

No. 11-1306

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

THE PICTURE PEOPLE, INC.,

Defendant-Appellee.

On appeal from the
United States District Court for the District of Colorado
Hon. Philip A. Brimmer, U.S.D.J., presiding
Civil Action No. 1:09-cv-02315

AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF THE DEAF
AND THE UNIVERSITY OF MARYLAND FRANCIS KING CAREY SCHOOL
OF LAW CIVIL RIGHTS OF PERSONS WITH DISABILITIES CLINIC IN
SUPPORT OF PLAINTIFF-APPELLANT AND IN SUPPORT OF REVERSAL.

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STATEMENT OF IDENTITY AND INTEREST OF
PROPOSED AMICI CURIAE

This *amici curiae* Brief is respectfully submitted by The National Association for the Deaf (“NAD”) and the University of Maryland Francis King Carey School of Law Civil Rights of Persons with Disabilities Clinic. The NAD is the nation’s premier civil rights organization of, by and for deaf and hard of hearing individuals in the United States of America. The NAD was established in 1880 by deaf leaders who believed in the right of the American deaf community to use sign language, to congregate on issues important to them, and to have its interests represented at the national level. Since 1976, the NAD Law and Advocacy Center has protected the legal rights of deaf and hard of hearing people through the courts. For more information, please visit www.nad.org.

The University of Maryland Francis King Carey School of Law Civil Rights of Persons with Disabilities Clinic provides pro bono representation to deaf and hard of hearing clients. This Clinic’s subject matter includes: special education under the Individuals with Disabilities Education Act; access to public entities and public accommodations under the Americans with Disabilities Act (ADA) and the Rehabilitation Act; post-secondary education and employment matters. In litigation and administrative advocacy matters, students enrolled in the Clinic handle cases at all stages of legal proceedings, including initial client

interviews, witness interviews, drafting pleadings, counseling, negotiation, discovery, motion practice, and trial.

This *amici curiae* Brief is offered to assist in resolving the important legal issues presented. The present case concerns an Americans with Disabilities Act (ADA) claim of unlawful termination and failure to accommodate.¹ At issue is whether a deaf or hard of hearing individual may be discharged from an employment position in a photography studio because the employer believes the employee may have a limited ability to communicate verbally when the employer has not accommodated the employee's hearing disability. This Court's decision may have a major impact on the scope of ADA protections for deaf or hard of hearing individuals in the workplace.

The amici filed this Brief in whole, and received no monetary contributions from either party's counsel or any other person as described in Fed. R. App. P. 29(c)(5).

STATEMENT OF FACTS

Picture People hired Jessica Chrysler, a deaf woman, on October 23, 2007, to work as a Performer after an in-person interview conducted by studio manager Arnold Aguilar. J.A.388a (Personnel R.); J.A.386a (Aguilar Interview); J.A.817a

¹ This *amici* Brief does not address the EEOC's ADA retaliation claims. However, the *amici* support the retaliation argument proffered by the EEOC in their Brief. *See* Brief of Petitioner-Appellant at 44-57, EEOC v. Picture People, No. 11-1306 (10th Cir. October 7, 2011).

(Aguilar Dep. 184:20-185:25). Typical Performer duties include customer intake, sales, portrait photography, and laboratory duties. J.A.721a-722a (Kiattinat Dep. 78:18-79:16); J.A.610a (Aguilar Dep. 131:8-17). Although Chrysler requested that Picture People provide a sign language interpreter for training, (J.A.591a), Picture People failed to do so. J.A.357a-358a. As a result, Chrysler arranged for an interpreter through the Colorado Division of Vocational Rehabilitation (DVR) for Picture People's new-employee orientation and training on November 12, 15, and 16, twenty days after she was hired. *Id.* Chrysler successfully completed the training. *Id.*

