

No. 17-1057

In the Supreme Court of the United States

VIOREL COTUNA,

Petitioner,

v.

WAL-MART STORES INC.,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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**THE PETITION FOR WRIT OF
CERTIORARI SHOULD BE GRANTED.**

This employment discrimination case does indeed involve a special, important and novel legal issue warranting Supreme Court review. It could help employers make better decisions while reinforcing the laws that affect potentially millions of Americans.

1. Arguments are not meritless.

ADA allows an employee to request and obtain medical leave for disability related reasons. That simply means that an employee cannot come to work. And this fact should not deem him/her unqualified when the employer does not engage in the required ADA interactive process or suggest alternate accommodations as an alternative to medical leave.

And the Sixth Circuit held that “Logically, if temporary leave can reasonably accommodate an employee in the performance of her essential functions, that same employee cannot be deemed unqualified to perform her essential functions by virtue of having requested the leave.” See *Stallings v. Detroit Pub. Schs.*, 658 F. App’x 221, 225 n.1 (6th Cir. 2016).

Respondent does not deny that a leave of absence necessary to train a service dog is compliant with ADA and EEOC’s Guidance Manual, is *per se* an unreasonable request for accommodation or that alternate offer was never made. Nor is there any dispute that this petition straightforwardly presents that question. The service dog would have allowed me to return to work and perform my duties, and through training, the service dog would have been compliant with ADA’s Titles II and III, where it requires that they must be properly trained in order to be allowed in public places. That is substantial reason by itself for

this Court to grant review.

Review also is justified because the Sixth Circuit's decision abandons the statutory text and this Court's precedent made it clear that the ADA steer clear of *per se* rules and requires case-specific analyses, as outlined in *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273 (1987), and *U.S. Airways, Inc., v. Barnett*, 535 U.S. 391 (2002).

According to Title I of the ADA, employers must make "reasonable accommodations," in the workplace for individuals with disabilities. The nature of the disability may be physical, as with a mobility, visual, psychological or hearing impairments. A reasonable accommodation is defined as a modification or an adjustment to a job or the work environment that allows an employee with a disability to perform essential job functions. And leave is a reasonable accommodation, without a bright line rule set by the Sixth Circuit for employers to follow, for the amount of time deemed reasonable.

Under the same law, service dogs constitute a reasonable accommodation to an individual with a disability in employment settings to assists a person with a disability in eliminating or mitigating barriers to completing essential work tasks.

Respondent's omits to address the questions presented in the Petition, specifically if a disabled employee should be granted at least the same amount of leave as granted to non-disabled, similarly situated employees and if an employer should engage in a good faith interactive process prior to his/her termination. This not only ensures compliance with Respondent's own Leave Policy as well as its Respect for the Individual Policy, but also with the Equal Opportunity Employer Policy, that requires employers to not discriminate against employees and job applicants based upon certain characteristics, such as age, race, color, creed, sex, national origin, religion and

disability.

A. Improper consideration of medical documentation.

My disability was obvious and known to Respondent during my entire employment.

Respondent says that my request was for indefinite leave while the documents on record shows that along with complete and sufficient medical certification, I originally requested "additional time off" on November 14, 2012. Being denied for this request for no valid reason, I submitted a reconsideration request and I provided a fixed date for the leave sought, until February 15, 2013, as well as the reason. To train my service dog.

The interpretation of the additional time off requested as an indefinite leave is incorrect and could have been easily clarified during an interactive process that never took place, as required not only by the ADA, but by the Respondent's own policy.

Furthermore, Respondent's standard medical form provided to me does not ask the medical provider for a return date and Respondent never contacted the Doctor's office to ask them to do so after express permission was given.

As a former member of Management of Respondent and having comprehensive training, it would have been improper for me to ask one of my blind subordinate for medical certification, every time he asked for guidance in the store due to his obvious disability, unless his request was not related to his disability.

Unlike the Family Medical Leave Act (FMLA) that requires medical certification for leave sought for various medical reasons, the ADA requires that a medical leave sought as a reasonable accommodation for an obvious or already known disability condition be

granted absent undue hardship.

B. Absence of undue hardship.

The ADA provides that an employer discriminates against an individual with a disability by failing to make a reasonable accommodation unless the employer shows the accommodation would result in an undue hardship on its operation. *See* 42 U.S.C. 12112(b)(5)(A). As the record reflects, I was not made aware that my request was unreasonable or that Respondent encountered any financial, operational or logistical hardship, and this is not the reason stated for my termination. And only the undue hardship factor, revealed at the interactive stage, allows an employer to deny a request for a reasonable accommodation.

As this Court expressed in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), the request must be “reasonable on its face” and the Respondent must “show special circumstances in the particular case that indicate the existence of an undue hardship”.

