

No. 18-____

Supreme Court of the United States

Joseph Cooney,

Petitioner,

v.

Barry School of Law a/k/a Dwayne
O. Andreas School of Law,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Pro Se Petitioner.

QUESTIONS PRESENTED

1. Whether the prohibitions against disability discrimination in Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12132, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), apply to the question that a *prima facie* case of discrimination is "adequate to sustain a finding of liability for discrimination" against the school, when "sufficient evidence" is provided to disprove the school's defense of its decision to not consider disabilities of students on probation and deny petitioner access to one of their educational programs.
2. Whether the evidence was improperly credited to the party seeking summary judgment by the lower court but failed to properly acknowledge key evidence offered by petitioner opposing respondent's motion for summary judgment. All evidence must be considered in favor of the non-moving party by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. In this case the opinion below in the 11th circuit reflects a clear misapprehension of summary judgment standards in light of U.S. Supreme Court and circuit court precedents, since the 11th Circuit +failed to adhere to the axiom that a ruling on a motion for summary judgment, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn

in his favor.” *Anderson v. Liberty Lobby, Inc.*
477 U.S. 242, 255 (1986)

3. Whether the lower court failed to address or rule on count two, and the secondary issues of exams and requesting a third amended the complaint in petitioner’s complaint and appeal which would lead to a determination of abuse of judicial discretion and a denial of due process since there was nothing in the 11th circuit decision addressing count two.

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PETITION FOR A WRIT OF CERTIORARI

Joseph Cooney, Petitioner, respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals is unpublished. (App 1-10) The minute entry and transcript of proceedings in the district court granting Petitioner's motion for summary judgment under Federal Rule of Civil Procedure 56(b)(6) (App. 15-39) have not been designated for publication.

STATEMENT OF JURISDICTION

The court of appeals initially entered judgment on January 9, 2018. After Appellant Joseph Petitioner timely petitioned for rehearing en banc denied Appellant's petition on March 13, 2018. (App. 11, 12). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 42 U.S.C. § 12112(a), 12101, 12182 et seq., Rehabilitation Act of 1973 § 504, 29 U.S.C. § 701(b)(1)

STATEMENT OF THE CASE

A. Legal Background

1. This case concerns the scope of the ADA's prohibition of "discrimination against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a).

In enacting the ADA, Congress found that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and costs the United States billions of dollars." Id. § 12101(a)(8).

Congress specifically stated that the purpose of the ADA was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Id. § 12101(b)(1). b. The ADA defines prohibited "discrimination" to include "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 [the DEFENDANT] can demonstrate that the accommodation would impose an undue hardship on the operation of the business." Id. § 12112(b)(5)(A).

The statute, in turn, states that "reasonable accommodation" may include "Petitioner was found to be disabled under the ADA by the Eleventh

Circuit after the Middle district of Florida erroneously cited pre-ADAA Act of 2008 precedent to grant Respondent Summary Judgment, and that petitioner was found to have made a prima Facie case by the Eleventh Circuit. (App 2,3)

B. FACTUAL BACKGROUND

This is a disability discrimination action. Petitioner started attending Barry in August 2010. Petitioner had an implant in his right eye since 2003. During the Spring 2011 semester, on or about March 12, 2011 the implant became dislocated and Petitioner became blind in the right eye. respondent, Barry School of Law a/k/a Dwayne O. School of Law (hereinafter respondent) refused to accommodate, grant appellant extended probation and dismissed Petitioner, Joseph Petitioner based on my disabilities, on February 2012.

C. PROCEEDINGS BELOW

Petitioner filed a complaint with the Office of Civil Rights, then an action in U.S. District Court, Middle District of Florida-Orlando Division, FL, alleging violations by Barry of the American with Disabilities Act (ADA) as amended (ADAA 2008). All claims have been dismissed by the district court through summary judgment. Petitioner appealed this case to the U.S. Court of Appeals 11th Circuit and the District Court's judgment was affirmed.

I. REQUEST FOR ACCOMMODATIONS

After becoming blind in the right eye from the dislocated IOL, Petitioner went in to the administration office of Appellee and requested extra

time on three exams and prior an extension of time to submit the appellate brief. Petitioner was told that I had to go to the professor to request an extension of time to submit the appellate brief. Appellee was made aware of the requests prior to the end of the semester and three accommodations were granted and one was denied. The requests via the administration office were forwarded to the office of disabilities. These requests were made by filling out variance request forms provided by Barry for disabled students seeking accommodations, and defendant told petitioner submit it to the administration office.

On March 12, 2011, the administration office was given medical documentation requesting the accommodations prior to approval. Appellant was informed that I had to go to the Professor to obtain an accommodation of an extension of time to submit the appellate brief. The Professor also stated in an affidavit that she has never given a student an accommodation ever. Megale could have had Petitioner's adversary in the assignment submit their brief on time and withheld it until Petitioner submitted his brief and done the exchange of briefs at that time. They could have done their oral argument last a few days later. This would not have had any type of deleterious effect on the class, nor would have it created any type of hardship on Barry.

No alternative means were discussed or even considered. Barry is creating an impermissible standard in not granting any students with disabilities an accommodation for submitting

Appellate briefs. *See Samson v. Federal Express Corporation*, No. 12-14145 (11th Cir. Mar. 26, 2014)

The denial of Petitioner's accommodation request was instantaneous by Professor Megale. Other students even did oral argument twice and received briefs from more than one student. (App 6) This completely contradicts Megale's claims that giving Petitioner extra time would have created an unfair situation for other students. Megale's syllabus states a brief can be late for extraordinary circumstances. Losing vision in one eye isn't extraordinary circumstance?

