. An opinion issued by the ideologically diverse Supreme Court, at the conclusion of its most recent term, emphatically and unanimously (9-0) answers this question in the negative in Groff v DeJoy, 216 L.Ed.2d 1041, 1059 (S.Ct. 2023). The Supreme Court defined "undue hardship" in that case as the

following: "We think it is enough to say that an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." Groff v. DeJoy, 216 L.Ed.2d 1041, 1059 (S.Ct. 2023). This case provided long-awaited clarification on employers' responsibilities regarding accommodating employees' religious practices. The Court redefined the concept of "undue hardship" and ruled that Title VII demands that an employer, denying a religious accommodation, must demonstrate that granting such an accommodation would result in "substantial increased costs in relation to the conduct of its particular business." This decision marked a departure from the employer-friendly interpretation widely adopted previously, which considered an undue hardship to exist if an employer bore "more than a de minimis cost."

This case was not even considered by Fourth Circuit, as it summarily dismissed Mr. Katz's appeal and denied the rehearing *en banc*. Here, the DEA did not even bother to attempt to justify or explain the previous burden requirement, they just ignored it. The DEA did not consider, nor offer any alternatives, to Mr. Katz prior to revoking his medical accommodations without explanation. The DEA cannot show why granting Mr. Katz's accommodation would result in an increased cost to the DEA in relation to the conduct of its regular business. Thus, this argument should fail on the basis of Groff, and this was completely ignored by the Panel in its dismissal.

Recently the U.S. Supreme Court stated in Muldrow v. City of St. Louis, 144 S.Ct. 967 (2024)

that a plaintiff does not need to show a "significant" harm in the adverse employment action. The Court stated that a plaintiff "need show only some injury respecting her employment terms or conditions. The transfer must have left her worse off, but need not have left her significantly so." Id. at 977. Thus, Mr. Katz was only required to show that he the action taken against him, by attempting to transfer him away from his doctor, let him "worse off," but he does not need to show that he was significantly so. Mr. Katz clearly has established that he was "worse off" with a transfer away from his doctors and the care he was receiving at Duke University.

In this case, the trial court held that Mr. Katz did not sustain his burden to prove a prima facie case that the DEA refused to make a reasonable accommodation, but Mr. Katz did make such a showing, if the court views the evidence in the light most favorable to Mr. Katz. Mr. Katz, already granted accommodation for his disability, did not seek its indefinite extension but wanted explanations for its potential revocation. Despite submitting medical evidence from two doctors, the DEA decided to end his accommodation, relocating him away from his healthcare providers. The DEA did not, has not, and could not show why leaving Mr. Katz in North Carolina would be an undue burden for the Defendant. Although the Court stated that it "strains credulity" to understand why Mr. Katz would have to stay close to Duke University, this is, again, substituting the court's determination for that of the jury. Valid medical reasons necessitate Mr. Katz's proximity to Duke University's specialists, a matter for jury consideration with expert testimony. The trial court's credibility assessments overstep the

jury's role, making the Summary Judgment grant and the Fourth Circuit affirmation erroneous. The jury should decide these issues, and this Court should review that decision now.

Mr. Katz's Telecommuting Accommodation

While an employer has discretion to choose between effective accommodations, "a reasonable accommodation should provide a meaningful equal employment opportunity" or "an opportunity to attain the same level of performance as is available to nondisabled employees having similar skills and abilities." Reyazaddin, supra, 789 at 416. A reasonable accommodation is one that allows an employee to perform the essential functions of the position without creating an undue hardship for the agency. 42 U.S.C. §12111(8). A genuine dispute of material fact arises where an accommodation allowing remote work is revoked, when it had previously been honored for a substantial length of time and evidence suggests physical presence at the office is not required. See, e.g., Woodruff v. Peters, 482 F.3d 521, 528 (D.C. Cir. 2007).

Mr. Katz was teleworking as needed to manage the symptoms of his disability, which includes headaches, vertigo, and spatial disorientation. This was previously granted as an accommodation to Mr. Katz. The DEA has allowed other individuals to work from home in headquarter positions (especially during the pandemic), some residing in different states. Despite this, Mr. Katz's request to telework from his unclassified work-from-home DEA laptop for the Confidential Source Unit (CSU) position was

denied under the false claim of it being classified, despite evidence to the contrary.

Mr. Katz's performance was at an acceptable level, and there were no performance issues that would have justified his removal from the granted medical accommodation allowing telework as needed in another position. The DEA management, Human Resources, and Chief Counsel were notified by the DEA EEO Director, Kelly Goode, via email that a performance issue alone was insufficient grounds to revoke an already granted medical accommodation. Despite this, DEA management failed to document any unsatisfactory performance levels in Mr. Katz's annual review, even though they initially attempted to use it against him.