After Chrysler began working, her clients expressed satisfaction with her performance. In fact, clients Matt and Melissa Krol told Aguilar, Chrysler's direct supervisor, that they were "very impressed" with Chrysler and described the experience as "really great." *See* J.A.606a-608a (Aguilar Dep. 116:9-118:3) ("vividly remember[s] [the Krols] telling [him] how great their sit was"; customers were "amazingly happy"). During her employment, Picture People expected Chrysler to attend mandatory staff meetings with the studio managers. J.A.91a (Aguilar Dep. 145:25-146:18). Although Chrysler requested interpreter services for these meetings, Picture People never provided her with one. J.A.359a, 790a. Then, on November 20, Picture People held a training on advanced photography for the staff, for which Chrysler requested and was again denied interpreter

services. *See* J.A.746a-748a (McGrail Dep. 35:9-37:18). After observing Chrysler during this training, Master Photographer Libby Johnston contacted the district manager with concerns about Chrysler, failing to mention any concerns to Chrysler. *See* J.A.500a (Chrysler Charge of Discrimination). The district manager subsequently reassigned Chrysler to the lab. J.A.57a-59a (Bryan Dep. 64:5-65:25, 70:5-75:3).

When Chrysler discovered that she was not listed on the post-holiday work schedule, she complained to her manager, Kim Doyle, who responded that there was not enough business to keep her on full-time. J.A.338a; *see also* J.A.693a-694a (Chrysler Dep. 210:14-211:23). However, in written notes exchanged between Doyle and Chrysler, Doyle said she would “love to have [Chrysler] here full time” and would try to provide Chrysler some weekend hours in the coming weeks. J.A.338a-39a. Then, Doyle e-mailed the district manager complaining that Chrysler was “demanding hours” and “threatening discrimination.” J.A.340a. Doyle also mentioned that Chrysler was “causing trouble” by refusing to take breaks, coloring with colored pencils, and declining opportunities to photograph clients. J.A.340a. Notably, while Doyle claimed to attempt to notify Human Resources of these issues, she did not address these issues with Chrysler. *See id.*

The district manager drafted a disciplinary notice against Chrysler for refusing to take breaks, coloring with colored pencils, and declining opportunities

to photograph clients. J.A.341a. Although this was Chrysler's first warning, Picture People labeled it her "final warning." J.A.342a. In e-mails arranging a meeting between the district manager and Chrysler, Chrysler requested an interpreter five times. *See* J.A.470a-471a. The manager refused, stating that "everything they were discussing [would be] typed out," so an interpreter was not necessary. *See id.* When Chrysler arrived to the meeting with the district manager and assistant manager, she again requested an interpreter. J.A.348a, 351a-353a. Although Chrysler was provided with a written disciplinary notice, the managers talked with each other throughout the meeting and refused to write down what they were saying. J.A.347a; J.A.593a; J.A.692a-693a (Chrysler Dep. 209:3-210:5); J.A.593a (Chrysler Decl. ¶15). This made it impossible for Chrysler to follow their conversation. *See id.*

While the disciplinary notice continued to list her as an employee, Picture People did not give Chrysler any hours after December 24. However, Picture People scheduled other employees who were hired after Chrysler to work a few days each week. *See* J.A.11a; J.A.475a-483a. Chrysler filed a discrimination charge with the EEOC on March 6, 2008. J.A.499a. Picture People responded that Chrysler was not formally terminated and that the company would contact her with future hours. J.A.503a, 355a. Picture People officially terminated Chrysler in October, 2008. J.A.388a.

ARGUMENT

A REASONABLE JURY COULD FIND THAT CHRYSLER WAS A QUALIFIED INDIVIDUAL WITH A DISABILITY AND PICTURE PEOPLE DISCRIMINATED AGAINST HER BECAUSE OF HER DISABILITY.