Barry's refusal to provide reasonable accommodation is evidence of discrimination. See *Terrell v. USAir*, 132 F.3d 621, 624 (11th Cir. 1998). The request for accommodations for the other three exams were process by the school administration office, but they did not process the request for the extension of time to turn in the appellate brief. Going to an individual professor myself gave the professor leeway to deny the accommodation instead of having the school inform her to grant me an accommodation.

II. EXAMS

This issue was mentioned in the original opposition and developed during discovery, and not addressed by the 11th Circuit. The appellate brief grade of petitioner was extremely questionable, Petitioner had conversation with counsel for defendant and informed defendant that there were no points awarded for the Times v. Sullivan case on page nine his constitutional law exam. When copies were sent

to petitioner there was a one written next to this case on the exam that was not there when petitioner reviewed the exam with Professor Pedrioli, who hid when process servers came to serve him with a subpoena for deposition. The new "one" written on the altered exam, in comparison to the ones in the half marks, do not match the original hand writing on the Con Law exam. This is why respondent would not produce the original exams during discovery when petitioner went down to Florida for a week for depositions in the first week of September 2015.

Respondent sent copies of exams to petitioner and falsely claimed they were originals. When questioned about the authenticity of the exams, Respondent then claimed that they "Located" new original exams down in Florida even though they were claiming they mailed petitioner the "original" exams.

Respondent is claiming that there is such a thing as more than one set of original exams. There is only one original and this claim supports the fact that defendant sent copies of exams to petitioner and tried to pass them off as originals.

Respondent states repeatedly that petitioner's grades were reason petitioner was dismissed, a fair analysis of what transpired in regard to petitioner's grades is needed and petitioner claims that petitioner's exam(s) were doctored/forged in regard to the grading during the discovery period of this lawsuit upon production of copies. Respondent to this day have with-held and concealed the original exams.

Petitioner requested accommodations on his exams, which were approved. Petitioner was instructed by

Barry that he needed to go to the professor to request extra time to submit appellate brief. Professor Megale/Berenguer refused to give extra time to Petitioner to submit the appellate brief and became irate and told Petitioner to leave her office. Petitioner received a D plus on the brief and ended up on academic probation and ended up on extended probation as a result of this grade. Petitioner flew down to Florida from NY in June 2011 to personally review this grade and when he starting questioning Megale/Berenguer about how she came to this grade, she became irate and told him to leave her office and stated: "Anyone can write about a case." Petitioner's adversary submitted a brief that violated all the requirements. It was not binded, it had no color and was submitted with a staple in the corner. The brief was also very short and generic. Petitioner received a lower grade for a superior brief from Professor Megale.

III. Request for a Third Amended Complaint

A request for a third amended complaint was requested and denied by the District Court, even though respondent refused to turnover petitioner's original exams for inspection during discovery. The original exams and the veracity of the copies are deeply in question. The 11th Circuit also never addressed this issue that was part of petitioner's briefs.

IV. MEETING WITH ACADEMIC SUCCESS DIRECTOR LISA KIRSCHT

Petitioner saw Kirscht at the beginning of the Fall 2011 Semester. Kirscht falsely stated in her report

that I ignored emails and didn't meet with her until September 6, 2011. She was seeing all the students for the first time during the same week in September that Petitioner first saw Kirscht. When petitioner first met with Kirscht, she informed me that I was required to meet with her on a weekly or bi-weekly basis throughout the semester. Petitioner knows for a fact that all students on probation were required to meet with Kirscht continuously throughout the semester, as she directly conveyed this to petitioner.

On September 15, 2011, After I told Lisa Kirscht that I was blind in my right eye and needed a reconstructive type of surgery to restore my sight, Kirscht strongly conveyed that I should take a leave of absence and come back after the eye operation. Petitioner said that I did not want to take a leave of absence and Kirscht became upset and told petitioner: "We are done, don't come back anymore"

No emails were sent to me throughout the whole semester until the very end of the Fall 2011 semester, when it was time to have my classes approved for the Spring 2012, which Kirscht was mandated to do for students on academic probation. Kirscht emailed other students about not coming to see her, but never emailed petitioner about not going to see her. Because Kirscht told petitioner to not come back, denying access to her as the academic success director. Kirscht acted in bad faith and gross misjudgment towards petitioner.

Kirscht also subjected petitioner to deliberate indifference to pervasive, severe disability-based harassment that effectively deprived a disabled student access to the school's resources and

opportunities. Access to the Academic Success Director is listed as one of three parts of the Academic Success Program, that is supposed to be available to all students. The availability of this academic program was conveyed to petitioner when I first entered Barry school of Law, and petitioner received a pamphlet stating "the director of academic success is available to meet individually with any student who is seeking to improve his or her study skills...." this is part of what petitioner and all students are entitled to under the academic success program, but Kirscht denied petitioner access to her for the entire semester, from September 15, 2011 until the conclusion of the Fall 2011 semester, and submitted a report to the probationary panel that contained false information about petitioner.