Furthermore, Mr. Katz's physicians reiterated the necessity of this accommodation in five subsequent letters provided to the DEA when the agency requested additional justification for the already granted accommodation.

Overall, Mr. Katz has provided compelling evidence of the DEA's failure to accommodate his disability in both proximity to the treatment center and teleworking options. The DEA's actions appear to be inconsistent with the treatment of other employees with disabilities. The refusal to explore alternative positions within or outside the DEA further highlights the failure to reasonably accommodate Mr. Katz.

Thus, the District Court erred in granting the motion for summary judgment in this case regarding the failure to accommodate in violation of the Rehabilitation Act and the Fourth Circuit erred in upholding that ruling. The court viewed the evidence in the light most favorable to the *moving*

party, which is the exact opposite of what should occur at this stage. The trial court substituted its own judgment for that of the jury, analyzing evidence that should be left to the fact finder. The trial court accepted the arguments of the DEA and discounted the arguments of Mr. Katz. Mr. Katz was wronged by his former employer, and he deserves to have this case heard on the merits in front of a jury. This Court should review that decision.

This case holds significant implications for the treatment of individuals with disabilities and whistleblowers in the workplace, both within and outside the federal government. The Department of Justice, tasked with enforcing laws that protect workers with disabilities and those who report misconduct, must be held to the highest standard in its own employment practices. This case underscores a troubling paradox: the very agency responsible for upholding the rights of disabled individuals and protecting whistleblowers appears to be among the worst offenders of those rights.

The outcome of this case will impact not only Mr. Katz but also countless other employees who rely on employers to implement the Rehabilitation Act and other disability protections. A ruling in favor of the Defendant could set a dangerous precedent, allowing any employer to circumvent established procedures for accommodating employees with disabilities and retaliating against those who expose wrongdoing, undermining the protections that Congress intended.

This broader impact is particularly alarming, given the DOJ's role as the enforcement arm of the federal government for workers with disabilities and whistleblowers, especially since Defendant could be

seen as an egregious violator of these rights. This could result in significant barriers to employment, reduced job performance, and even job loss. Moreover, the fear of retaliation for reporting misconduct could deter whistleblowers from coming forward, allowing unethical and illegal practices to go unchecked. This Court's intervention will send a clear message that violations will not be tolerated and that the rights of disabled workers and whistleblowers must be upheld.

II. THE COURT NEEDS TO ADDRESS THE IMPORTANT FEDERAL QUESTION OF WHETHER THE DISTRICT COURT ALLOWED THE DEPARTMENT OF JUSTICE TO RETALIATE AGAINST MR. KATZ

The District Court acknowledged that Mr. Katz made a prima facie case for retaliation under the Rehabilitation Act but ruled that the DEA had a legitimate reason for its actions, which Mr. Katz could not rebut. Consequently, the court granted summary judgment. The District Court erred in finding no genuine issue of material fact, and the Fourth Circuit erred in upholding this ruling. This Court should review the case.

In order to establish a prima facie case for Retaliation, a plaintiff must show: 1) that plaintiff engaged in a protected activity; 2) that the employer took adverse action against the plaintiff; and 3) that the adverse action is causally linked to the protected activity. See Hopkins v. Baltimore Gas and Electric, Co., 77 F.3d 745, 754 (4th Cir. 1996). In this case,

the trial court held that Mr. Katz has shown enough for a prima facie case for Retaliation.

Once the plaintiff has established a prima facie case, "the burden shifts to the employer to produce a legitimate nondiscriminatory reason for the adverse act, thereby rebutting the presumption of retaliation." Joyner v. Fillion, 17 F.Supp.2d 519, 525 (E.D.VA 1998). Then, if the employer can show "a legitimate nondiscriminatory reason why it took the adverse action, the plaintiff must prove by a preponderance of the evidence that the defendant's stated reason was pretext for discriminatory actions." Id. In order to show that the employer's reason is merely pretextual, "the plaintiff may present direct evidence of retaliation or demonstrate that the stated reason is unworthy of credence." Id. A plaintiff can show pretext by demonstrating "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the employer's explanation. Holland v. Washington Homes, Inc., 487 F.3d 208, 218 (4th Cir. 2007).

As the trial court stated, Mr. Katz was able to show that he was engaging in a protected activity, that the DEA took an adverse action against him, and that adverse action was causally linked to his protected activity.