The ADA prohibits discrimination against a qualified individual based on his or her disability concerning “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a). To qualify for relief under an ADA unlawful termination claim, the plaintiff must show “(1) that he is a disabled person within the meaning of the ADA; (2) that he is qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired; and (3) that he was discriminated against because of his disability.” *Davidson v. America Online, Inc.*, 337 F.3d 1179, 1188 (10th Cir. 2003). Here, both parties agree that Chrysler is disabled under the ADA. *See* J.A.857a (Order Granting Summ. J.). Thus, the issue is whether Chrysler could perform the essential functions of the Performer position with or without reasonable accommodations.

I. The District Court erred in holding as a matter of law that verbal communication is an essential function of the Performer position.

To establish that an individual is qualified under the ADA, the plaintiff must show that he or she “can perform the essential functions of the employment position [held].” 42 U.S.C. § 12111(8). An “essential” job function must be

“fundamental” to the job, and not merely a “marginal function[] of the position.” *Davidson*, 337 F.3d at 1191 (citing 29 C.F.R. § 1630.2(n)(1)). Courts analyze whether a job function is fundamental by looking into whether the job specification “is job related, uniformly enforced, and consistent with business necessity.” *Mason v. Avaya Commc’ns, Inc.*, 357 F.3d 1114, 1119 (10th Cir. 2004) (citing *Davidson*, 337 F.3d at 1191).

The first inquiry focuses on whether an employer “requires all employees in the particular position to satisfy the job-related requirement.” *Davidson*, 337 F.3d at 1191 (quoting *Tate v. Farmland Indus., Inc.*, 268 F.3d 989, 993 (10th Cir. 2001)). Next, courts assess whether the function is a necessity—in which case, “removing the function would fundamentally alter the position.” *Id.* (citing *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1124 (10th Cir. 1995)); *see also* 29 C.F.R § 1630.2(n). An employer’s judgment is not conclusive as to whether a job function is essential. *Davidson*, 337 F.3d at 1191. “[A]n employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description.” *Id.* (quoting *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1071 (9th Cir. 2000) *rev’d on other grounds*, 536 U.S. 73, 122 (2002)).

A. *A reasonable jury could find that verbal communication is not an essential job function because it is not a uniformly enforced requirement for all Performers.*

Picture People has not shown that verbal communication is an essential function of the Performer position, and there is a genuine issue of material fact as to whether verbal communication is a uniformly enforced requirement. Picture People hired and employed Chrysler with full knowledge of her deafness, demonstrating it believed she was qualified to perform the essential functions of the Performer position despite her disability. Picture People was aware of Chrysler's deafness from the time of her initial interview—conducted primarily in writing, and during which her deafness was acknowledged. J.A.311a (Aguilar-Chrysler Interview). Because interpreter services were used during parts of Chrysler's training process, Picture People should have known that interpreter services or other reasonable accommodations might be needed during her employment. J.A.790a, 814a, 358a . Despite Chrysler's deafness, she performed her position until she was taken off the employment schedule in late December, 2007, allegedly due to lack of work. J.A.336a-338a; *see also* J.A.693a-694a (Chrysler Dep. 210:14-211:23). Therefore, a factual issue is raised as to whether verbal communication is actually an essential function and whether Chrysler is qualified to work as a Performer. *See Tate*, 268 F.3d at 993 (citing *Milton*, 53 F.3d at 1124) (“The question of whether a job requirement is a necessary requisite to

employment initially focuses on whether an employer actually requires all employees in the particular position to satisfy the alleged job-related requirement.”). A reasonable jury could find that verbal communication is not an actual requirement for all employees in the Performer position, and thus cannot be an essential function.

Furthermore, there is factual evidence suggesting that Picture People has found other job candidates with limited verbal communication skills to be qualified to serve as Performers, indicating that verbal communication is not an actual job requirement. J.A.810a (Aguilar Dep. 19:16-21:22). For example, Wendy Duke successfully served as a Performer for Picture People in Texas for two years despite being profoundly deaf and having limited verbal communication skills. *See* J.A.777a (Duke Dep.). There is no evidence that Ms. Duke’s limited verbal communication impaired her ability to serve as a satisfactory employee and complete the fundamental duties of her job. J.A.810a (Aguilar Dep.). Thus, Picture People cannot show that verbal communication was a fundamental and uniformly enforced component of the Performer position.