V. EXTENDED PROBATION HEARING

Petitioner met with the panel on February 1, 2012 for extended probation. Professor Frank Schiavo is head of the panel. Petitioner was asked why I had not met with the academic success director after September 2011. This was a major issue during the hearing. Petitioner informed the panel that I had met with Kirscht and was told not to return. Members of the panel stated that I did not meet with Kirscht for the entire semester and told me that I was required to.

I was questioned intensely about the status of my eye and if I was getting the surgery. I informed the panel that the recovery period would be longer than originally anticipated and that petitioner wanted to continue school for the Spring 2012 semester. (App

53-55) One panel member stated: "What has changed regarding your eye going forward into the spring 2012 semester?" *Id.* I was being told that since I was blind in one eye that nothing has changed, they were very negative about my being blind in my right eye and continuing in school. (App 53-55)

Petitioner was going to get doctor lines to get an accommodation for double time on the exams, which is permissible. Almost the entire hearing was about my eye and when or if I was having surgery and my not meeting with Kirscht after September 15, 2011. The panel member continually stated that I did not meet with Kirscht after September 15, 2011, and this questioning was based on the report Kirscht submitted to the panel. The panel member had the paper in his hand while he was referencing this. Schiavo stated he never received the report from Kirscht, yet he stated that he knew what was in the report. This makes absolutely no sense. Schiavo had the Kirscht report as did all the panel members.

When petitioner was being denied extended probation, defendant claims petitioner did not comply with probation by meeting with the academic success director after September 15, 2011, as Kirscht's report plainly states. When this situation is before the court, defendant back tracks and has Kirscht state that a student is only required to meet with her once. Kirscht never wrote in her report that petitioner complied with probationary terms by meeting with her the alleged required one time, she wrote that "I did not hear from student for the rest of the semester." This would only be stated if the student was required to continue to meet with Kirscht on a regular basis and failed to.

Kirscht also stated in her recommendation to the hearing panel that petitioner did not review any of my exams. Defendant even went so far as to falsely inform the Office of Civil rights that petitioner did not comply with my probation by failing to review my exams, "The notes also indicate that the Complainant failed to comply with his probation by failing to review his exams." The Office of Civil rights even made this a major point in dismissing the charge. Petitioner emailed all my professors and reviewed all my exams every semester. (App. 66-72) The head of the panel, Professor Schiavo, who reviewed this recommendation, knew that petitioner reviewed my exams since I reviewed my exams with Professor Schiavo & Schiavo admitted in deposition that I reviewed my exams with him for both semesters I had his class. This displays the unethical and discriminatory actions Kirscht subjected petitioner to at the conclusion of the Spring 2011 semester, Petitioner even went so far as to fly down to Orlando, rented a hotel and car to review my exams as June emails reflect. *Id.*

VI. DENIAL OF EXTENDED PROBATION

Petitioner received notice that I was denied extended probation. Petitioner sent email requesting the reason(s) why I was denied extended probation. Professor Schiavo, the head of the panel who made the decision to deny petitioner extended probation, stated that this information was confidential and he refused to answer this query. (App 60-62)

The emails and petition reports plainly state that Petitioner was denied extended probation because of his physical difficulties (App 53-57,62), and because he was not having the surgery at this time. (same reasoning that lead to Academic Success Director to tell Petitioner to leave and don't come back) In *Denney v. Albany* there was no direct evidence, there was pretextual theory that was much less compelling than what Barry plainly stated in the emails and even admitted to removing the fact that they dismissed Petitioner because he was blind in his right eye to "save them from a lawsuit." (App. 62) Barry's pretext was directly revealed by stating the exact reason why they deleted and denied any mention of Petitioner's being blind in his right eye in finalizing Petitioner's dismissal, this remark could have no other reason or meaning. "only the most blatant remarks, whose intent could mean nothing other than to discriminate on the basis of some impermissible factor constitute direct evidence of discrimination. *Rojas v. Florida*, 285 F.3d 1339, 1342 n.2 (11th Cir. 2001) "The more a remark evinces a discriminatory state of mind, and the closer the remark's relation to the allegedly discriminatory behavior, the more probative that remark will be." See *Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 56 (2d Cir.1998).

Schiavo even stated in deposition that Petitioner was dismissed because of being blind in right eye:

D-130-Schiavo dep pg 26: lines 2-18:

Q: So, you were stating that because of my eye, being blind in my eye, was a contributing fact for the committee not

approving my petition? Schiavo Answer:
That's what this says, but this is not the final
report.

Q: Did you write this report?

Schiavo Answer: Yes, I did.

Q: and you were the chair of my hearing?

Schiavo Answer: Yes, I was.

Q: So-and I also-presented that I was blind in
my right eye during my hearing? Schiavo

Answer: I do remember that.

Q: And this was the feelings of the committee
and yourself that you wrote this? Schiavo

Answer: This is

Schiavo dep pg.27:4-5

Q: was this report based on my hearing?

Schiavo answer: Yes, it was

Schiavo dep pg.30:4-8

Q: But the feeling was prior to the final
report, If I'm, If I'm correct, is that my eye was
a factor in not receiving extended probation?

Schiavo Answer: It could've been, yes.

Q: page one of two

Schiavo A: "Megan: You're absolutely right
about mentioning Mr. Cooney's physical
disability. Helia Hull agrees with you. As a
result, I have completely revised Mr.
Petitioner's report and attach it. Thanks for
saving us from a lawsuit."