The burden then shifts to the Defendant to show a legitimate nondiscriminatory reason for taking such adverse action and Mr. Katz is allowed to show such reasons are pretextual. Here, Mr. Katz showed numerous inconsistencies and contradictions in the DEA's account that suggest pretext. For example, the DEA stated that the reasoning for moving the CATS Program back to Arlington had nothing to do with Mr. Katz, but was being considered months

prior to any complaints to the EEOC. McGuire claimed he decided to relocate CATS due to management concerns, but these same concerns predated Mr. Katz's whistleblowing, undermining the timing. This relocation decision lead to the complete failure and closure of the CATS program. The DEA had no issues with Mr. Katz's performance or accommodations until after he reported contract fraud. This suspicious timing casts doubt on the legitimacy of the DEA's actions. The District Court failed to consider the cumulative effect of the DEA's actions. Even if individually justified, collectively the extensive harassment, increased scrutiny, duty restrictions, accommodation revocation, and involuntary transfer would lead a reasonable jury to find pretext and retaliation. It was unknown who made the final decision to move the Program and when that decision was made, but McGuire claims he made it after visited Fort Bragg and saw that Mr. Katz was not present in the facility. The emails from Edward Wezain stating he was informed on or about February 27, 2019 contradict McGuire, which is another fact in dispute and whose credibility should assessed by a jury. The DEA stated that the move had nothing to do with Mr. Katz or the complaints that he made, but this is really just the word of the employees at the DEA, who were then believed by the trial court when it granted the Motion for Summary Judgment. Mr. Katz tried to enumerate his arguments as to why these reasons were only pretextual for the Retaliation, but the trial court opted to believe the DEA and not believe Mr. Katz. Again, the trial court is substituting its own judgment for that of the fact finder in this case, and

this should not be allowed at this stage of the proceedings.

The move of the facility occurred at the same time as Mr. Katz was making complaints to the EEOC about contracts given to former employees and about the treatment he was receiving from his supervisor. "Close temporal proximity gives rise to an inference of causal connectivity." Dollar v. Shoney's, Inc., 981 F. Supp. 1417, 1420 (N.D. Ala. 1997); see also Carter v. Ball, 33 F.3d 450, 460 (4th Cir. 1994) (six-week period between hearing on plaintiff's first EEO complaint and effective date of decision to downgrade him sufficient to establish prima facie case of retaliation); King v. Rumsfeld, 328 F.3d 145, 151 n.5 (4th Cir. 2003) (The Fourth Circuit has held that close temporal proximity between protected activity and adverse action is sufficient to establish pretext). A plaintiff can attempt to show this causal connection through two routes. "A plaintiff may establish the existence of facts that suggest that the adverse action occurred because of the protected activity." Smith v. CSRA, 12 F.4th 396, 417 (4th Cir. 2021). "A plaintiff may also show that the adverse act bears sufficient temporal proximity to the protected activity." Id. (denying the motion for summary judgment and holding that a reasonable jury could find that a causal connection existed and reject the nondiscriminatory pretextual arguments put forth by the defendant).

In Joyner, supra, plaintiff made a complaint to the EEOC and then she was discharged. Her employer attempted to provide sufficient reasons supporting her discharge by listing certain misconduct by her while on the job. The court

rejected these arguments as pretextual. The court viewed the record as a whole and in a light most favorable to plaintiff, as it should, and then found that "genuine issues of material fact exist regarding the Defendant's reason for suspension and termination of Joyner. To rebut the reasons offered for her suspension and termination, Joyner relies on her verified complaint, depositions, and documents of record." 17 F.Supp.2d at 526. Thus, by relying on the documents in the record already, and viewing the evidence in the light most favorable to the plaintiff, the court denied the motion for summary judgment.

In this case, although the DEA has stated it began thinking about moving the Program before Mr. Katz's complaints, this is not accurate, considering the proof in the record of internal and external concerns being raised by Mr. Katz and other contractors that resulted in retaliatory acts occurring in very close proximity to the concerns being voiced. In addition to that, the moving of the Program and the revocation of the reasonable accommodation occurred in such proximity to the complaints that this should be a question for the jury to decide. The jury is the entity that should be weighing the credibility of the witnesses. The jury should be determining if the DEA truly was looking to move the program prior to the complaints being made, or if such decisions did not take root until Mr. Katz engaged in his protected activity. All of these activities were occurring at the same time. Mr. Katz has shown that the adverse act taken against him was in sufficient temporal proximity to making his complaints with the EEOC. It should have been up to a jury to weigh the credibility of the witnesses and

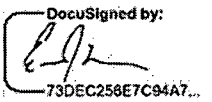
assess the dispute of facts. In viewing the evidence in the light most favorable to Mr. Katz, the District Court erred in granting the Motion for Summary Judgment, and the Fourth Circuit erred in upholding that ruling. This Court should now review that ruling.

CONCLUSION

In light of the foregoing, Petitioner requests that this Court grant this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit affirming that granting of the Respondent's Motion for Summary Judgment.

Respectfully submitted:

PETITIONER:
ERIC KATZ



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