B. A reasonable jury could find that verbal communication is not a business necessity, and any perceived limitation of Chrysler's verbal communication does not fundamentally alter the Performer position.

There is also a genuine issue of material fact as to whether verbal communication is a job necessity, and whether removing that job function would

necessarily modify the Performer position. In an essential function analysis, even “if the employer does require performance of those functions, the inquiry then center[s] around whether removing the function would fundamentally alter the position.” *Davidson*, 337 F.3d at 1191 (citing *Milton*, 53 F.3d at 1124). A reasonable jury could find that an employee with a disability is qualified for a position when there is evidence that the employee has completed that specific job in the past. *See Rizzo v. Children’s World Learning Centers, Inc.*, 173 F.3d 254, 260 (5th Cir. 1999) (finding that evidence presented of employees’ safe driving history in spite of hearing impairment could dispel employer’s claim that employee was unqualified). Therefore, factual issues exist as to whether verbal communication is a job necessity, and if that function were removed, the Performer position would be fundamentally altered.

Chrysler was able to complete her job duties although she was deaf, indicating that verbal communication is not a business necessity. Chrysler performed the photography, sales, and cash wrap functions of the job without fundamentally altering the position. *See* J.A.370a (Pl.’s Opp’n to Def.’s Mot. for Summ. J.). Clients Matt and Melissa Krol stated that they were “very impressed” and had a “really great experience” working with Chrysler. J.A.735a, 737a, 739a-741a (Melissa Krol Dep. 24:2-4, 26:2-20, 30:2-25, 33:8-34:21). The Krols even bought more pictures from Chrysler than they originally intended to purchase, and

returned one month later to have Chrysler take additional pictures. J.A.737a, 742a-744a. Chrysler's first supervisor reported that she was a "great employee," who could perform the essential functions of the job. J.A.815a, 386a (Aguilar Dep. 167:15-19, 185:7-25). Chrysler's second supervisor also stated that she "would love to have [Chrysler] here full time." J.A.338a; *see also* J.A.693a-694a (Chrysler Dep. 210:14-211:23). Picture People provided no evidence to Chrysler of any customer complaint based on her perceived difficulty of communicating with clients. J.A.246a-248a (Chrysler Dep. 145:24-147:7). Again, factual evidence exists for a reasonable jury to find that Chrysler's positive reviews from both customers and her supervisors indicate she was able to perform the functions of the job, and that any perceived limitation of her verbal communication does not fundamentally alter the Performer position.

Furthermore, there is no basis to support Picture People's stereotyped notion that verbal communication is a required skill for a photographer. Deafness is not a *per se* disqualifying factor of being a photographer in a portrait studio. As a Performer, Chrysler was charged with carrying out the functions of a photographer. Deaf photographers have successfully photographed both deaf and hearing individuals for a long time. For example, Conrad Frederick Haeseler was a famous deaf artist- photographer assigned to photograph President Theodore Roosevelt's inaugural picture. 7 Frank W. Booth, The Association review 275 (1905). Today,

many deaf photographers have found commercial success running their own photography studios.² There is also an association of deaf photographers—the Deaf Professional Photographers of America.³ Deaf photographers use a variety of communicative tools to converse with hearing clients, young and old, including verbal cues, interpreters, quick responses, and setting an immediate professional tone by telling clients that the photographer is deaf to ensure positive experiences.⁴ Some individuals may prefer to work with deaf photographers who may have heightened visual senses. *See e.g.*, University of Sheffield, Retina Holds the Key to Better Vision in Deaf People, ScienceDaily (June 2, 2011), <http://www.sciencedaily.com/releases/2011/06/110601171620.htm>. Given the success of many deaf photographers, there is no evidence that verbal communication is a fundamental factor to the success of a photography position.