Schiavo states in deposition that the panel does not consider disabilities in making their decisions, but prior to his deposition the records directly displays a series of emails with all the other panel members (decision makers) that fully exhibit the reason why Cooney was dismissed was because he was blind and remained blind for the upcoming semester. (App 53-64)

If disabilities aren't considered, then why is Schiavo and the members exchanging emails that Cooney was denied extended probation because of his physical disabilities? This was respondent's main primary defense in the 11th Circuit. "describing direct evidence as consisting of testimony that the defendant acted with a discriminatory motive" See *Bell v. Birmingham Linen Servs.*, 715 F.2d 1552 (11th Cir. 1983)
Original email:

Mr. Cooney had eye surgery in 2005 resulting in an interior ocular implant. Unfortunately, the implant became dislocated and he has been suffering with blindness in his right eye since March 2011. Between an uncooperative surgeon and no insurance, the problem still exists. He has found insurance and the problem will be fixed in another month or two. ...

Because of his physical difficulties
and his lack of concern about advice

for succeeding, the Committee did not approve his petition. (App 34)

Exert from an amended Report:

BECAUSE HIS
PHYSICAL
DIFFICULTIES WILL
CONTINUE DURING
THIS SEMESTER, THE
DEFICIENCIES IN HIS
PETITION, AND HIS
LACK OF CONCERN
ABOUT ADVICE FOR
SUCCEEDING, THE
COMITTEE DID NOT
APPROVE HIS
PETITION. (App 58,59)

Respondent finally removed all language of Cooney being blind in my right eye, because they reasoned that their handbook had to be followed. (App. 54)

From respondent's brief to the 11th circuit:

"In reviewing the draft report, the Committee noted that it could not consider things outside of the academic standard in the Handbook. DE126-34, pp.10-11. As a result, the Committee revised the report to only address the academic standard."

Respondent conveniently failed to mention that their handbook also contains a no discrimination section in it including disabled students. (App F 51-52) This defense argument has no standing unless discrimination is an accepted policy at respondent's school.

Respondent also altered petitioner's GPA increase in their final report:

First final draft removing mention of being blind:

DURING THE FALL 2011
SEMESTER HIS
CUMULATIVE GPA ROSE
FROM 1.809 TO 1.883
(App.54-56)

Final Draft with GPA lowered along with removing mention of being blind:

DURING THE FALL 2011
SEMESTER HIS
CUMULATIVE GPA ROSE
FROM 1.876 TO 1.879,
LEADING TO HIS
DISMISSAL (App. 58)

Professor Schiavo agreed that Professor Bitatkis was "absolutely right" about removing any reference to Cooney's "physical disability." He then circulated a "completely revised" letter and thanked Professor Bittakis for "for saving us from a lawsuit." (App 62) The revised letter completely excised any description of Cooney's condition—including that he was "suffering from blindness in his right eye"—and removed the phrase "physical difficulties" as well as any suggestion that Cooney's petition was denied because of his "physical difficulties." Indeed, the letter literally replaced the actionable "Because of his physical difficulties" with the anodyne "Because of the deficiencies in his petition." This remarkable evidence manifestly establishes that, at a minimum, there is a genuine factual dispute over whether Barry employed pretextual for denying his petition and dismissing him from school rather than imposing probation. Petitioner has clearly made a substantial showing that respondent's explanations were false.

This decision by the respondent to restructure their true reason for dismissing Appellant is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. The contention here is that the institution's action was motivated by bad faith of discrimination. Schiavo also displayed deliberate indifference to Cooney being blind in his right eye, in that he stated in deposition that he didn't know if a dispute with a landlord is more serious than being blind.

REASONS FOR GRANTING THE PETITION

MAY IT PLEASE THE COURT:

I. Introduction

Petitioner submits the following in support of my writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals, Middle District of Florida granting respondent's Motion for Summary Judgment.

In granting summary judgment, the lower court departed from the accepted standard of review set by this court in *Reeves v Sanderson Plumbing Products, Inc.*, 120 S.Ct. USLW 4480, (U.S. June 12, 2000). This departure was sanctioned by the Eleventh Circuit Court of Appeals. In addition the District court failed to apply the standard of the ADAA of 2008 and either applied overturned law or failed to address the issues presented to oppose the respondent's motion for summary judgment as a consequence of applying overturned law that was addressed in detail by the petitioner in my opposition to respondent's motion for summary judgment.

II. Standard of Review for Summary Judgment

A. SUMMARY JUDGMENT IS TO IDENTIFY ISSUES TO BE TRIED NOT FOR THE COURT TO DECIDE THEM

"Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. At the summary judgment stage, the trial judge's function is not himself to weigh the evidence. There is no such issue unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. The inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). To be held liable under the Rehabilitation Act for failing to provide services to student, school officials must have known or have been reasonably expected to know of the student's disability, but student need not establish that there was an intent to discriminate. Rehabilitation Act of 1973, § 504(a), 29 U.S.C.A. § 794(a).

"As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." See *Anderson*. Such as what

did defendant imply or directly state when they produced a series of emails stating that Cooney was being dismissed from the school because of his physical disabilities, yet they go on to say that they don't consider disabilities when addressing petitions for extended probation. If that is true then what was the series of emails about in regard to Cooney's physical disabilities? The inconsistencies pertaining to these highly relevant material facts are definitely in dispute.