C. Respondent’s duty to engage in the interactive process.

Respondent’s own Policies and training Programs are crafted to reflect not case laws, but real life-scenarios and legal standards of State and Federal Laws, which along with Respondent’s mandatory and comprehensive Computer Based Learning (CBL) training programs, that are specifically customized for decision-making employees, calls for a formal interactive process to find appropriate reasonable accommodations, if an employee requests it. And in this case, Respondent’s failure to engage in the process resulted in the failure to find an appropriate, alternate accommodation.

As the evidence on record shows, to defend the retaliation claim, Respondent departed from its own practices stating in an oral argument in the District Court and without evidentiary documents, that “the wheels were already put in motion” as to the decision to terminate my employment long before I engaged in protected conduct on December 7, 2012, and before the December 9, 2012 deadline to provide additional medical documentation or be terminated.

This clearly and simply shows Respondent’s premeditated decision to terminate my employment regardless of its obligations to further communicate and explore alternate solutions to my accommodation request that would have allowed me to return to work. Not just during my leave, nor after my termination that was appealed to Respondent’s Home Office, but to this present day.

Furthermore, Respondent cannot direct the attention to any legal standard nor any of its own policies, that conditions and associates the required interactive process with the additional medical documentation sought for an already known and incontestable disability.

By contrast, the evidence on record distinctly highlights a bias towards unhealthy employees.

D. Application of Respondents Leave of Absence Policy is Discriminatory and Retaliatory, in Violation of Title VII and ADA.

Exceptions to Respondent’s Leave Policy are reasonable since it already allows an extension past the 12-month limit as a reasonable accommodation for disability related reasons and absent undue hardship.

The District Court and the Court of Appeals did not properly consider the direct evidence where it shows that Respondent administered its Leave Policy

in a discriminatory manner, when exceptions to its 12-month limit, regardless of the outcome of their employment, allowed longer leaves to non-disabled and non-Romanians employees, who have not engaged in protected conduct.

This Court decided long ago that “where an employer uses a neutral policy or rule, or utilizes a neutral test, and this policy or test disproportionately affects minorities or women in an adverse manner, then the employer must justify the neutral rule or test by proving it is justified by business necessity”. The Court reasons that Congress directed the thrust of Title VII to the consequences of employment practices, not simply the motivation. See *Griggs v Duke Power Co*, 401 US 424 (1971). And Respondent provided no business necessity reason for my termination on record and even assuming that a medical certification was not provided to Respondent, I should have been entitled to at least the same amount of unpaid leave, as provided to employees from a different class or allowed to use my accrued leave of three weeks. And this fact demonstrates a retaliatory reason for my engagement in protected conduct, a pretext and a false legitimate and no-discriminatory reason for my termination.

This Court also established that a retaliation claim does not need to involve a tangible employment action, like a discharge, to be actionable. Instead, it said that a material change of terms and conditions of employment, which could mean excluding someone from career-development opportunities, could also be retaliation. See *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006).

In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), this Court ruled that when a plaintiff makes a showing of a disparate impact violation of Title VII, he must do so by demonstrating that specific practices (and not the cumulative effect of the

employer's selection practices) adversely affected a protected group. Further, the Court held that when a showing of disparate impact is made, the employer only has to produce evidence of a business justification for the practice, and that the burden of proof always remains with the employee.

As the records show, there is not a business reason, or the absence of medical documentation listed on the "Exit Interview" form as a legitimate reason for my termination. And respondent did not provide an explanation why the reason of my termination was changed at the Motion for Summary Judgment stage, specifically that I failed to produce medical certification.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court held that a charging party can prove unlawful discrimination indirectly by showing, for example, in a hiring case that: (1) the charging party is a member of a Title VII protected group; (2) he or she applied and was qualified for the position sought; (3) the job was not offered to him or her; and (4) the employer continued to seek applicants with similar qualifications. If the plaintiff can prove these four elements, the employer must show a legitimate lawful reason why the individual was not hired. The employee still may prevail if he or she discredits the employer's asserted reason for not hiring him or her.

Accordingly, The District Court found that temporal proximity played a role in my termination and for the reasons listed above, Respondent's non-discriminatory reason, failure to provide medical documentation, fails. Having tolerated the conduct before the protected activity, this creates an inference that the real reason was the protected activity.

This Court also held that employees who give evidence of harassment in an internal investigation in response to the employer's questions, without having

come forward on their own and without any EEOC charge having been filed, are protected by the opposition clause of § 704(a) of Title VII. The Court stated: "There is, then, no reason to doubt that a person can "oppose" by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question". See *Crawford v. Metropolitan Government of Nashville and Davidson County*, __ U.S. __, 129 S. Ct. 846 (2009).

CONCLUSION

For the reasons outlined above, the petition for a writ of certiorari should be granted.

Respectfully submitted:

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Dated: March 12, 2018.