Finally, Picture People cannot rely on its job description as conclusive that verbal communication is an essential function. “Strong verbal communication skills” specifically falls under Picture People’s “job qualifications” standard, and

² For instance, one website lists over seventeen successful deaf photographers that advertise to the public. *See* WhiteHawk Press Photography: Photography Through Deaf Eyes, <http://whitehawkpress.com/photo/> (last visited Oct. 3, 2011).

³ *See id.* (featuring a listing for the Deaf Professional Photographers of America).

⁴ *See* website of Andy Blackburn, award-winning deaf photojournalist, for additional information on how deaf photographers might adapt to photographing hearing individuals. Andy Blackburn Photography, <http://andyblackburn.com/?pageID=326211> (last visited Oct. 9, 2011). *See also* Joe Strupp, *Deaf Photog and Blind Editor Overcome the Odds Together*, Editor & Publisher (May 16, 2007), <http://www.editorandpublisher.com/Article/Deaf-Photog-and-Blind-Editor-Overcome-the-Odds-Together> (noting that Blackburn finds he does his job “as well as any other editor or photographer, with news instincts and quick responses being more important than hearing”).

not the “duties and responsibilities” section of the Performer job description. *See* J.A.371a (Pl.’s Opp’n to Def.’s Mot. for Summ. J.). None of the included duties and responsibilities include verbal communication. *Id.* Had verbal communication actually been a fundamental component of the Performer position, Ms. Duke and Chrysler would not have been hired and could not have competently performed their jobs. Thus, there is a genuine issue of material fact as to whether verbal communication is an essential function of the Performer position, and a jury should decide this question.

II. Even if verbal communication is an essential job function, there is a genuine issue of material fact as to whether Chrysler could have performed this function with reasonable accommodations.

When reasonable accommodations are available, an employer violates the ADA if it does not engage in an interactive process with the employee to identify and provide such accommodations. 42 U.S.C § 12112(b)(5)(A); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1171 (10th Cir. 1999). Before eliminating her hours, Picture People never raised concerns with Chrysler about her ability to communicate verbally with customers. J.A.343a-354a. Further, if Picture People was concerned about Chrysler’s ability to communicate with customers, it failed to engage in a good faith interactive process to identify an accommodation to allow Chrysler to communicate with clients, colleagues, and supervisors. J.A.454a-456a. Therefore, assuming that verbal communication is an essential function of the

Performer job, there is a genuine issue of material fact, precluding the entry of summary judgment, with respect to whether there are reasonable accommodations that would have enabled Chrysler to perform this function.

A. Picture People refused to engage in an interactive process with Chrysler to identify and provide reasonable accommodations.

The interactive process is triggered once an employer is put on notice that an employee has a disability. *See Smith*, 180 F.3d at 1171-72. When accommodations are needed, both parties are required to work together to identify reasonable accommodations that will help the employee overcome the limitations that have resulted from the disability. *See id.* If Chrysler needed accommodations to perform the essential functions of the Performer job, as Picture People asserts, the EEOC put forth substantial evidence demonstrating that Picture People failed to meet its obligation under the ADA to engage in an interactive process with Chrysler to identify reasonable accommodations.

In fact, despite concerns now raised by Picture People about Chrysler's ability to communicate with customers, there is a factual dispute as to whether Picture People ever engaged in the interactive process by bringing such concerns to Chrysler's attention while they employed her. J.A.246a-248a. (Chrysler Dep. 145:24-147:7). Chrysler's supervisor, Aguilar, indicated that customers never complained to him about their interactions with Chrysler. J.A.93a (Aguilar Dep. 164:7-17). Picture People never gave Chrysler verbal or written reprimands about

her ability to communicate with customers, and the company never warned Chrysler that it believed that she was failing to perform the essential functions of her job satisfactorily. J.A.343a-354a.