The key components in a federal motion for summary judgment are materiality and genuineness. The three United States Supreme Court decisions in 1986 have clarified the parties' respective burdens on a summary judgment motion. When the burden of proof on an issue at trial is on the opposing party, the movant may meet its burden of production by pointing out that the record lacks sufficient evidence for petitioner to make out its case. Once the movant has met its burden, the opposing party must identify specific, admissible facts in the record or in its affidavits which support its allegations. See *Matsushita Electronic Industries Company v. Zenith Radio Corporation* (U.S. 1986) *Celotex Corporation v. Catrett* (U.S. 1986) and *Anderson v. Liberty Lobby, Inc.* (U.S. 1986). Defendant's emails can be argued as exhibits of direct evidence of discrimination. Professor Schiavo even confirmed in deposition that petitioner's eye injury was why petitioner was not granted extended probation. None of this shows any genuineness on the part of the defendant. *Id.* These and many other examples are sufficient evidence that supports petitioner making his case for a jury trial.

"The U.S. Supreme Court reversed summary judgment because two lower courts "neglected to adhere to the fundamental principle" when considering such a motion.

A decision of the U.S. Court of Appeals for the Fifth Circuit had affirmed a grant of summary judgment, but in a per curiam opinion, the Supreme Court's reversal emphasized to the federal courts that "reasonable inferences should be drawn in favor of the nonmoving party." This case with its unusual procedural posture reminds lawyers that courts should only grant summary judgment when there are undisputed material facts." See *Tolan v. Cotton*, 572 U. S. (2014)

A "judge's function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U. S., at 249.

Summary judgment is appropriate only if "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(a). In making that determination, a court must view the evidence "in the light most favorable to the opposing party." *Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 157 (1970); see also *Anderson, supra*, at 255.

Courts must "avoid weighing conflicting evidence or making credibility determinations," *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000), and consider the entire record, but

"disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 2102.

Such evidence should include disputed testimony of defense witnesses. The Court's function at the stage of summary judgment "is to identify issues to be tried, not decide them." Hill v. Pfizer, Inc., 266 F. Supp 2d. 352 (2003 D. Conn.)

"We view the evidence in the light most favorable to the nonmoving party, draw all reasonable inferences in favor of the nonmoving party, and may not weigh conflicting evidence or make credibility determinations." See *Furcron v. Mail Ctrs. Plus, LLC*, 843 F.3d 1295, 1303 (11th Cir. 2016)

"viewing all the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in its favor." See *Payroll Mgmt., Inc. v. Lexington Ins. Co.*, 815 F.3d 1293, 1297 (11th Cir. 2016), *Flowers v. Troup Cty. Sch. Bd.*, 803 F.3d 1327, 1335 (11th Cir. 2015)

In *SWIERKIEWICZ v. SOREMA N. A.* 534 U.S. 506 (2002)

Justice Thomas delivered the opinion of the Court. This case presents the question whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973). We hold that an employment discrimination complaint need not include such facts and instead must contain only "a short and plain

statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

B. An Argument that Direct Evidence of Discrimination is Present

A discrimination petitioner can defeat summary judgment and obtain a trial based merely on evidence that the defendant's asserted reason for its adverse action is false, regardless of whether additional evidence of discrimination is presented. In this case petitioner actually made a claim that not only is there circumstantial evidence that is acceptable under *McDonnell Douglas Corp.* but that a claim of direct evidence is present and was in the original complaint, and on appeal petitioner presented an argument of DIRECT EVIDENCE of discrimination which is present based on the series of amended emails by Schiavo and the probation panel to eliminate the language that petitioner was denied extended probation because of his physical disabilities to "Save them from a Lawsuit." The Eleventh Circuit never addressed the direct evidence claim by petitioner.

III. Rule 10. Considerations Governing Review on Writ of Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's

discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

It is clear that the 11th circuit has entered a decision that is in conflict with their own decisions and other circuit appellate courts. The 11th circuit failed to cite even one case of precedent to support their opinion and order (App 1-10) No cases are in the 11th circuit ten-page opinion and order of Petitioner v. Barry, not one. (App1-10). This would lead one to conclude that the decision cannot be supported by any mandatory legal precedence in the 11th circuit or any legal precedence in any other circuit. The decision being unpublished also puts a "blanket" on their decision that is contrary to existing laws and legal precedence throughout the United States courts. I reviewed other decisions from the 11th circuit, and every one of them contained supported case law to support their decisions.

The 11th Circuit stated in their opinion the following:

"It is true that the initial draft of the Committee's reasons for denial suggested that the Committee believed that petitioner, suffering as he did with the eye problem, would not be likely to achieve a 2.0 GPA if given the opportunity of another semester." (App. 9) The 11th Circuit is stating clearly that respondent has at the very least suggested they dismissed Petitioner because of being disabled. This in itself contradicts and undermines the ADA of 1990 and Section 504.

"And the initial draft of the Committee's rationale is a mere statement of the obvious fact that petitioner's GPA does in fact indicate that there is little likelihood that an additional semester of probation would result in petitioner's achieving a cumulative GPA of 2.0 or greater. In other words, the Committee's initial draft is a mere recognition that petitioner was not "otherwise qualified." (App 9) The 11th Circuit is stating that Petitioner was not otherwise qualified because I was blind in my eye and not having eye surgery going into the Spring 2012 semester. The respondent clearly wrote this.

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

The 11th Circuit Court of Appeals has decided this case that conflicts with a federal question based on the ADA and the ADAA of 2008. The defense that the defendant/Appellee submits is that disabilities are not considered in reviewing a student who requests extended probation. They are stating that

disabilities are checked at the gate at their institution and the ADA doesn't apply to them.

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Appellant addresses the 11th circuit's alternative holdings. The 11th circuit erroneously claims that Appellant mounts two primary arguments that the district court erred in its alternative holdings. Appellant had three primary arguments, one being count two that Appellant submitted in my briefs and even gave oral argument on November 9, 2017 (App C 16-17).

The 11th circuit granted Appellant the right to participate at oral argument for the very specific reason of addressing count two. *Id.* Petitioner specifically requested that the 11th circuit rule on count two and the direct evidence argument in my request. (App 9) There was no mention or discussion of any kind in regard to count two. Count two was well briefed and argued in front of the 11th Circuit and a proper legal analysis should be in the opinion. *Id.* That court's opinion on count II was never addressed. There is no understanding of the resolution of count two, as the 11th circuit failed to address it. The 11th circuit is admitting they never considered count two as in their opinion it states that Appellant mounts two primary arguments when in fact Appellant submitted three primary

arguments along with the question of being disabled. (App 3) This lack of addressing this cause of action fails on every level in addressing a claim under the Rehabilitation Act of 1973 and the ADA of 1990.

IV. COUNT TWO: PETITIONER WAS DENIED ACCESS TO ACADEMIC SUCCESS ADVISOR AND CAN STATE A PRIMA FACIE CASE OF DISCRIMINATION UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973.

Access to the Academic Success Director is listed as one of three parts of the Academic Success Program, that is supposed to be available to all students. The availability of this academic program was conveyed to petitioner when I first entered Barry school of Law, and petitioner received a pamphlet stating "the director of academic success is available to meet individually with any student who is seeking to improve his or her study skills." This is part of what petitioner and all students are entitled to under the academic success program, but Kirscht denied petitioner access to her for the entire semester. Section 504 requires schools to make their classes, programs, and activities accessible to students with disabilities and injuries.

Once a student receives notice that he is on mandatory academic probation, he must meet promptly with the Director of the academic Success Program, who shall determine what measures may improve the student's academic performance." When

Petitioner went to see Kirscht, she told him not to come back in a very unprofessional and agitated manner. Dean Witherspoon stated in deposition that the director of the academic Success Program will instruct students to meet with the them on a regular basis, and students have been cited for not meeting with the academic success program director on a regular basis. Inconsistencies are blatant in regard to how many times a student must meet with the academic success program director and professor Schiavo. Schiavo said in deposition that he didn't know how many times a student is to meet with the director.

The academic success program director was emailing all the students who failed to meet with her during the semester except petitioner.

A. Students Who Applied for Extended Probation Second Interrogatory Responses:

Student three: meet with the director regularly; student five: met on a weekly basis (as plaintiff claimed is required); student ten: spoke briefly with and needs to be accountable to academic success director, student seven: was not responsive to emails from the director; second student no. ten: did not maintain contact with director; student eleven had little or no contact with director; student thirteen: did not maintain contact with director ; student fourteen: was not prepared for any meetings (met more than once) Unlike the above mentioned students; the director didn't email petitioner in regard to not seeing her because she told petitioner not to come back

Their own dean (Witherspoon) of this program contradicts this in deposition. Former Barry Student Joshua Erwin submitted a second affidavit of support stating that he had to meet with Kirscht throughout the semester, on a regular basis while on probation, it was a requirement, and another affidavit that stated in his brief that upon meeting with Lisa Kirscht, she also stated to Erwin that "disabled students do not belong in law school." (App 74)

V. Other Circuits and the Conflict with This Case

To establish a violation of § 504, petitioners must demonstrate that (1) E.J. is disabled as defined by the Act; (2) E.J. is "otherwise qualified" to participate in school activities; (3) the school or the Board receives federal financial assistance; and (4) E.J. was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1380 (3d Cir.1991); 34 C.F.R. § 104.4(a). In addition, to be liable, defendants "must know or be reasonably expected to know of" E.J.'s disability. *Nathanson*, 926 F.2d at 1381. However, petitioners "need not establish that there has been an intent to discriminate in order to prevail under § 504." *Id.* at 1384. See *Alexander v. Choate*, 469 U.S. 287, 297, 105 S.Ct. 712, 718, 83 L.Ed.2d 661 (1985).

In *Washington v. Indiana High School Athletic Ass'n*, 181 F.3d 840, 849 (7th Cir. 1999), that Court considered the causation element of both a Title II ADA claim and a Section 504 claim and treated them as the same. The "solely by reason of" language in

Section 504 “merely indicates that [the petitioner] must establish that, but for his disability, he would have been eligible” for the program in question. *Id.* (emphasis added). The same “but for” standard has been used by this Court to describe the causation element under Title II of the ADA. *Wis. Comm’y Servs. v. City of Milwaukee*, 465 F.3d 737, 752 (7th Cir. 2006). Thus, the causation element is the same for both claims.

The Petitioner must establish that “but for” their disabilities, they would have been able to participate in the Academic Success Program by being permitted to receive services from the academic success program director by meeting with her on a regular basis as she originally stated to petitioner that was what was going to be permitted on a weekly basis, until it was disclosed that petitioner wasn’t having the eye surgery.