Moreover, a factual dispute exists as to whether Picture People failed to engage in an interactive process to provide Chrysler with reasonable accommodations when Chrysler put the company on notice as to her need for reasonable accommodations to assist her in communicating with her colleagues and supervisors. J.A.454a-456a. The day after she was hired, Chrysler requested interpreter services for her initial job training. J.A.591a. Chrysler made other similar requests throughout her tenure with Picture People. J.A.454a-456a. These requests for interpreter services put Picture People on notice as to Chrysler's disability and her need for accommodations. Chrysler's frequent requests should have also triggered the interactive process to ensure effective communication with not only colleagues and supervisors, but also customers, if necessary. *See Smith*, 180 F. 3d at 1171-72. However, Picture People refused Chrysler's requests for interpreter services, and the company made no subsequent effort to engage in an interactive process with Chrysler to identify other reasonable accommodations. J.A.454a-456a.

Additionally, the EEOC presented evidence that Picture People's actions effectively delayed the efforts of Chrysler's supervisor, Aguilar, to provide

Chrysler with reasonable accommodations. On Chrysler's behalf, Aguilar contacted his supervisors to inquire about obtaining interpreter services for Chrysler's job training. J.A.605a (Aguilar Dep. 109:7-10). Picture People never provided the requested information to Aguilar. J.A.620a-621a (Aguilar Dep. 220:16-221:3); J.A.591a (Chrysler Decl. ¶ 3). Because of Picture People's refusal to assist Aguilar in obtaining an interpreter for Chrysler, he had to delay Chrysler's start date by three weeks. J.A.315a-317a (e-mail exchanges between Aguilar and HR Official Jeff Rawlings); J.A.815a-816a, 617a-621a (Aguilar Dep. 166:21-167:2, 172:14-23, 217:14-221:3).

Viewing the evidence in the light most favorable to Chrysler, a reasonable jury could conclude that Picture People (1) was put on notice as to Chrysler's disability and need for accommodations, J.A.454a-456a; (2) failed to notify Chrysler that it thought that she was not communicating effectively with customers, J.A.246a-248a (Chrysler Dep. 145:24-147:7); (3) failed to provide accommodations requested by Chrysler, J.A.454a-456a; and (4) refused to consider other reasonable accommodations for Chrysler, *id.* Therefore, a genuine issue of material fact exists as to whether Picture People engaged in a good faith interactive process to identify an appropriate accommodation for Chrysler.

B. *Had Picture People engaged in the interactive process, the parties could have identified reasonable accommodations for Chrysler.*

In order to survive an employer's motion for summary judgment, the plaintiff must present sufficient evidence to demonstrate that the employer could have reasonably accommodated the employee. *Hennagir v. Utah Dep't of Corr.*, 587 F.3d 1255, 1265 (10th Cir. 2009). Interpreter services is an example of a reasonable accommodation commonly used by deaf workers for staff training and other group meetings. 29 C.F.R. § 1630.2(o)(2)(ii); *see also* Tracie Saad, *Accommodation and Compliance Series: Employees with Hearing Loss*, U.S. Department of Labor Office of Disability Employment Policy, 8 (2010) [hereinafter Saad]. Chrysler requested interpreter services for job training, staff meetings, and disciplinary meetings because she had difficulty following the conversations in those settings. J.A.254a-256a, 258a, 260a (Chrysler Dep. 157:1-159:24, 161:7-9, 163:1-25).

When Chrysler obtained interpreter services through DVR for her job training, she was able to communicate with her colleagues and supervisor. J.A.790a, 358a. However, Picture People did not provide Chrysler with these services at subsequent meetings, and as a result, Chrysler “missed out on all of the discussion at the meeting.” J.A.359a, 790a. Therefore, factual issues exist as to whether interpreter services would have reasonably accommodated Chrysler.

There are also other modifications that, if identified through the interactive process, could have reasonably accommodated Chrysler. Small changes to Chrysler's workspace could have helped to reasonably accommodate her. Mirrors can be installed "to communicate the presence of other workers or customers (e.g., in areas where an employee's back may be turned)." *See* Saad at 8. Likewise, small signs can be positioned in work-areas to inform clients that the employee is deaf and that communication should be in writing. *Id.*

Recent technological advancements also could have assisted Chrysler in her face-to-face communication with clients and coworkers. Email and text messages are alternatives to verbal communication that allow the deaf to communicate one-on-one with hearing individuals. *Id.* For individuals with poor written English language skills, computer and speech-recognition software can help with in-person communication. *See* Saad at 8. This software works by converting, in real time, an individual's speech into text, video sign language, or computer-generated voice. *Id.* at 17. Another useful tool is the augmentative and alternative communication device (AAC). These hand-held "[t]ype and talk devices allow users with some literacy skills and motor function to generate electronic speech by typing words on a keyboard." *Id.*

Given the various types of accommodations that are available to deaf individuals, factual issues exist as to whether Picture People could have reasonably

accommodated Chrysler's disability. Picture People failed to engage in a good faith interactive process, and thus did not meet its obligation under the ADA to provide Chrysler with a reasonable accommodation. Therefore, because a genuine issue of material fact exists, the District Court erred in granting Picture People's motion for summary judgment.

III. The District Court erred in failing to consider evidence that Picture People unlawfully discriminated against Chrysler.

The District Court erroneously held that Chrysler was not qualified for the Performer position, and thus failed to consider the EEOC's proffered evidence of discrimination. *See* J.A.862a-863a (Order Granting Summ. J.). After the EEOC presented evidence establishing a dispute of material fact as to whether Chrysler was an qualified disabled individual, the District Court should have considered the final element of the prima facie showing of discrimination under the ADA: whether Picture People discriminated against Chrysler because of her disability. *See Davidson*, 337 F.3d at 1188.

A. The EEOC offered sufficient evidence of adverse employment action.

In order to survive a motion for summary judgment, "the plaintiff must present some affirmative evidence that disability was a determining factor in the employer's decision." *Morgan v. Hilti*, 108 F.3d 1319, 1323 (10th Cir. 1997) (quotations omitted). Here, sufficient evidence was presented to meet this initial burden of an adverse employment action claim. This Court has held that the

plaintiff must only offer evidence “that the employer terminated her employment under circumstances *which give rise to the inference* that the termination was based on her disability,” finding that the plaintiff’s burden is not “perfunctory,” but neither is it “onerous.” *Morgan*, 108 F.3d at 1323-24 (emphasis added).

The EEOC provided sufficient evidence upon which an inference can be made that Picture People’s adverse actions were based on Chrysler’s disability. First, Picture People assigned Chrysler to work almost exclusively in the lab although the typical duties of a Performer include photography, sales, lab work and front desk duties. J.A.853a (Order Granting Summ. J.). Manager Candi Bryan assigned Chrysler to the lab to keep her “away from the public.” J.A.11a (Complaint). Second, Picture People did not give Chrysler employment hours after December 24, 2007. J.A.856a. (Order Granting Summ. J.). Third, employees hired after Chrysler received employment hours following December 24, 2007. J.A.11a (Complaint). This cutback in Chrysler’s schedule can be equated with a firing because Chrysler lost all benefits of the position. *See Rizzo*, 213 F.3d at 214 n.6 (finding that a reduction in hours constituted an adverse employment action because of the resulting reduction in wages). Therefore, the EEOC met its burden of showing affirmative evidence that Chrysler’s disability was a determining factor in not providing her additional hours.

B. *Picture People offered Chrysler pretextual justifications before discontinuing Chrysler's employment.*

This Court regularly employs the *McDonnell Douglas* burden-shifting framework to analyze such employment discrimination cases because such disputes are largely based on circumstantial evidence. *See Williams v. Widnall*, 79 F.3d 1003, 1005 (10th Cir. 1996). After the plaintiff introduces evidence of a prima facie case of an ADA claim, “the burden shifts to the employer to offer a legitimate nondiscriminatory reason for its employment decision.” *Morgan*, 108 F.3d at 1323. Once the employer offers a nondiscriminatory reason for its decision, the plaintiff may survive summary judgment by offering evidence that the employer’s reasons were merely a pretext for unlawful discrimination based a disability. *Morgan*, 108 F.3d at 1323.