In *Argenyi v. Creighton University* 703 F.3d 441 (8th Cir 2013)

The Eight Circuit reversed the district court’s grant of summary judgment to Creighton University and sent the case back to the district court. The Eight Circuit ordered the district court to decide the case in light of its finding that Creighton must furnish reasonable auxiliary aids and services so that all individuals have an equal opportunity to gain a like or equal benefit. Although this decision is an important national case. The Court’s decision in *Argenyi* will help provide increased meaningful access to professional education through both the

Rehabilitation Act and ADA. This is significant because people with disabilities are underrepresented in higher education generally.

The decision is also significant because the Court ruled that universities could not simply dictate the best approach in providing accommodation to individuals with disabilities. Instead, the Court found that schools have to listen to the individual's determination about what works best for them, as they are the most familiar with their disability.

Other circuit courts have ruled in a comparable way as the Court did in *Argenyi*. The Eighth Circuit agreed with and cited an Eleventh Circuit case in coming to the conclusion that providing necessary auxiliary aids and services means providing the student an opportunity to receive a like or equal benefit from the institution.

The Fourth Circuit came to a similar conclusion in *Feldman v. Pro-Football Inc.* (4th Cir. 2011) where it ruled that stadiums must provide auxiliary access to more than just emergency information at NFL football games to ensure deaf visitors an equal benefit.

"Petitioner's eye problem occurred on March 12, 2011. Thereafter, petitioner contacted an appropriate office and made several requests to accommodate for his eye disability, including additional time for taking examinations, additional time to turn in his brief in his legal writing class"

For a student with a disability to succeed in a suit claiming discriminatory dismissal, he or she must be otherwise qualified and be able to show that the university knew of the disability and failed to accommodate (*Nathanson v. Medical College of Pennsylvania*, 1991; *Rossomando v. Board of Regents of University of Nebraska*, 1998), provided inappropriate or inadequate accommodation *Rodgers v. Curators of University of Missouri*, (8th Cir. 1998; *Wong v. Regents of the University of California*, (9th Cir. 1999), or discriminated in other ways on the basis of the student's disability.

11th Circuit opinion stated: "Megale's immediate response was that she could not grant the delay because of the fixed oral argument date, petitioner did not suggest to the professor that only a day or two would have been helpful." (App) Megale stated in her affidavit that she has never given anyone extended time on a brief ever, nor was petitioner ever afforded any type of discussion in regard to an alternative accommodation.

Cutrer v. Board of Supervisors of LSU, 429 F.3d 108 (5th Cir. 2005) The Fifth Circuit held that Institutions should engage in interactive process to determine reasonable accommodations.

Constantine v. George Mason University, 30 Nat'l Disability L. Rep. ¶ 157 (4th Cir. 2005) The Fourth Circuit held that a law student with intractable migraine syndrome requesting additional time on exam could pursue claim. No 11th amendment immunity.

Amir v. St. Louis University, 12 Nat'l Disability L. Rep. ¶ 151 (E.D. Mo. 1998); 184 F.3d 1017 (8th Cir. 1999) Medical student with obsessive compulsive disorder was dismissed because of academic deficiencies; unreasonable to grant request to change supervisors, which would be fundamental alteration; appeal recognized basis for claim of retaliation.

Pushkin v. Regents of the University of Colorado (10th Cir. 1981)

Summary: Pushkin was an M.D. with multiple sclerosis applying for a medical residency at the University of Colorado Psychiatry unit. He was denied admission. Those in the interview committee justified their decision to deny him admission, stating that (a) they were concerned how patients would react to Dr. Pushkin; (b) they felt Dr. Pushkin had not come to terms with his disability, and that this would affect his ability to treat patients; (c) Dr. Pushkin would not be able to handle the stress on the job on account of his condition; (d) and that Dr. Pushkin would require too much medical care to be able to satisfy the requirements of the job. The members of the admissions committee gleaned all this from a 45-minute interview. Dr. Pushkin's therapist offered testimony stating his belief that Dr., Pushkin would be able to handle the stress of the job. Dr. Pushkin offered information on how he would handle his need for on-going medical treatment. The 10th Circuit found that the residency program had discriminated against Dr. Pushkin.

Key Points: Pushkin makes clear that there must be an individualized inquiry into the circumstances of each individual and that broad stereotypes of the limitations of individuals with various disabilities are not properly the basis of a decision that someone is not "otherwise qualified". Typical applications in higher education involve students in clinical placements or teacher education programs. Pushkin teaches that we may not stereotype students with disabilities when deciding whether they are otherwise qualified for such programs, but rather consider how each individual student can or cannot meet program requirements.

Another recent decision involving academic deficiencies is *Peters v. University of Cincinnati College of Medicine* (S.D. Oh 2012) in which a medical student with depression, a learning disability, and ADD was placed on academic probation. The medical school refused to allow her to retake exams after her medication regimen had stabilized because her history of depression and mood swings would prevent her from being a good physician. However, the court found that evidence that the dismissal was because of a pattern of psychiatric difficulties might establish a Title II case.

VI. Statutes

To be held liable under the Rehabilitation Act for failing to provide services to student, school

officials must have known or have been reasonably expected to know of the student's disability, but student need not establish that there was an intent to discriminate. Rehabilitation Act of 1973, § 504(a), 29 U.S.C.A. § 794(a).