Picture People offered various reasons for failing to give Chrysler hours after December 24, 2007. First, Picture People contended that all Performers’ hours were cut after the peak holiday season because of the shifting business cycle and subsequent decrease in demand for the photography studio’s services. J.A.38a (Mot. for Summ. J.). Second, Picture People contended that Chrysler received a “Final Warning” disciplining her for “coloring with pencils, refusing to take legally required rest breaks, [and] demanding hours.” J.A.341a-342a (Performance

Track).⁵ Third, after the EEOC complaint was filed, Picture People contended for the first time that Chrysler was not qualified to be a Performer due to her disability. J.A.857a (Order Granting Summ. J.).

This Court has held that evidence showing that an individual was treated differently from others who were similarly situated “gives rise to an inference of discrimination.” *Goldstein v. Sprint United Mgmt. Co.*, 288 F. App’x 476, 480 (10th Cir. 2008) (unpublished). The EEOC offered evidence suggesting that, although no “lab technician” position exists, Chrysler was assigned primarily to the lab, unlike any of her non-disabled Performer colleagues. J.A.500a (Charge of Discrimination). Additionally, Chrysler was individually reprimanded for engaging in similar behaviors to other Performers: coloring with colored pencils, refusing to take breaks, and asking for more hours. J.A.350a (Handwritten notes from disciplinary meeting). Finally, Chrysler was not given shifts after December 24, 2007, while employees hired after her continued to be given employment hours. J.A.11a (Compl.). This evidence combined with the inconsistent reasons proffered by Picture People and the prima facie showing of discrimination demonstrate that the employer has not “honestly represent[ed] its reasons for terminating” Chrysler.

⁵ Chrysler asserts that this final warning was given “despite the fact that [she] had never received any prior counseling about issues with [her] job performance.” J.A.500a (Chrysler Charge of Discrimination).

See Miller v. Eby Realty Group LLC, 396 F.3d 1105, 1111 (10th Cir. 2005).⁶ Since there is still a genuine issue of material fact regarding Chrysler’s termination, this case should be reversed and remanded to the District Court.

CONCLUSION

For the foregoing reasons, the NAD and the University of Maryland Francis King Carey School of Law Civil Rights of Persons with Disabilities Clinic respectfully urge this Court to reverse the District Court’s grant of summary judgment in favor of The Picture People, Inc., on the EEOC’s claims of discrimination, failure to accommodate, and retaliation, and to remand this matter for a jury trial.**

⁶ In other contexts, this Court has found pretext when the employer’s proffered reasons are inconsistent or implausible such that “a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.” *Trujillo v. PacifiCorp*, 524 F.3d 1149, 1158 (10th Cir. 2008) (quoting *Morgan*, 108 F.3d at 1321). This Court has even found that inconsistent reasons justifying an employer’s challenged action is ordinarily enough to survive summary judgment. *See Goldstein*, 288 F. App’x at 481 (citing *Whittington v. Nordam Group Inc.*, 429 F.3d 986, 994 (10th Cir. 2005)) (quotations omitted), *Morgan*, 108 F.3d at 1324 (“all doubts concerning pretext must be resolved in plaintiff’s favor.”); *see also Young v. Warner-Jenkinson Co., Inc.*, 152 F.3d 1018, 1024 (8th Cir. 1998) (“Although [the employer] may be able to offer a plausible explanation for this apparent change in positions...these are matters to be decided at trial and not by summary judgment.”).

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5143 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14 point.



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*The views expressed in this Amici Brief are those of the Civil Rights of Persons With Disabilities Clinic of the University of Maryland Francis King Carey School of Law. They do not expressly or impliedly represent the views of the University of Maryland Francis King Carey School of Law, or of the University of Maryland Francis King Carey School of Law Clinical Law Program.