VII. The Questions presented are paramount to disabled students and school compliance with the ADA and Section 504

Students with disabilities should be allowed to participate in all activities that are available for students without disabilities. They should be allowed to participate in the same academic curriculum as well as in nonacademic extracurricular activities. Students protected by Section 504 and the ADA must have equal access to health services, recreational activities, athletics, student employment, clubs, specific courses, and field trips.

Under the ADA, independent schools may not discriminate against any student with a disability by excluding the student from fully participating in any school program or activity. The ADA protects otherwise qualified disabled students from any of the following forms of discrimination by schools:

Using eligibility criteria that tend to "screen out" otherwise qualified individual students with disabilities or classes of students with disabilities from the full and equal enjoyment of school programs⁴, unless such criteria are necessary for

the provision of the school programs offered

The following are examples of reasonable accommodations, provided that such accommodations do not fundamentally alter a school's mission and objectives. Extra charges may generally not be imposed on students or their families in order to cover the cost of measures taken to ensure compliance with the ADA. Rather, the costs should be absorbed as overhead expenses.

allowing more time to complete tests or other assignments;

1. substituting specific courses where substituted courses fully satisfy a school's mission and objectives;
2. adapting a manner in which specific courses are conducted;
3. extending the time to complete course/graduation requirements;
4. adapting the manner in which the course materials are distributed;
5. providing alternative formats for examination

Teachers have an obligation to maintain awareness about the responsibilities imposed by the ADA and should be mindful of the issues facing their students with special needs. Good communication between school personnel, parents, and students also decreases the likelihood of disputes requiring formal resolution. The ultimate goal is always to succeed in educating students with disabilities without interfering with the protections provided to

them by the ADA.

In *Bartlett v. New York Law Examiners*, (2nd Cir. 1998) The Supreme Court remanded the case back to the Second Circuit and on remand the second circuit held, "Petitioner's experts have convinced me that the extra time provided to learning disabled applicants merely levels the playing field and allows these individuals to be tested on their knowledge; it does not provide them with an unfair advantage."

Wynne v. Tufts University School of Medicine, 932 F.2d 19, 26 (1st Cir. 1991).

The First Circuit held that involving modifications and accommodations burden is on the institution to demonstrate that relevant officials within the institution considered alternative means, their feasibility, cost and effect on the program, and came to a rationally justifiable conclusion that the alternatives would either lower academic standards or require substantial program alteration.

Jenkins v. National Board of Medical Examiners, (6th Cir. Feb. 11, 2009) The

Sixth circuit held that in reliance upon Toyota Motor, the district court found "Jenkins did not qualify as disabled. The Court of Appeals held the ADA amendments apply to this case as it was pending on appeal when the amendments became effective. The 6th Circuit remanded the case back to the district court to determine if slow and labored reading is a substantial limitation under the newly amended law."

Steere v. George Washington University School of Medicine and Health Sciences (D.C. Cir. 2007)
The D.C Circuit court held as a final note even after ruling in favor of defendant

“because of a Pre-ADAA 2008 application, the Court would like to caution defendant that, as an educational institution, it is obligated to provide reasonable accommodations to students who demonstrate that they are entitled to them under the ADA. Defendant's practice of dismissing a student after receiving documentation of the student's disability -- and without even considering whether the disability exists -- is imprudent given the possibility that the student actually does suffer from a disability under the ADA. If the request for reasonable accommodations is received prior to the official dismissal, as it was in this case, defendant must consider it before issuing its final decision whether to dismiss the student.”

In *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005) The 11th Circuit held “to make out a claim for *prima facie* discrimination under Section 504 of the Rehabilitation Act, “an individual must show that (1) he has a disability; (2) he is otherwise qualified for the position; and (3) he was subjected to unlawful discrimination as the result of his disability.” (quoting *Sutton v. Lader*, 185 F.3d 1203, 1207-08 (11th Cir. 1999).

"Ordinarily the courts may not second-guess an educational institution's academic judgments, but a dismissal for a student's failure to state a claim is improper where the contention is that the institution's action was motivated by bad faith." See *Scaccia v. Stamp*, 700 F. Supp. 2d 219 (N.D. N.Y. 2010).

VIII. This Case is an Excellent Vehicle for Addressing the Questions Presented

This case would be good law to support the ADAA of 2008 in that it would carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA by applying the ADAA of 2008.

There is very little case law precedent in regard to upper education level students being directly dismissed because of being disabled, either pre or post ADAA of 2008.

This case would also be good law to support the rights of student's rights under The Rehabilitation Act of 1973 not being barred access to educational programs because of a disability. This facts on the record directly reflect that petitioner was dismissed because of being disabled, was denied access to program(s) in violation of Section 504 and treated differently than non-disabled students. Older students and adult students that are or become

disabled need protections under the umbrella of the courts.

The U.S. Supreme Court is the proper legal forum to install a precedent that would encompass all disabled students in The United States of America to protect and enforce the rights of all adult age disabled students in our country. Congress enacted

the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1)

This case clearly displays a blatant disregard for Supreme Court precedent and the Circuit Courts in the application of Rule 56 Summary judgment motions and the ADA of 1990 as amended 2008 and The Rehabilitation Act of 1973

CONCLUSION

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

June 9, 2018

Respectfully submitted,

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